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BOOK REVIEW

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Editorial foreword

No matter how immense, precise or refined competition rules are, their effectiveness is dependent on their enforcement. In turn, the enforcement depends on the institutional and procedural setting within which competition law operates. The instrumental preparedness embedded in the procedural entourage, marching hand in hand with the substantive norms, is the puzzle to be assembled so as to bring about interventions adequately tailored to counter anticompetitive practices. At the same time, a number of implicit and explicit factors constantly influence the enforcement practice. Since these factors are in the process of changing, the enforcement architecture needs to adapt accordingly. Against this backdrop, the Authors of this volume endeavour to capture the lessons provided by the past in order to deliver up-to-date solutions. This bridge between the past and the present is a noticeable characteristic for most of the contributions awaiting the Readers.

Lena Hornkohl poses the question whether modern competition law should welcome lay judges, who are experts on competition, but chiefly from an economic angle. Thereby, she addresses concerns related to complicated economic issues, which jurist-judges may not manage on their own. The article of Selçukhan Ünekbaş is, in turn, a genuine representative of the characteristics outlined above. He discusses comfort letters, and examines them as measures to confront the uncertainty that competition law deals with. Next, Bruce Wardhaugh touches in his paper upon the topical dilemma to what extent competition law can tackle the consequences of a crisis. Given that we are now living in the times of multiple crises, whichever they may be, the Author offers a relevant discussion on this topic and his proposals, particularly for the NCAs and the Commission, are certainly worth considering. Similarly, Miłosz Malaga discusses 'independence' as a condition to be satisfied by National Competition Authorities (NCAs). The Author's analysis was prompted by the recent judgment of the General Court in the *Sped-Pro* case, but is not limited thereto. In particular, he places this issue in the context of merger control and related doubts surrounding the Polish national champion, the gas retailed and oil refiner PKN Orlen. In the following article, Raimundas Moisejevas, Justina Nasutavičienė and Andrius Puksas share their thoughts with regard to the personal liability of managers for violations of competition law in Lithuania. Their questions about broadening the toolbox available to NCAs, in order to intensify increasingly accurate efforts to tackle anticompetitive practices, relate to a broader discussion pertaining to the assessment of enforcement. In spite of the persuasive rationale behind this approach, which the Authors

convincingly raise, fundamental principles of law cannot be diminished. The last article of the volume is authored by Martin Milán Csirszki and covers the topic how 'agricultural' antitrust fits into the broader perspective within which current enforcement challenges are analysed. As the production and supplies of food are crucial factors weighing heavily on various economies across the globe, this paper's analysis of agricultural exemptions in EU and US competition law could not have been provided at a more suitable moment in time.

Two other sections are included in this volume of YARS. First, a book review presented by Rafik Rabia provides the Readers with the opportunity to familiarise themselves with a recent book written by Alexandr Svetlicinii entitled 'Chinese State Owned Enterprises and EU Merger Control'. Through the lens of – inter alia – competition law, SOEs as such are both intriguing and controversial. In a rapidly changing world, considering Chinese SOEs in the light of EU law can elicit curiosity even more. Second, regardless of the increasing availability of offline conferences, it will never be feasible to attend them all. YARS's conference reports serve this end. The first report of the volume presents the International Conference of the Jean Monnet Network on EU Law Enforcement (EULEN), 'EU Competition Law Enforcement: Challenges to Be Overcome', organised by the Centre for Antitrust and Regulatory Studies at the Faculty of Management of the University of Warsaw on 26th and 27th May 2022 (reported by Veronica Piccolo). Following the theme of the event, the report outlines recent discussions on the most pressing challenges in competition law enforcement. Second, the volume contains a report on the International Colloquium of the University of Naples Federico II Faculty of Law, 'How the EU Rules the World: Insights from Four Continents' held on 4th October 2021 (reported by Susanna Picariello).

Considering a wide range of subjects impacting every aspect of our lives, all the papers included in this volume of YARS provide added value to the debate – that outreaches the competition landscape – how to alleviate current difficulties and those facing us in forthcoming years. In light of the diversity of the issues tackled by the Authors, this volume of YARS offers a multifaceted collection of contributions.

The publication of this issue would not be possible without the support of various people. We are particularly grateful to Laura Zoboli, YARS new Managing Editor, Marta Sznajder, YARS editorial process coordinator and the YARS junior editors: Giulia Toraldo, Mateusz Kupiec, Italo Leone, Rahil Mammadov, Susanna Picariello, Zofia Mazur, Jérôme de Cooman.

Warsaw, October 2022

Dr Kamil Dobosz (Volume Editor)
Prof. Maciej Bernatt (YARS Editor-in-Chief, Volume Editor)

A R T I C L E S

Leave it to the experts: A comparative analysis of competition-expert lay judges in private enforcement of competition law

by

Lena Hornkohl*

CONTENTS

* Ass.-Prof. Dr. Lena Hornkohl, LL.M. (College of Europe) is a Tenure Track Professor at the University of Vienna and a Postdoctoral Researcher at Heidelberg University. The paper was presented at the "International Conference of the Jean Monnet Network on EU Law Enforcement (EULEN) – EU Competition Law Enforcement: Challenges to Be Overcome" at the University of Warsaw in May 2022 and at the "Vienna Competition Law Days" at the WU Vienna in September 2022. The author would like to thank Jasper P. Sluijs and Walter Bruno as well as the participants of the conferences for providing useful comments and Anne-Catherine Kern and Tabea Bergmann for their editorial help. The paper uses a generic feminine form which intends to include persons of all genders. The usual disclaimers apply.

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Abstract

This paper focuses on the procedural instrument of 'competition-expert' lay judges to ease damages calculations and private actions for damages for the violation of competition law in general. To this end, the paper analyses various forms of 'expert' lay participation that already exist in Europe. It concentrates, in particular, on commercial and intellectual property proceedings, but also delves into the few existing examples of competition-expert lay judges for private enforcement of competition law. It assesses their transferability for competition damages proceedings and attempts to test EU and national competition as well as procedural law boundaries more generally. The paper considers common grounds, advantages and disadvantages, as well as best practices in this context. It concludes with early proposals for including competition-expert lay judges in private enforcement of competition law.

Resumé

Cet article se concentre sur l'instrument procédural que sont les juges non professionnels experts en concurrence pour faciliter le calcul des dommages et intérêts dans les actions privées en dommages et intérêts pour la violation du droit de la concurrence. À cette fin, l'article analyse diverses formes de participation d'experts non professionnels déjà existantes en Europe. Il se concentre en particulier sur les procédures commerciales et de propriété intellectuelle, mais se penche également sur les quelques exemples existants de juges non professionnels experts en concurrence pour l'application privée du droit de la concurrence. Il évalue leur transférabilité aux procédures de dommages-intérêts en matière de concurrence et tente de tester plus généralement les limites du droit de la concurrence et du droit procédural au niveau européen et national. L'article met en évidence les motifs communs, les avantages et les désavantages, ainsi que les meilleures pratiques. Il se conclut par des premières propositions visant à inclure des juges non professionnels experts en concurrence dans l'application privée du droit de la concurrence.

Key words: Competition law; private enforcement; damages; lay judges; expert lay judges; economics; specialisation; commercial court.

JEL: K21, K40, K41

I. Introduction

The 2014 Damages Directive[1] led to an increase in private damages actions for competition law violations across the EU.[2] Unfortunately, these actions have less often resulted in an award of damages. Instead, courts only handed down interlocutory judgments affirming liability without quantifying damages or they had to dismiss actions altogether.[3] This trend results from the considerable difficulty of quantifying cartel damages. According to recital 45 of the Damages Directive, '[t]he quantification of harm in competition law cases can […] constitute a substantial barrier preventing effective claims for compensation'. An analysis often entails reconstructing entire market structures, and 'prices, sales volumes, and profit margins depend on a range of factors and complex, often strategic interactions between market participants that are not easily estimated'.[4]

For damages calculation, including a calculation of a possible pass-on of damages, parties depend on complex and lengthy economic assessments provided by costly economic experts. There are often several contradictory expert opinions of the parties as well as court appointed expert opinions, which further drive-up procedural costs and the duration of the proceedings.[5] Particularly the costs incurred for the engagement of economic experts could exceed the actual damages in case of small claims and is, therefore, prohibitive.[6] Accordingly, the Directive itself contains several measures meant to ease this problem, such as the possibility of damages estimation[7], and is accompanied by a Practical Guide on quantifying harm[8]. Furthermore, practice and academia have suggested several substantive and procedural solutions to facilitate damages actions and damages calculations across the EU which

[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 (hereinafter: Damages Directive).

[2] Jean-François Laborde, Cartel damages actions in Europe: How courts have assessed cartel overcharges: 2021 edition (5th edn) [2021] Concurrences 232, 235.

[3] Ibid 236.

[4] European Commission, 'Practical Guide Quantifying Harm in Actions for Damages Based on Breaches of Article 101 or 102 of the TFEU (SWD (2013) 205)' par 16, available at: https://ec.europa.eu/competition/antitrust/actionsdamages/quantification_guide_en.pdf (accessed on 01.05.2022).

[5] See Provincial Court of Barcelona, 10 January 2020, No. 1964/2018.

[6] Tilman Makatsch and Babette Kacholdt, 'Estimation of cartel damages in competition litigation in Germany: 15 per cent as the new standard?' (2021) 14 GCLR 12, 15.

[7] Art. 17(1) of the Damages Directive.

[8] European Commission (n 4).

include presumptions of harm[9], various forms of collective redress[10], litigation funding[11] or the involvement of competition authorities in the calculation of the damages[12].

This paper focuses on a further procedural instrument that could be added to the toolbox, and that could ease damages calculations and damages actions in general: the use of competition-expert lay judges. This paper uses the terminology of lay judges for any kind of lay participation on the judicial bench, where the layperson either has no (full) legal training directed at being a professional judge or judging is not the primary source of her income. It thus contrasts lay judges with professional judges who are full-time judges, where court work is their primary source of income, and who have obtained full corresponding legal education. This paper does not cover the participation of laypersons in the general public's sense. Instead, the focus will be on so-called expert lay judges.

In most Member States, ordinary civil courts handle cartel damages actions with panels consisting of professional judges. Although these judges could have gradually acquired a competition focus, emphasis on competition-expertise, particularly economic expertise, of the judicial panel could be improved further by including lay judges that are experts on competition issues (hereinafter: 'competition-expert' lay judges) on the bench. These lay judges would be competition economists in particular who are sufficiently familiar with damages and pass-on calculation. These expert lay judges would share the bench with professional judges to handle primarily damages calculation and other economically sensitive issues in private enforcement of competition law that are nowadays handled by (often multiple) economic experts.

The paper is based on and aims to test the following hypothesis: the participation of competition-expert laypersons on the bench, serving instead or next to professional judges, advances the understanding of the economic realities of damages calculation of the judiciary and thus leads to improved damages calculations and overall procedural efficiencies. To this end, the paper analyses various forms of expert lay participation already existing in Europe, especially in commercial and intellectual property matters, but also the few examples of competition-expert lay judges for private competition law

[9] Lena Hornkohl, 'The Presumption of Harm in EU Private Enforcement of Competition Law – Effectiveness vs Overenforcement' (2021) 5 ECLIC 29.

[10] Eda Şahin, *Collective Redress and EU Competition Law* (1st edn Routledge 2018).

[11] Inge Scherer, 'Gewerbliche Prozessfinanzierung' (2020) 3 VuR 83.

[12] Justus Haucap and Ulrich Heimeshoff, 'Kartellschadensermittlung im Spannungsfeld zwischen Präzision und Effizienz: Prinzipielle Anforderungen aus ökonomischer Perspektive und praktische Handlungsoptionen' [2022] ZWeR 80, 100.

damages actions.[13] However, this paper does not include an empirical study on the usage of lay judges[14] but is based primarily on a systematic legal policy analysis. The paper compares different approaches for lay participation in civil justice across Europe and beyond competition damages proceedings, assesses their transferability for competition damages proceedings, and attempts to test more generally the boundaries of EU and national competition and procedural law. It strives to find the common ground, the advantages and disadvantages of this legal institution as well as formulate best practices. It concludes with a practical proposal for including competition-expert lay judges in private enforcement of competition law.

II. Taking stock: lay judges in civil justice across Europe

This section analyses the general state of play regarding expert lay participation in civil justice across Europe, focusing on commercial and intellectual property proceedings, which have some similarities with private competition litigations. Finally, the section will shed light on existing concepts of lay participation in private damages actions for competition law violations. Thus, it will serve as general background and will provide models for a possible extension of the concept of expert lay judges.

1. Examples of lay participation in civil justice

Involving lay judges on the bench is a well-known concept, both in the EU but also in other European States. Generally, lay participation in civil procedures can take different forms and concern different subject matters of civil justice. Layperson involvement can consist of a single lay judge, a panel of lay judges and mixed courts consisting of both lay and professional judges.[15] While general lay participation in criminal matters exists across the board[16],

[13] Other forms of judicial specialisation, such as concentration or special chambers for competition matters, will also be briefly addressed, as they are thematically related to the question of further expertise on the bench in cartel damages cases. However, a complete analysis is beyond the scope of this paper.

[14] Stefan Machura, 'Civil Justice: Lay Judges in the EU Countries', (2016) 6 Oñati Socio-legal Series [online] 235.

[15] Ibid 241.

[16] Marijke Malsch (ed), *Democracy in the Courts: lay participation in European criminal justice systems* (Routledge 2009); Gerald Kohl and Ilse Reiter-Zatloukal (eds) *Laien in der Gerichtsbarkeit* (Verlag Österreich 2019); Sanja K Ivkovic, Shari S Diamond, Valerie P Hans and

lay participation in civil matters is more limited. Only the so-called 'justices of the peace' known, for example, in Italy[17], Luxembourg[18] and Spain[19], are single lay judges of the first instance in civil matters competent to resolve general but minor civil legal disputes.[20] The above-mentioned general distinction between general and expert lay judges should also be noted here; the latter is the subject of the following analysis.

Unlike criminal procedures, lay judges are used in specialised courts or special divisions of ordinary civil courts. In that sense, many European countries foresee lay judges in labour law proceedings.[21] Lay judge participation in labour law is certainly the most extensive form of judiciary lay participation in Europe, as the concept is known, *inter alia*, in Austria[22], Belgium[23], Finland[24], France[25] and Germany[26]. Labour courts usually consist of an even number of employer and employee representatives as lay judges who are appointed for a specific period of time. In labour law, other reasons are also given for the use of lay judges, such as an increased acceptance of the decision through the involvement of peers.[27] However, the main reason given for their involvement is their workplace knowledge and experience, acquired in their daily professional and social environment that lay labour judges bring to the bench.[28]

Nancy S Marder (eds), *Juries, Lay Judges and Mixed Courts – A Global Perspective* (Cambridge University Press 2021).

[17] Art. 7 of the Italian Code of Civil Procedure (*Codice di procedura civile*).

[18] Art. 1 of the Luxembourgian Code of Civil Procedure (*Code de procedure civile*).

[19] Art. 100 of the Spanish Law 6/1985 of 1 July 1985 on the Judiciary (*Ley Orgánica 6/1985, de 1 de julio, del Poder Judicial*).

[20] In Italy, for example, the 'giudici di pace' are, *inter alia,* competent for disputes not exceeding a certain value, for example, € 5000 for disputes relating to movable property, Art. 7 of the Italian Code of Civil Procedure.

[21] Sue Corby, Peter Burgess and Armin Höland, 'Employees as judges in European Labour courts: A conflict of interests?' (2021) 27(3) *European Journal of Industrial Relations* 231; Peter Burgess, Sue Corby, Armin Höland, Hélène Michel, Laurent Willemez, Christina Buchwald and Elisabeth Krausbeck, 'The Roles, Resources and Competencies of Employee Lay Judges: a cross-national study of Germany, France and Great Britain' (2017) Working Paper 151, available at: https://www.boeckler.de/pdf/p_fofoe_WP_051_2017.pdf (accessed on 1.05.2022).

[22] §§ 10 and 11 of the Austrian Labour and Social Court Act (*Arbeits- und Sozialgerichtsgesetz*).

[23] Art. 81 of the Belgian Judicial Code (*Gerechtelijk Wetboek, Code Judiciaire*).

[24] § 8 of the Finnish Act on proceedings before the Labour Court (*laki oikeudenkäynnistä työtuomioistuimessa*).

[25] Art. L-1421-1 of the French Labour Law (*Code du travail*).

[26] § 6 of the German Labour Court Act (*Arbeitsgerichtsgesetz*).

[27] Malte Creutzfeldt, 'Ehrenamtliche Richter in der Arbeitsgerichtsbarkeit' [1995] AUA 263.

[28] Burgess/Corby/Höland/Michel/Willemez/Buchwald/Krausbeck (n 21) 79.

In some Member States, such as Germany[29] and France[30], there are special courts or chambers for agricultural disputes where expert lay judges participate in the decision-making process.[31] These courts are usually competent for disputes concerning agricultural leases or tenancy.[32] Lay judges are appointed for a specific period. They usually consist of an even number of landlords and farmers appointed based on a proposal by the representative professional organisation or elected by their peers.[33] The main reason for the involvement of lay judges in agricultural disputes is their specialist knowledge. Agricultural land disputes have a strong economic orientation, and the legislator wanted to make courts more independent from expert opinions.[34] Therefore, the panels themselves should include persons who have the necessary expertise to contribute to an independent base for the judgements through their professional experience and their familiarity with the conditions of agriculture.[35]

In several branches of the civil judiciary, technical questions play an important role. Above all, intellectual property proceedings, especially patent infringement and invalidity proceedings usually revolve around technical questions or even concerns the novelty of a specific technical feature. In many systems, so-called 'technical judges' sit alongside professional judges (fully legally qualified judges), on panels in patent courts that deal with invalidity and infringement proceedings. Although the conditions of appointing technical judges to the judicial benches as well as their tasks vary in their details, those mixed panels can be found in patent courts in Austria[36], Germany[37], Sweden[38], Switzerland[39] and even the newly established Unified Patent Court[40]. Similarly, at the mixed civil-administrative Italian Higher Public Water Court (*Tribunale Superiore delle Acque Pubbliche*), which, *inter alia*, deals with damages actions

[29] §§ 2 and 3 of the German Agricultural Procedures (*Landwirtschaftsverfahrensgesetz*).

[30] Art. L492-1 of the French Rural and Maritime Fishing Code (*Code rural et de la pêche maritime*).

[31] Mechthild Baumann, Hasso Lieber, 'Ehrenamtliche Richter in Landwirtschaftsverfahren' [2012] Richter ohne Robe 6; Ute Gerlach-Worch, 'Ehrenamtliche Landwirtschaftsrichter: Mitwirkung auf Augenhöhe durch Sachkunde' [2016] Richter ohne Robe 7.

[32] § 1 of the German Agricultural Procedures Act.

[33] Art. L492-2 of the French Rural and Maritime Fishing Code.

[34] BT-Drs. I/3819 16, 19; BT-Drs. I/4429 1.

[35] German Constitutional Court, 3 June 1980, 1 BvL 114/78; 7 November 1975, 2 BvL 13/75.

[36] § 146 of the Austrian Patent Act (*Patentgesetz*).

[37] § 65 (2) of the German Patent Act (*Patentgesetz*).

[38] Chapter 2 § 1 of the Swedish Act on Patent and Market Courts (*Lag om patent- och marknadsdomstolar*).

[39] Art. 8 of the Swiss Patent Court Act (*Patentgerichtsgesetz*).

[40] Art. 15 (1) Unified Patent Court Agreement.

resulting from the exploitation of water[41], technical judges sit on the panel with professional judges[42]. The technical judges in either field are to be regarded as lay judges, since they have not received full legal education, but have instead attained a degree in a technical subject plus, if necessary, further legal training.[43] However, in contrast to the above examples from labour or agricultural law, in some jurisdictions technical judges can also pursue this judicial activity full-time.[44] Their lay status follows solely from the fact that they have not had a full legal education but are technicians by training. Similar to the above examples, technical judges are involved in the adjudication because of their specialised knowledge; they should ensure specialised expertise of the courts in technical questions, which professional judges are not familiar with by virtue of their training, even if they have gained experience in patent law.[45] Their involvement also results from the possibility of dispensing with a likely to be costly expert opinion in view of the technical judge's own expertise.[46] Furthermore, as intellectual property law could also involve potentially difficult-to-quantify damages claims, the organisation of courts in intellectual property law in Sweden should be highlighted here as another compelling example. In Sweden, next to a technical judge, an economic judge also sits on the panel to better assess the economic questions in intellectual property proceedings.[47]

Due to their long-standing tradition of involving commercial lay judges, commercial courts, commercial chambers, or senates in civil courts in some European countries are particularly noteworthy.[48] They are especially relevant as commercial proceedings are on a general level comparable to private

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[41] Art. 140 Royal Decree 1975 of 1933, the Italian Consolidated Law on Public Waters (*Regio Decreto n° 1775 del 1933 (Testo Unico delle Acque Pubbliche)*).

[42] Art. 142 Royal Decree 1975 of 1933 (Consolidated Law on Public Waters).

[43] See Chapter 2 § 4 of the Swedish Act on Patent and Market Courts, Art. 15 (3) Unified Patent Court Agreement.

[44] See § 65 (3) of the German Patent Act.

[45] Karl-Heinz Leise, 'Das Selbstverständnis des Bundespatentgerichts unter besonderer Berücksichtigung des technischen Richters' [1981] GRUR 470; Rudi Beyer, 'Bewährte Zusammenarbeit zwischen technischen Richtern und rechtskundigen Richtern auch bei einem zentralen europäischen Patentgericht' [2001] MittdtPatA 329; Antje Sedemund-Treiber, 'Braucht ein europäisches Patentgericht den technischen Richter?' [2001] GRUR 1004.

[46] German Federal Court of Justice, 26 August 2014, X ZB 19/12.

[47] Chapter 2 §§ 1 and 4 of the Swedish Act on Patent and Market Courts.

[48] Vito Piergiovanni (ed), *The Courts and the Development of Commercial Law* (Dunker & Humblot 1987); Alexander Brunner (ed), *Europäische Handelsgerichtsbarkeit* (Stämpfli Verlag 2009); Alexander Brunner and Isabelle Monferrini (eds), *Die Zukunft der Handelsgerichte in Europa* (Stämpfli Verlag 2019). There are states that foresee commercial courts without lay participation, such as the Netherlands, Quincy C Lobach, 'Netherlands Commercial Court – Englisch als Gerichtssprache in den Niederlanden' [2017] IWRZ 256.

damages actions for competition law violations, since both belong to the overall business law sector. Therefore, in some states, private competition law damages proceedings directly fall within the jurisdiction of their commercial courts. Austria[49], Belgium[50], France[51], Germany[52] and Switzerland[53], for example, acknowledge the concept of commercial expert lay judges. These commercial judges are not legal professionals, but they come from different

[49] §§ 7(2), (3), 15–18 of the Austrian Jurisdictional Rules (*Jurisdiktionsnorm*), see also Paul Oberhammer, 'Österreichische Handelsgerichte' in Brunner (n 48) 87; Sonja Bydlinski and Maria Wittmann-Tiwald (eds), *300 Jahre staatliche Handelsgerichtsbarkeit* (NMW 2018); Georg Kathrein, 'Grundlagen Österreich' in Brunner/Monferrini (n 48) 45; Karl-Heinz Krenn, 'Der Beitrag der fachmännischen Laienrichter aus dem Handelsstand für die Handelsgerichtsbarkeit' in Kohl/Reiter-Zatloukal (n 16) 431.

[50] In Belgium, commercial courts have recently been replaced by so-called business courts. Nevertheless, business courts also know the concept of lay judges deriving from the business community, Artt. 85 and 203 of the Judicial Code Belgium (*Code judiciaire*), see Paulette Vercauteren, 'Pratique en Belgique' in Brunner/Monferrini (n 48) 119.

[51] Artt. L721-1 – L724-7 of the French Commercial Code (*Code du commerce*); see Jean-Luc Vallens, 'Les tribunauxde commerce en France' in Brunner (n 48) 145; Holger Fleischer and Nadja Danninger, 'Handelsgerichte in Frankreich und Deutschland zwischen Tradition und Innovation' [2017] RIW 549; Nicole Stolowy and Matthieu Brochier, 'France's commercial courts: administration of justice by ordinary citizens' [2017] JBL 1; Yves Chaput, 'Objectifs en France' in Brunner/Monferrini (n 48) 93; Jean Betrand Drummen, 'Pratique en France' in Brunner/Monferrini (n 48) 101.

[52] § 105 of the German Judicature Act (*Gerichtsverfassungsgesetz*), §§ 44–45a of the German Judiciary Act (*Deutsches Richter Gesetz*); see Ulrich Haas, 'Deutsche Zivilkammern in Handelssachen' in Brunner (n 48) 113; Dieter Kunzler, 'Deutsche Handelsgerichtsbarkeit – Praxis' in Brunner (n 48) 133; Klaus Lindloh, *Der Handelsrichter und sein Amt* (6th edn Vahlen 2012); Fleischer/Danninger (n 51) 549; Holger Fleischer and Nadja Danninger, 'Die Kammer für Handelssachen: Entwicklungslinien und Zukunftsperspektiven' [2017] ZIP 205; Nils Neumann and Hans-Gert Bovelett, 'Zur KfH oder nicht? – Prozesslagen und Anwaltstaktik' [2018] NJW 3498; Rupprecht Podszun and Tristan Roher, 'Die Zukunft der Kammer für Handelssachen' [2019] NJW 131; Eberhard Kramer, 'Grundlagen Deutschland' in Brunner/Monferrini (n 48) 67; Dieter Kunzler, 'Praxisvorschläge Deutschland' in Brunner/Monferrini (n 48) 77; Felix Fuchs, 'Aktuelle Fragen und Rechtsprechung im Zusammenhang mit der Verweisung des Rechtsstreits von der Zivilkammer an die Kammer für Handelssachen' [2020] GWR 280.

[53] Art. 6 of the Swiss Code of Civil Procedure (*Zivilprozessordnung*), most prominently in Zurich §§ 38, 39 Law on the Organisation of Courts and Authorities in Civil and Criminal Procedure (*Gesetz über die Gerichts- und Behördenorganisation im Zivil- und Strafprozess*); see also Peter Nobel, 'Zur Institution der Handelsgerichte' (1983) I ZSR 137; Friedemann Vogel, '125 Jahre Zürcher Handelsgericht' (1992) 88 SJZ 17; David Rüetschi, 'Die Zukunft der Handelsgerichte' (2005) 101 SJZ 29; Alexander Brunner, 'Handelsrichter als Vermittler zwischen Wirtschaft und Recht', (2006) 102 SJZ 428; Isaak Meier and Michael Rüegg, 'Handelsgerichtsbarkeit in der Schweiz' in Brunner (n 48) 33; Thomas Klein, 'Praxis an den Schweizer Handelsgerichten' in Brunner (n 48) 75; Alexander Brunner and Peter Nobel (eds), *Handelsgericht Zürich 1866–2016: Zuständigkeit, Verfahren und Entwicklungen* (Schulthess 2016); Christoph Leuenberger, 'Grundlagen Schweiz' in Brunner/Monferrini (n 48) 21; Peter Nobel, 'Praxisvorschläge Schweiz' in Brunner/Monferrini (n 48) 33.

business sectors.[54] They are usually honorary- or part-time judges appointed or elected for a specific period.[55] In some systems, they are paid like professional judges.[56] In others, they are unpaid but compensated for their efforts.[57] In most systems, they share the bench with professional judges in mixed courts.[58] In France, however, despite plans to introduce a system of mixed courts, the panels at commercial courts consist solely of lay judges.[59] Instead, court clerks (*greffiers*) are also involved, especially in drafting the decisions, and they also assist commercial judges in legal matters.[60] This stems back from the long French tradition of having commercial disputes solved solely by peers from the economic community.[61] In addition to economic and commercial expertise, the legitimacy and communication function is cited as the main reason for involving only lay judges in the decision-making process.[62] In other mixed-court systems, the focus lies solely on the expertise: commercial lay judges should provide the bench with a better understanding of economic contexts and business practices.[63] Commercial lay judges are expected to assess a case based on their particular professional qualifications and business experience, allowing for a practical and appropriate judgment in commercial disputes.

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[54] §§ 108 and 109 of the German Judicature Act; Art. 203 of the Judicial Code Belgium, Art. 723-4 of the French Commercial Code.

[55] § 15(3) of the Austrian Jurisdictional Rules, § 108 of the German Judicature Act; Art. 85, 203 of the Judicial Code Belgium; Art. 722-6 of the French Commercial Code.

[56] § 15(1) of the Austrian Jurisdictional Rules.

[57] § 107 of the German Judicature Act; Art. L722-16 of the French Commercial Code; see also Brunner (n 48) 430.

[58] § 7(2) of the Austrian Jurisdictional Rules; § 105 of the German Judicature Act; Art. 85 of the Belgian Judicial Code; § 39(2) of the Law on the Organisation of Courts and Authorities in Civil and Criminal Procedure Zurich.

[59] Artt. 721-1, 722-1 of the French Commercial Code; exceptions exist for Alsace–Moselle, where instead of commercial courts, commercial chambers similar to the German system exist, which are mixed courts (Art. 731-3 of the French Commercial Code); and for the overseas departments, who also have mixed courts (Art. 732-3 of the French Commercial Code).

[60] Fleischer/Danninger (n 51) 549, 555.

[61] On the historical developments: Étienne Regnard, *Les tribunaux de commerce et l'écolution du droit commercial* (Arprint 2007); Amalia D. Kessler, *A Revolution in Commerce: The Parisian Mechant Court and the Rise of Commercial Society in Eighteenth-Century France* (Yale University Press 2007); Fleischer/Danninger (n 51) 549, 550; Stolowy/Brochier (n 51) 2 – 11; Drummen (n 51) 103.

[62] Stolowy/Brochier (n 51) 12; Chaput, 'Objectifs en France' in Brunner/Monferrini (n 48) 96.

[63] The expertise is specifically mentioned in § 39(2) of the Law on the Organisation of Courts and Authorities in Civil and Criminal Procedure Zurich; Lindloh (n 52) 60, 61; Fleischer/Danninger (n 52) 205, 207, 208; Stolowy/Brochier (n 51) 1, 20; Neumann/Bovelett (n 52) 3499; Podszun/Roher (n 52) 133; Leuenberger (n 53) 23; Krenn (n 49) 435.

In summary, expert lay judges are a well-known concept in civil justice in Europe. They are consistently used primarily because of their specific expertise.

2. Existing forms of lay participation in private enforcement of competition law

In private enforcement of competition law, expert lay judges have so far been the exception and can only be found in very few systems in Europe. In some states, private actions for competition law damages fall into the jurisdiction of commercial courts, which entirely or partly consist of commercial lay judges. Still, except for the Commercial Court of Zurich (*Handelsgericht Zürich*) with its special allocation mechanism that considers the particular knowledge and focus of the judges, also these systems do not necessarily pay attention to competition law expertise of the lay judges.

2.1. France

In France, commercial courts generally have jurisdiction over any litigation between traders or companies concerning commercial acts,[64] which usually includes actions for damages for breaches of competition law.[65] Not all commercial courts have jurisdiction over cartel damages actions; such proceedings are concentrated in eight specific commercial courts.[66] These courts should, in theory, be specialised in competition matters, amongst other areas falling within their jurisdiction.[67] As mentioned above, the judges at French commercial courts are entirely laypersons coming from the business community. However, neither the selection process of commercial judges nor their further training pays any specific attention to their competition law expertise.

Nevertheless, at least at the larger commercial courts, above all in Paris, chambers are formed for particular areas of law.[68] For example, at the Paris Commercial Court (*Tribunal de Commerce de Paris*), there is a chamber for competition law.[69] In this particular chamber, one can thus expect a certain

[64] Art. L721-3 of the French Commercial Code.

[65] For the rare actions of a non-tradesperson against a tradesperson, the non-tradesperson can choose between a commercial or civil court, Stolowy/Brochier (n 51) 15.

[66] Artt. L420-7, R-420-3, Annex 4-2 of the French Commercial Code.

[67] Critical David Bosco, La spécialisation judiciaire française en matière de concurrence dans l'impasse, (2011) 1 Concurrences 236.

[68] Stolowy/Brochier (n 51) 17; Fleischer/Danninger (n 51) 556.

[69] Tribunal de Commerce de Paris, 'Chambre de Contentieux' (2022), available at: https://www.tribunal-de-commerce-de-paris.fr/fr/chambres-de-contentieux (accessed on 09.05.2022).

expertise of the commercial judges in competition law and, since the commercial judges are members of the business community, some economic expertise is also assumed. Moreover, already in 2010, an English-speaking International Chamber was established at the Paris Commercial Court,[70] which also lists competition damages actions in cases involving an international dimension amongst their competencies[71]. However, since other legal matters concerning international affairs also fall within its competences, it can not necessarily to be assumed that these commercial judges have special expertise in competition law and competition economics. Without specific statistical data for competition law actions being available, though, the success rate of French commercial courts is quite high. *Stolowy and Brochier* have shown that 'the rate of appeals against decisions by commercial courts is lower than the rate of appeals against district court decisions', and 'the rate of commercial court rulings overturned on appeal is much lower than the rate for other courts of the first instance'.[72] At the same time, *Stolowy and Brochier* have shown that the duration of procedures of commercial courts, with an average of 5 months per procedure in 2015, is much shorter than in ordinary civil courts.[73]

2.2. Switzerland

In Switzerland, notably at the prominent Commercial Court in Zurich, competition law disputes, including private damages actions, fall into the jurisdiction of the commercial court.[74] There, special emphasis is placed on the expertise of the commercial judges. In that respect, the allocation mechanism of commercial judges according to their individual expertise is particularly noteworthy,[75] which is also referred to as the so-called 'pool solution'[76].

The Commercial Court Zurich is staffed with two professional and three commercial judges. This composition with a majority of commercial judges

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[70] Bernard Auberger, 'La chambre internationale du Tribunal de Commerce de Paris' (2010) 10 Juriste d'Entreprise Magazine 61; Christoph A Kern, 'English as a Court Language in Continental Courts' (2012) 5 Erasmus L Rev 187, 195; Giesela Rühl, 'Auf dem Weg zu einem europäischen Handelsgericht? ' [2018] JZ 1073, 1076; Alexandre Biard, 'International Commercial Courts in France: Innovation without Revolution?' (2019) 12 Erasmus L Rev 24.

[71] Tribunal de Commerce de Paris, 'La Chambre Internationale: Les Domaines de Compétence' (2022), available at: https://www.tribunal-de-commerce-de-paris.fr/fr/domaines-de-competence-tribunal-de-commerce-de-paris (accessed on 09.05.2022).

[72] Stolowy/Brochier (n 51) 19.

[73] Ibid.

[74] § 44 lit. a) of the Law on the Organisation of Courts and Authorities in Civil and Criminal Procedure Zurich, Art. 5(1) lit. b) of the Swiss Code of Civil Procedure.

[75] Leuenberger (n 53) 30, 31.

[76] Fleischer/Danninger (n 52) 208; Podszun/Roher (n 52) 133, 134.

also underlines the focus on the economic expertise of the panel.[77] The commercial judges 'are designated taking into account their expertise'.[78] In practice, the commercial judges are distributed among chambers according to their own industry affiliation and legal expertise.[79] This includes a chamber for 'competition and intellectual property law'.[80] Within the chambers, the president of the higher court selects three most appropriate, knowledgeable, and competent commercial judges from all commercial judges of this chamber by virtue of his authority to manage the court.[81] The Zurich Commercial Court particularly emphasises that they have commercial judges who are competition law experts.[82] However, no information is provided on the profession of these commercial judges, particularly, whether they are economists or not.

Generally, not specific to competition law, the Zurich Commercial Court is praised for its fast, relevant and cost-effective handling of cases, especially because expensive expert opinions can be avoided.[83] It is often taken as a model for a reorientation of courts, primarily commercial courts, in terms of their specialisation.[84]

2.3. Austria

The Austrian system yields a mixed picture. On the one hand, it generally follows a positive approach with regard to the inclusion of expert lay judges in general competition proceedings before the Austrian Cartel Court (*Kartellgericht*).[85] Expert lay judges must have longer professional experience in the legal or economic field and a corresponding law, business or economics degree.[86] In theory, due to the expertise that they bring to the bench, these expert lay judges of the Austrian Cartel Court could well serve as a model for other jurisdictions, as this paper will explore further below. However, in

[77] Brunner (n 48) 429.

[78] § 39(2) of the Law on the Organisation of Courts and Authorities in Civil and Criminal Procedure Zurich).

[79] Fleischer/ Danninger (n 52) 208; Leuenberger (n 53) 30, 31.

[80] Isabelle Monferrini 'Vergleichsverhandlungen vor dem Zürcher Handelsgericht, Beiträge aus den zehn Kammern des Handelgerichts' in Brunner/Nobel (eds) (n 53) 134.

[81] § 77(1) of the Law on the Organisation of Courts and Authorities in Civil and Criminal Procedure Zurich.

[82] Zivil und Strafrechtspflege Zürich, 'Handelsgericht: Aufgaben' (2022), available at: https://www.gerichte-zh.ch/organisation/handelsgericht/aufgaben.html (accessed on 09.05.2022).

[83] Brunner (n 48) 429; Leuenberger (n 53) 23.

[84] Fleischer/ Danninger (n 52) 208; Podszun/Roher (n 52) 133, 134.

[85] §§ 59, 64–72 of the Austrian Competition Act (*Kartellgesetz*), see also Elfriede Solé and Anneliese Kodek and Sabine Völkl-Torggler, *Das Verfahren vor dem Kartellgericht* (2nd edn Verlag Österreich 2019) 11.

[86] § 66 of the Austrian Competition Act.

practice, it cannot be guaranteed that the expert lay judges at the Austrian Cartel Court will actually have profound knowledge of competition law economics. Moreover, those expert lay judges are not involved in private damages actions for the violation of competition law. It is the ordinary civil courts, and not the Austrian Cartel Court, that have jurisdiction over private damages actions.[87] In ordinary civil courts, lay judges are not part of the judicial bench.

Only in exceptional cases will the Cartel Court, with its expert lay judges, become – lightly – involved in private enforcement of competition law. In principle, any undertaking or association of undertakings, which has a legal or economic interest in the decision, has a right to apply to the Cartel Court under Section 36(4) No. 4 Austrian Competition Act (*Kartellgesetz*). Further, in case the anticompetitive conduct has already been seized, and there has been no other final decision of the Cartel Court regarding this infringement, the Cartel Court may, upon request, issue a declaratory decision of a violation of Austrian competition law, but not that of the EU,[88] insofar as there is a legitimate interest, for example, future damages actions.[89] A decision of the Cartel Court has a binding effect on private actions for damages.[90] Yet, the binding effect only encompasses the competition law violation, as the decision of the Cartel Court does not contain any calculations of damages.[91] Consequently, the expert lay judges at the Cartel Court involved in the declaratory decision cannot use their expertise to calculate damages for specific volitions of competition law.

In addition, under certain circumstances, the Vienna Commercial Court (*Handelsgericht Wien*), or the commercial senates of the regional courts, may also have jurisdiction over private damage claims. Therein, commercial expert lay judges share the panel with two professional judges. The Vienna Commercial Court and the commercial senates of the regional courts do not normally have jurisdiction over private damages actions for the violation of competition law under the Austrian Competition Act[92].[93] However, a competition law violation can also constitute an infringement of § 1 Austrian Unfair Competition Act (*Gesetz gegen den unlauteren Wettbewerb*) if

[87] Friedrich Rüffler and Robert A Steinwender, 'Allgemeines Wettbewerbsrecht' in Michael Holoubek and Michael Potacs (eds) *Öffentliches Wirtschaftsrecht* (4th edn Verlag Österreich 2019) 651, 686–688; Solé/Kodek/Völkl-Torggler (n 85) 36.

[88] Axel Reidlinger and Isabella Hartung, *Das neue Österreichische Kartellrecht* (4th edn Verlag Österreich 2019) 230; Rüffler/Steinwender (n 87) 711, 712; Norbert Gugerbauer, *Kartellgesetz und Wettbewerbsgesetz* (3rd edn Verlag Österreich 2017) 424.

[89] §§ 28 and 36(4) of the Austrian Competition Act.

[90] § 37i(2) of the Austrian Competition Act (*Kartellgesetz*); Gugerbauer (n 88) 527.

[91] 'Declaration of the infringement' in § 28(1) of the Austrian Competition Act.

[92] §§ 37a – 37m of the Austrian Competition Act.

[93] § 51 of the Austrian Jurisdictional Rules.

the infringement is capable of giving the infringer a competitive advantage, which will regularly be the case.[94] Disputes concerning unfair competition fall within the jurisdiction of the Vienna Commercial Court and the commercial senates of the regional courts.[95] At least at the Vienna Commercial Court, the allocation of the commercial expert judges follows a similar procedure as the aforementioned Zurich court.[96] Nevertheless, the competition-expertise of the expert lay judges in commercial matters should not be overestimated, as the actions for unfair competition practices based on a competition law infringement only occupy a small part even in the law of unfair competition. Moreover, the jurisdictional fragmentation in competition matters does not necessarily contribute to an increased understanding of competition law and competition economics on the bench.

2.4. Germany

In Germany, a negative trend can be observed as to lay participation in the judiciary. Private enforcement of competition law, including actions for damages, used to be a commercial matter.[97] In commercial cases, the claimant generally has the choice to have the case heard by a chamber of the usual civil division, consisting of three professional judges in the normal composition, or a chamber belonging to the commercial division.[98] In their usual composition, commercial chambers are composed of two lay judges and one professional judge[99], but there is also the possibility of excluding lay judges and having the professional judge decide on her own.[100]

In the 8th amendment of the German Competition Act (*Gesetz gegen Wettbewerbsbeschränkungen*), the Federal Government has succeeded in its drive to abolish the jurisdiction of commercial chambers for competition law damages claims.[101] Actions for injunctive relief and the levying of benefits may still be transferred to the commercial chambers at the claimant's request.[102] The German Federal Government cited, as reasons for this amendment,

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[94] Gugerbauer (n 88) 59; Rüffler/Steinwender (n 87) 688; Solé/Kodek/Völkl-Torggler (n 85) 36.

[95] § 51(2) No. 10 of the Austrian Jurisdictional Rules.

[96] Fleischer/ Danninger (n 52) 208.

[97] On legislative changes: Jürgen Keßler, 'Was lange währt, wird endlich gut? – Annotationen zur 8. GWB-Novelle' [2013] WRP 1116, 1121; Achim Gronemeyer and Dimitri Slobodenjuk, 'Die 8. GWB-Novelle – Ein Überblick' [2013] WRP 1279, 1284.

[98] §§ 96 and 98 of the German Judicature Act.

[99] § 105 of the German Judicature Act.

[100] § 349(3) of the German Code of Civil Procedure.

[101] BT-Drs. 17/9852, 54.

[102] § 95(2) No. 1 of the German Judicature Act.

that competition law damages actions are factually, economically and legally complex and should, therefore, be assigned to collegiate panels of professional judges in general civil chambers, instead of commercial chambers, which are only staffed with one professional judge.[103] However, as we will see more in detail below, it is precisely because of the complicated nature of economic damages calculation why private damages actions for the violation of competition law should be decided by mixed panels that include lay judges, as economic experts, on the bench.

Nevertheless, the changes brought about by the 8th amendment of the German Competition Act might not necessarily be based on a complete legislative misunderstanding of economic realities in cartel damages actions but result, instead, from the generally problematic state of German commercial chambers.[104] Case numbers are declining and the case allocation system is outdated.[105] Cases are randomly allocated to a commercial chamber to which the commercial judges belong, and there is no allocation according to the particular skills and specialised knowledge of the commercial judges, the benefit of which is consequently lost.[106] Therefore, in practice, the mentioned possibility of having the case decided solely by the professional judge, without the participation of the commercial lay judges, is used in 90% of the cases.[107] Special competition lay judges, for example, economists with special knowledge of cartel damages calculation, did not exist anyway. The change brought about by the 8th amendment of the German Competition Act may, therefore, rather be a reaction to these grievances for private damages actions. The discussion of the involvement of lay judges in competition law disputes could also be taken as an opportunity to rethink the function and organisation of the chambers for commercial matters in Germany.[108]

This section has shown that expert lay judges are not completely unknown in private damages actions for competition law violations. However, the existing areas of application still suffer from several weaknesses, even though individual aspects certainly could have a model function.

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[103] BT-Drs. 17/9852, 38.

[104] Gralf-Peter Calliess and Hermann Hoffmann, 'Effektive Justizdienstleistungen für den globalen Handel' (2009) 42(1) ZRP 1; Christian Wolf, 'Zivilprozess versus außergerichtliche Konfliktlösung – Wandel der Streitkultur in Zahlen' [2015] NJW 1656, 1659; Gerhard Wagner, *Rechtsstandort Deutschland im Wettbewerb* (CH Beck 2017) 199; Fleischer/Danninger (n 52) 207; Podszun/Roher (n 52) 132.

[105] Wagner (n 104) 202; Podszun/Roher (n 52) 132.

[106] Fleischer/ Danninger (n 52) 207.

[107] Fleischer/Danninger (n 51) 549, 553.

[108] Generally, on the specialisation of courts and involvement of lay judges in German civil procedure law, Gralf-Peter Calliess, 'Der Richter im Zivilprozess – Sind ZPO und GVG noch zeitgemäß?' [2014] NJW-Beil. 27, 29.

III. Advantages and disadvantages of competition-expert lay judges

While the previous part has illustrated that expert lay judges are indeed a familiar concept in Europe, possibly one that could be expanded further, the following section examines the theoretical foundations and explores the advantages and disadvantages of involving expert lay judges in private competition law damages actions. At this point, the practical details of such involvement are not discussed in detail, but this paper proposes the use of competition economists as expert lay judges.

1. The advantages of specific expertise as to cartel damages and the accompanying consequences

The previous section has already demonstrated that the civil justice system mainly involves lay judges in the judicial decision-making process in order to benefit from their expertise. As mentioned above, lay labour, agricultural, technical and commercial judges are used because they provide the bench with specific expert knowledge that the professional judges do not possess or possess to a lesser degree. In the case of competition-expert lay judges, too, it would be precisely and above all their economic expertise that could be an advantage and have several positive implications for cartel damages actions.

First, the judicial expertise on the part of the expert lay judges would make other expertises redundant. In addition to legally challenging questions, economic questions, especially the calculation of cartel damages and pass-on, are the main challenge in private damages litigation. As already mentioned, these calculations are often provided through outside expert evidence, either through party, or court appointed experts, or both. Competition-expert lay judges can decide based on their own expertise, making external expert opinions obsolete. Generally, civil procedural law allows the court's own expertise to replace expert evidence. In German civil procedural law, for example, a party's request to submit an expert opinion can be rejected on the grounds that the court itself has the necessary expertise.[109] At German commercial chambers, in particular, the court may, with the involvement of expert lay judges, decide on the basis of its own expertise and knowledge, for the assessment of which a commercial appraisal by the lay judge is sufficient, without obtaining an expert opinion.[110] Only when the bench's own expertise is insufficient must an

[109] See, for example, German Federal Court of Justice, 26 April 1989, Ivb ZR 48/88.

[110] § 114 of the German Judicature Act, see hereto Jürgen Blomeyer, 'Der Ruf nach dem spezialisierten und sachverständigen Richter' [1970] ZRP 153, 155; Fleischer/ Danninger (n 52) 2011; Neumann/Bovelett (n 52) 3499.

external expert be involved.[111] Practice at the German Federal Patent Court, the agriculture and commercial chambers has shown that expert opinions can usually be avoided due to the involvement of technical judges.[112]

This reasoning is transposable to private damages actions for competition law violations. Professional judges do not have any training in economics themselves, albeit they have often gained experience in competition matters, especially if they serve on competition-specific chambers. However, special economic expertise with econometric models is required when calculating cartel damages,[113] which professional judges do not have. Even if economics classes should rightfully be included in the curriculum of law schools or if further economics training is offered for judges to increase their economic competences,[114] the acquired expertise would certainly not compare to those of an experienced competition economist. Accordingly, economic expertise on the bench can only be meaningfully exercised by competition-expert lay judges.

Consequently, procedural efficiencies could be created. As mentioned above, both parties often provide differing expert opinions for the damages calculation in cartel damages claims, which makes a court-appointed expert necessary. This approach ramps up procedural costs and prolongs procedures. The use of competition-expert lay judges, on the other hand, would make expert evidence obsolete altogether and is therefore cost-effective and fast.[115] In general, specialisation is usually considered a key factor for judicial efficiency from a legal economy point of view.[116] General economic expertise relevant in competition proceedings is increased by the competition-expert lay judges, which can lead to further procedural efficiencies.[117] The expert judge can educate the other bench members, the professional judges, on the respective economic matter so that the entire bench can accurately grasp the economic issues relevant to the decision within a reasonable time and effort.[118] It is

[111] Similar reasoning for technical judges in patent courts and providing practical examples Stephan Neuhaus, 'Der Sachverständige im deutschen Patentverletzungsprozess' [1987] GRUR Int. 483, 484.

[112] For technical judges in particular Beyer (n 45) 329, 329.

[113] See European Commission (n 4).

[114] Critically Fleischer/Danninger (n 52) 211.

[115] See Jürgen Blomeyer, 'Der Ruf nach dem spezialisierten und sachverständigen Richter' [1970] ZRP 153, 155; similar reasoning for technical judges in patent courts Sedemund-Treiber (n 45) 1004, 1009; for German commercial judges, Neumann/Bovelett (n 52) 3498, 3499.

[116] Lawrence Baum, *Specializing the Courts* (University of Chicago Press 2011); Stefan Voigt, 'Determinants of judicial efficiency: a survey' (2016) 42 Eur J Law Econ 183, 191; Podszun/Roher (n 52) 133; general discussion Holger Fleischer, 'Spezialisierte Gerichte: Eine Einführung' [2017] RabelsZ 497.

[117] Fleischer/ Danninger (n 52) 207.

[118] Generally Machura (n 14) 235, 240; similar reasoning for technical judges in patent courts Sedemund-Treiber (n 45) 1004, 1008; for commercial courts Fleischer/Danninger (n 52)

reported that the expert lay judges at Austrian, French and Swiss commercial courts or the technical judges at patent courts, for example, generally use their practical expertise to provide accurate, timely and cost-saving information as well as orders to expedite and cheapen proceedings.[119] As mentioned-above, French commercial court proceedings, in particular, are much shorter than ordinary civil proceedings.

Like in commercial courts used today, expert lay judges in private damages actions for the violation of competition law could be sparring partners or a counterweight for the legally trained professional judges. They could bring a different, non-legal but practically relevant and economically sound perspective into the proceedings.[120] In addition, they can use their expertise to oppose and challenge the highly specialised competition lawyers and economists in a manner that a professional judge will not be able to do because of her limited economic knowledge.[121] The expert judge thus also contributes, through his presence on the bench, to preventing possible communication problems between the professional judges and the parties with their highly specialised lawyers and economists.[122] The management of such negotiations by the expert lay judges could then also improve court settlement negotiations and, thus, end cartel damages proceedings consensually.[123] This, in turn, saves time and resources and could lead to greater acceptance of the outcome by the parties. Figures from Swiss commercial courts have shown that the involvement of expert lay judges resulted in a settlement rate of around 70% in the first instance.[124]

In general, the expertise provided by the lay judges on the judicial bench can lead to a more relevant, pragmatic, practice-oriented and innovative damages calculation and overall decision in competition law damages proceedings.[125]

211.

[119] Brunner (n 48) 429; Stolowy/Brochier (n 51) 15, 18; Krenn (n 49) 431, 434; Leuenberger (n 53) 23; Sedemund-Treiber (n 45) 1004, 1008.

[120] Machura (n 14) 235, 239; Podszun/Roher (n 52) 133.

[121] Michael Lotz, 'Qualitätssicherung im Zivilprozess' [2014] DRiZ 20; Martin Zwickel, 'Interdisziplinär besetze Richterbank als Chance für größere Bürgernähe' [2014] DRiZ 258, 259; similar reasoning for technical judges in patent courts Beyer (n 45) 329, 330; similar for lay judges at commercial courts Lindloh (n 52) 63.

[122] Similar reasoning for technical judges in patent courts Sedemund-Treiber (n 45) 1004, 1008.

[123] Similar reasoning for commercial proceedings Stolowy/Brochier (n 51) 15, 16; Podszun/Roher (n 52), 'Die Zukunft der Kammer für Handelssachen' [2019] NJW 131, 133; Krenn (n 49) 431, 434.

[124] Brunner (n 48) 431; Roland O Schmid 'Vergleichsverhandlungen vor dem Zürcher Handelsgericht, Beiträge aus den zehn Kammern des Handelsgericht' in Brunner/Nobel (n 80) 235; Leuenberger (n 53) 24.

[125] Similar for lay judges in commercial proceedings Lindloh (n 52) 60; Fleischer/ Danninger (n 52) 213.

This can also lead to a higher acceptance of the decision by the parties and the public.[126] Where expert judges are already used, for example, in the commercial courts in France and Zurich, their rulings enjoy a high level of acceptance by the parties as demonstrated by low appeal rates and, in general, their good reputation.[127] In this context, the democratic participation function through the involvement of such lay judges, often peers from a similar industry as the parties, should also be mentioned.[128] From a rule of law perspective, the participation of such expert lay judges is also to be assessed positively. An expert decision certainly fulfils the expectations of the parties. The provided expertise and accompanying specialisation also ensure a certain quality of jurisprudence.[129] As an imperative of the rule of law, it is the task of the judiciary to resolve legal disputes with the necessary expertise and guarantee effective judicial protection.[130]

The fact that expert lay judges are already used in other legal areas in many European states shows that in those states, the legislator has already made a fundamental decision in favour of the participation of expert lay judges in their legal systems.[131] In other states, where the concept of (expert) lay judges does not exist, existing models found in other states can serve an exemplary, comparative function. This exemplary function applies especially to existing systems that already provide for competition-expert lay judges. The fact that expert lay judges are already used in many areas of civil justice, would also not lead to an unjustified privilege for private enforcement of competition law. Moreover, the introduction of competition-expert lay judges goes hand in hand with general, Europe-wide developments and the introduction of specific commercial courts for international commercial disputes[132] – as such it could fulfil a crucial complementary function.

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[126] Zwickel (n 121) 258; Olga Stürzenbecher-Vouk, 'Der den Gerichten beigegebene Sachverstand' (2016) 7 ZVG 3, 626, 627; Krenn (n 49) 431, 433, 435; providing empirical research on the issue of lay judges and their acceptance in general Stefan Voigt, 'The effects of lay participation in courts — A cross-country analysis' (2009) 25 Eur J Polit Econ 327.

[127] Stolowy/Brochier (n 51) 433.

[128] See Zwickel (n 121) 258; Stürzenbecher-Vouk (n 126) 239.

[129] Baum (n 116) 213.

[130] Similar reasoning for commercial courts Podszun/Roher (n 52) 131; in the context of special information technology courts Rupprecht Podszun, QualityLaw: Zuständigkeitskonzentration für IT-Recht, [2022] MMR 249.

[131] Fleischer/Danninger (n 52) 211.

[132] Rühl (n 70) 1073; Biard (n 70) 24; Burkhard Hess and Timon Boerner, 'Chambers for International Commercial Disputes in Germany: The State of Affairs' (2019) 12 Erasmus L Rev 33; Erik Peetermanns and Philippe Lambrecht, 'The Brussels International Business Court: Initial Overview and Analysis' (2019) 12 Erasmus L Rev 42.

2. Dispensing and mitigating concerns

Conversely, there are also disadvantages brought forward against the participation of expert lay judges, which, in theory, can be transposed to private enforcement of competition law. However, on closer examination, these do not prove to be valid as long as the procedural rules are adapted accordingly.

As mentioned above, private damages actions usually involve not only complex economic calculations but also legal questions. Lay judges are not trained to solve those legal questions; a professional judge is superior in this aspect. The fact that lay judges have no legal training is, as mentioned above, also the reason why in Germany, competition law damages actions no longer fall under the jurisdiction of commercial chambers and why a general decline of proceedings at those commercial chambers is notable. However, such concerns can be addressed by appointing expert lay judges in mixed courts and, if necessary, even for their numbers to exceed professional judges on the respective panel. Sound legal competence can be provided by the professional judge and practical, economic competence by the expert lay judge.[133] Furthermore, mandatory trainings could be introduced for expert lay judges, which would provide them with the basic knowledge of competition law and civil procedure. A basic legal understanding acquired through practice and their cooperation with lawyers is presumably already present among competition economists.

In addition, actual competition economics expertise of the expert lay judges would have to be effectively assured.[134] As mentioned above, German commercial chambers were, for example, criticised for not assigning commercial judges to cases according to their expertise and industry-specific knowledge. Any such criticism could be avoided with respect to competition-expert judges through appropriate allocation rules, for example, akin to the Zurich Commercial Court model, and further procedural guidelines. To additionally assure the aforementioned expertise, competition-expert lay judges would need to be effectively compensated. Otherwise, a lack of available competition economists, to fill open expert lay positions, could undermine the objective of actually increasing expertise on the part of the judicial bench. Especially for small EU Member States, it could be challenging in general to find enough suitable expert lay judges from their own nation. Cross-national pools of competition-experts, for example, provided through lists of suitable competition-experts drawn-up by the European Commission, could mitigate

[133] See Krenn (n 49) 431, 435; Leuenberger (n 53) 24.
[134] See Wolf (n 104) 1659; Fleischer/Danninger (n 52) 208.

those concerns. Having said that, national procedural and constitutional rules would need to allow appointing lay judges from other Member States.

Naturally, there is less flexibility in using such highly specialised lay judges in a large variety of cases. However, this specialisation is precisely the advantage of involving expert lay judges. Similarly, there are concerns that lay judges may not be able to prevail over dominating professional judges.[135] As a result, the advantage of their expertise would be lost. However, with appropriate training of professional judges on a mixed panel, and an appropriately balanced composition regarding the number of lay judges and professional judges, such concerns can also be mitigated.

Their expertise and industry knowledge are also sometimes held against expert lay judges. Above all, there have been concerns about bias and capture as well as the lack of impartiality and judicial independence of lay judges conflicting with Article 6(1) European Convention of Human Rights[136] (hereinafter: ECHR).[137] Nevertheless, also this concern can be mitigated since the normal conflicts of interest and confidentiality rules also apply to lay judges, as they do to professional judges.[138] This enables a lay judge who is too close to a certain industry to be excluded, if necessary.[139] Nevertheless, a balanced approach should be chosen here as well since it is industry knowledge that qualifies a lay judge for her position. Furthermore, it is also not sufficient in the sense of Article 6(1) ECHR that there is abstract or structural proximity of the lay judges to a party or to a certain subject matter of the proceedings; concrete conflicts between the subject matter of the dispute and the interest of the lay judges are necessary for a violation of Article 6(1) ECHR.[140] Incidentally, a mixed court with a balance between professional and lay judges can also be helpful in the sense that the professional judges can then devalue existing biases in an argumentative exchange with the lay judges.

Lastly, the use of expert lay judges for cartel damages actions is, of course, not the all-encompassing and only solution that will eliminate the

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[135] Similar reasoning for technical judges in patent courts Leise (n 45) 470, 474.

[136] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5, available at: https://www.refworld.org/docid/3ae6b3b04.html (accessed on 21.05.2022).

[137] Markus B Zimmer, 'Overview of Specialized Courts' (2009) 2 International Journal For Court Administration 4; Bernd Hirtz, 'Die Zukunft des Zivilprozesses' [2014] NJW 2529, 2531, early discussions Fritz Baur, 'Laienrichter – heute?' in Otto Bachof (ed) *Tübinger Festschrift für Eduard Kern* (Mohr Siebeck 1968), 49, 53.

[138] For example § 42 of the German Code of Civil Procedure.

[139] On such rules in French commercial proceedings Stolowy/Brochier (n 51) 13, in Swiss commercial proceedings, Brunner (n 53) 430.

[140] European Court of Human Rights, 22 June 1989, *Langborger v. Sweden*, Application No. 11179/84; 26 October 2004, *Kellermann v. Sweden*, Application No. 41579/98.

aforementioned problems existing in private enforcement of competition law, especially the calculation of cartel damages. Nevertheless, it is a step in the right direction, necessarily alongside other procedural means, such as the concentration of proceedings and specialisation of courts, to make private enforcement of competition law more effective.

IV. A possible way forward

Following the advantages of the use of expert lay judges in cartel law presented here, the question of the structure and organisation of such a concept arises. The paper makes some general but brief suggestions in the following part based on the models and examples provided above. However, the exact organisation for introducing lay judges to private enforcement of competition law will depend – outside of possible EU harmonisation efforts with a revised Damages Directive[141] – on the civil procedure rules of the different Member States. Hence, only a broad overview and general concepts can be given here.

The systematic and legal policy results found here support the introduction of expert lay judges in cartel damages law. Their introduction should also be accompanied by an overall specialisation of courts and supposedly their concentration as to their location, similar to the French concentration provisions for competition damages actions.[142] Otherwise, competition-expert lay judges would have to be appointed at each civil court, which in principle, have jurisdiction to decide on cartel damages action. This would entail an increased organisational effort. Any specialisation and concentration can be implemented, for example, through special competition law chambers at specific civil courts, where competition damages action will be concentrated

[141] Article 20(1) Damages Directive foresaw a review of the Directive and its implementation by 27 December 2020. Article 20(3) particularly provides that, if appropriate, the report should be accompanied by a legislative proposal. On 14 December 2020, the Commission published a report and came to an overall positive conclusion, see European Commission, 'Commission Staff Working Document on the implementation of Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (14 December 2020)' 14, available at: https://ec.europa.eu/competition/antitrust/actionsdamages/report_on_damages_directive_implementation.pdf (accessed on 09.05.2022). Due to the considerable backlog of most Member States transpositions, the report does not contain the envisaged in-depth analysis of the Directive or a legislative proposal. However, this might follow in the future.

[142] See Fleischer (n 116) 497.

or through special courts for competition law, such as the British Competition Appeal Tribunal[143]. However, the exact form of such judicial specialisation is beyond the scope of this paper.

In order to achieve the discussed balance between legal and economic expertise, mixed courts (such as the majority of commercial courts or chambers) are preferable. Expert lay judges and professional judges should share the bench. To ensure a decision-making function and capability, an unequal number of judges is appropriate. Professional judges should be predominant to perform the genuine judicial function, to counter the aforementioned criticism that expert judges lack legal knowledge and to be able to satisfactorily solve the difficult legal questions arising in competition damages law. Nevertheless, further legal training should also be mandatory for expert lay judges, as is usual for French commercial judges at the French commercial courts.[144]

Furthermore, the overarching question arises, what kind of lay judges would generally be appropriate for private damages actions. As mentioned throughout this paper, difficulties in private damages actions arise specifically with regard to damages calculation. As this is nowadays usually provided by economic experts, competition economists are suitable candidates for the position of expert lay judges in competition law cases – that is, providing their expertise as part of the panel rather than as a party- or court-appointed expert. The general legal requirements can be based on those of commercial judges, namely a certain minimum age and a certain minimum period of time of practical economic experience in competition law.[145] The right to nominate and the election or appointment of lay judges must also be regulated accordingly. Expert lay judges should be appointed for a specific period of time, with the possibility of renewal, similar to existing provisions for commercial courts or chambers in Europe.

It is necessary to turn here to the issue of how the expertise of the lay judges can be as targeted as possible and, thus, most precise and appropriate for the specific dispute at hand. In order to ensure that the expert lay judges' special sectorial knowledge and their knowledge of certain industries are, respectively, adequately covered and assigned to specific cases, the mentioned pool solution from the Zurich Commercial Court, which has been generally proposed for

[143] On their involvement in private enforcement of competition law Anthony Maton, Simon Latham, Marc Kuijper and Timo Angerbauer, 'Update on the Effectiveness of National Fora in Europe for the Practice of Antitrust Litigation' (2012) 3 JECLAP 586, 591; Tom De La Mare, 'Private Actions in the Competition Appeal Tribunal: The Consumer Rights Act Giveth and the 2015 Competition Appeal Tribunal Rules Taketh away' (2015) 14 Competititon LJ 219; David George, 'Reforms to Private Actions in the Competition Appeal Tribunal – Taking Stock One Year on' (2016) 15 Competititon LJ 225.

[144] Stolowy/Brochier (n 51) 10, 11.

[145] See, for example, § 109 of the German Judicature Act.

commercial disputes[146], would also be suitable for private damages actions for violations of competition law. Accordingly, the appropriate lay judges for the case are appointed by the president from a pool of expert lay judges available to the court at the commencement of the proceedings. As mentioned above, especially small Member States should assess the appointment of competition-expert lay judges from other EU countries, possibly with the help of lists of experts drawn-up by the Commission.

Finally, certain procedural rules should be introduced, or existing rules applicable to other kinds of lay judges or to judges, in general, should be applied to competition-expert lay judges in order to ensure the proper administration of justice in accordance with the rule of law. This includes, for example, rules on confidentiality or conflicts of interest. At the same time, the aforementioned concerns towards impartiality and judicial bias of the expert lay judges would be mitigated.

V. Conclusion

This paper has shown that from a systematic and legal policy point of view, the introduction of competition-expert lay judges can advance the understanding of the economic realities of cartel damages calculation of the judiciary and thus lead to an improvement in the area of damages calculation and overall procedural efficiencies. The economic expertise of competition-expert lay judges serves as their main advantage. The expertise available on the bench through the expert judge can save costs and time and can lead to economically sound and thus substantively relevant administration of justice, the genuine task of the judiciary. Any concerns and disadvantages can usually be mitigated through the use of procedural rules.

Existing forms of expert lay judges in Europe, most notably commercial judges, and the positive examples of the already existing concept of expert lay judges for competition law, generally underline those findings and can be used as models for a further advancement of the concept. Comparative analysis has shown that the use of expert lay judges nowadays is the absolute exception in private enforcement of competition law and that systems such as Germany, which has abolished expert lay judges for private damages actions, need improvement. The use of expert lay judges, especially at commercial courts in France and Zurich, or the examples of technical judges at several patent courts have illustrated the successful use of lay judges, which can, in

[146] Fleischer/Danninger (n 52) 208; Podszun/Roher (n 52) 133, 134.

principle, be transferred to private enforcement of competition law. The high settlement and low appeal ratio show that decisions involving expert lay judges are largely accepted by the parties and generally improve the administration of justice.

The exact implementation of the concept could only be outlined here. This paper suggested the introduction of competition-expert lay judges, notably competition economists with a specific acquired and recognised expertise, in mixed courts, where the respective allocation mechanism should allow allocation according to industry knowledge. In order to ensure EU-wide harmonised (minimum) standards, the basic concept for competition-expert lay judges raised here could be taken up in a revision of the Damages Directive and supplemented by further refinements.

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The Resurrection of the Comfort Letter: Back to the Future?

by

Selçukhan Ünekbaş*

CONTENTS

Abstract

Pandemic-induced economic shocks saw the European Commission and national competition authorities adopt so-called comfort letters to provide guidance, assurance, and legal certainty to undertakings in order to help mitigate the detrimental effects of the crisis. Whereas it is true that desperate times may call for desperate measures, the fact that the Commission continues to issue comfort letters for initiatives with little relevance to the ongoing emergency raises questions. This article analyzes the re-emergence of comfort letters from the viewpoints of legal basis and certainty. It finds that the foundations upon which the letters are

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constructed are shaky, which translates into the fostering of uncertainty. In that regard, explored are alternatives for Union enforcers to deploy a robust bespoke guidance regime for the future.

Resumé

Les chocs économiques induits par la pandémie ont amené la Commission européenne et les autorités nationales de la concurrence à adopter des lettres dites de confort pour fournir des orientations, des assurances et une sécurité juridique aux entreprises afin de contribuer à atténuer les effets néfastes de la crise. S'il est vrai que les temps désespérés appellent des mesures désespérées, le fait que la Commission continue à émettre des lettres de confort pour des initiatives peu pertinentes par rapport à l'urgence actuelle soulève des questions. Cet article analyse la réapparition des lettres de confort au regard de la base juridique et de la certitude. Il constate que les fondements sur lesquels ces lettres sont construites sont fragiles, ce qui se traduit par un encouragement à l'incertitude. À cet égard, cet article explore les alternatives pour les autorités chargées de l'application de la législation de l'Union de mettre en place un solide régime d'orientation sur mesure pour l'avenir.

Key words: European Union; competition; comfort letter; guidance; legal certainty.

JEL: K21, L4, L5

I. Introduction

Comfort letters are informal tools primarily geared towards providing businesses with additional clarification on whether their practices, actual or potential, are likely to infringe European competition law. These letters have been used extensively before the procedural modernization of EU competition law; although the Commission has recently signalled its intentions to revitalize the procedure. This revival draws on a need to provide undertakings with greater ability to navigate the complexities of the digital economy, as well as to plan in accordance with the objectives of the Green Deal. However, reinvigorating the use of comfort letters is not without problems either.

This article addresses several of such potential legal problems stemming from the increasing reliance on informal guidance and the so-called 'comfort letters' by the European Commission. The appetite for providing relief via comfort letters has resurfaced with the advent of the pandemic. As part of its Temporary Framework, the Commission resurrected the procedure, providing assurance that companies implementing certain cooperation mechanisms do

not contravene EU antitrust law.[1] Since then, comfort letters have been given to undertakings operating in 'essential sectors', such as the medical equipment sector,[2] pharmaceuticals,[3] cloud-computing,[4] and road transport.[5] In addition to the debatable question of whether these sectors are indeed essential for European economies, the rekindled interest in comfort letters generates further concerns, two of which form the focus of this article: the legal basis and legal effects.

It is not obvious on which grounds the Commission draws competence to resort back to comfort letters. Well-known is the fact that the introduction of Regulation 1/2003 discontinued the use of comfort letters – nowadays, undertakings are expected to self-assess their conduct to determine if they contravene antitrust rules. Although there exists a Commission Notice on informal guidance to novel questions related to EU antitrust law, it has never been used. Comfort letters also differ from 'non-infringement decisions', another highly unpopular method of guidance, as the latter may be rendered only *ex post*, whereas comfort letters are geared toward *ex ante* clarifications.[6] Furthermore, it is unclear on which *competitive rationale* these letters are being issued: do they illustrate that the agreements in question are pro-competitive, or ancillary to a greater good?[7]

Comfort letters also raise questions regarding their effects. In the letters issued lately, the Commission is always cautious to remind the recipients

[1] EC, 'Antitrust: Commission provides guidance on allowing limited cooperation among businesses, especially for critical hospital medicines during the coronavirus outbreak' (*European Commission Press Release*, 8 April 2020) <https://ec.europa.eu/commission/presscorner/detail/en/ip_20_618> accessed 20 May 2022.

[2] EC, 'Comfort letter: coordination in the pharmaceutical industry to increase production and to improve supply of urgently needed critical hospital medicines to treat COVID-19 patients' COMP/OG – D (2020/04403).

[3] Lewis Croft, 'Pharma sector to get second EU "comfort letter" for COVID cooperation' (*MLex*, 25 March 2021) <https://content.mlex.com/#/content/1274967?referrer=search_linkclick> accessed 20 May 2022.

[4] EC, 'Feedback on the membership criteria and internal working rules of GAIA-X' COMP/C.6/SS/RI/vvd.

[5] Lerna Hornkohl & Anna Jorna, 'Uncharted legal territory? – European Commission fines Volkswagen and BMW for colluding on technical development in the area of emission cleaning' (*Kluwer Competition Law Blog*, 15 July 2021) <http://competitionlawblog.kluwercompetitionlaw.com/2021/07/15/uncharted-legal-territory-european-commission-fines-volkswagen-and-bmw-for-colluding-on-technical-development-in-the-area-of-emission-cleaning/> accessed 20 May 2022.

[6] Council Regulation (EC) 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 L001/1.

[7] Giorgio Monti, 'Business Cooperation in Times of Emergency: The Role of Competition Law' (*Competition Policy International*, 10 May 2020) <https://www.competitionpolicyinternational.com/business-cooperation-in-times-of-emergency-the-role-of-competition-law/#_ednref45> accessed 20 May 2022.

that comfort letters do not comprise a formal decision. In other words, the letters do not produce binding legal effects, from which it follows that they are not 'acts' within the meaning of Union law.[8] However, the letters could create reasonable expectations on behalf of their recipients, altering their legal situation against their rivals and the market in which they operate. Moreover, even recommendations or 'position statements' may produce legal effects.[9] Lastly, legal certainty regarding the effects of comfort letters on national competition authorities and courts leaves much to be desired.[10]

The article does not aim to simply dismiss this trend as unlawful. It is sensible to expect that the use of such letters will continue, specifically vis-à-vis sustainability initiatives and digitalization efforts.[11] In that regard, the article will provide reasoned recommendations to alleviate the confusion and improve legal certainty via recourse to existing legal avenues in an innovative manner. This is expected to contribute to managing the risks raised by comfort letters and ignite further debates on this contentious issue.

II. The Problem of Legal Basis

In contrast to Regulation 1/2003, the reign of Regulation 17 was marked by the notification procedure. Despite a few judgments to the contrary, the notification procedure was one of the features of the old regime that perpetuated a form-based analysis of competition rules.[12] In essence, the notification system required every agreement capable of infringing Article 85 of the EEC Treaty (hereinafter referred to as Article 101 TFEU for clarity) to be notified to the Commission. In turn, the Commission would individually exempt arrangements that satisfied the conditions not to restrict competition in the internal market. However, the enlargement of the Union, as well as the completion of the Single Market towards the end of the millennium, meant that the Commission started to feel overwhelmed with the sheer number of submissions it received. As a response, it aspired to practically bypass the

[8] Dallal Stevens, 'The "comfort letter": old problems, new developments' (1994) 15(2) European Competition Law Review 81.

[9] Case 64/82 *Tradax v Commission* [1984] ECR II-1359, Opinion of AG Slynn.

[10] Leander Stahler & Mariolina Eliantonio, 'The Legal Effects of EU Competition Soft Law in the Decisions of National Competition Authorities: The Case of the Bundeskartellamt' (2020) 4 European Competition & Regulatory Law Review 273.

[11] Gianni de Stefano, 'COVID-19 and EU Competition Law: Bring the Informal Guidance On' (2020) 11(3-4) JECLAP 121.

[12] Case C-234/89, *Stergios Delimitis v Henninger Brau* [1991] ECR I-00935.

relatively procedure-heavy requirements of Regulation 17.[13] The result was the creation of comfort letters, on which the Commission came to rely heavily over time. However, with the introduction and entry into force of Regulation 1/2003, the notification procedure was abolished, and undertakings were required to self-assess whether their conduct fell afoul of European competition law. Thus, the provisional validity of agreements fulfilling the conditions under Article 101 (3) would be transformed into a fully-fledged validity, without the need to seek a prior decision by a competition enforcer.

With the recent resurrection of comfort letters, one of the questions that sparks interest is the legal basis on which these letters are grounded. As regards the old system, even though comfort letters were not foreseen in Regulation 17, they were nevertheless conceived as mere shortcuts serving the powers possessed by the Commission, such as the authority to issue individual exemptions. However, having abolished the individual exemption/clearance system, Regulation 1/2003 does not equip the Commission with such powers. This begs the question: what are other suitable legal bases to which the recent proliferation of comfort letters may be linked? This chapter conducts this inquiry in detail. It considers three prominent candidates: the Temporary Framework for the pandemic, the Notice on informal guidance related to novel practices, and Article 10 of Regulation 1/2003. Each of these candidates is examined below, in turn.

1. The (Not So?) Temporary Framework

COVID-19 generated ripple effects in global supply chains that affected a range of products.[14] At the early stages of the pandemic, Europe, much like other parts of the world, faced considerable disruptions in the manufacturing, supply, and distribution of medicines, medical equipment, and vaccines. Recognizing that undertakings in such a hostile environment may need to collaborate more intensely, the Commission adopted a Communication setting out a Temporary Framework for assessing antitrust issues related to business cooperation responding to the urgency.[15] In short, the Temporary Framework aims to match supply and demand, aggregate production and capacity

[13] Denis Waelbroeck, 'New forms of settlement of antitrust cases and procedural safeguards: is Regulation 17 falling into abeyance?' (1986) 11(4) European Law Review 268.

[14] 'Why supply-chain problems aren't going away' (*Economist*, 29 January 2022) <https://www.economist.com/business/2022/01/29/why-supply-chain-problems-arent-going-away> accessed 20 May 2022.

[15] Commission, 'Temporary Framework for assessing antitrust issues related to business cooperation in response to situations of urgency stemming from the current COVID-19 outbreak' (Communication) 2020 C/116/02.

information, identify essential products, and spur cooperation to ensure a steady supply of high-demand materials. Provided that such cooperation initiatives are objectively necessary, temporary, and proportionate to achieve their intended effects (that is to mitigate the detrimental effects of the pandemic), the Commission considers them as either unproblematic vis-à-vis Article 101 TFEU, or outside the purview of its enforcement priorities.

Whereas the Commission's initiatives are laudable, its subsequent practices present a number of hazards. Essentially, not all comfort letters issued by the Commission (and national authorities) pertain to the health crisis. In the early days, the Commission strictly adhered to its Temporary Framework (as it should), due to the exceptional nature of the situation, to formulate its letters. For instance, the first comfort letter after the termination of the old system was provided to Medicines for Europe, a trade association of pharmaceutical manufacturers.[16] In that letter, the gathering and sharing of information between manufacturers were deemed not to raise concerns under Article 101 TFEU, provided that the exchanges were necessary to improve the supply and dissemination of essential medicines to fight COVID-19. Similarly, in another comfort letter, the Commission gave assurance to a Matchmaking Event that congregated suppliers of raw materials, companies with production capacities, and other undertakings with relevant assets to coordinate the manufacturing of vaccines.[17] Whereas such an organization entailed substantial exchanges of information, the Commission nonetheless decided that it does not contravene Article 101, provided that the exchanges were indispensable to attain their objectives.

Whereas these two examples seem in conformity with the Temporary Framework, subsequent letters do not. The most obvious example in this regard is the letter given to GAIA-X.[18] GAIA-X is a consortium of technology companies concerned with developing technical specifications and harmonized rules for the secure sharing, portability, and interoperability of user data. The letter views this initiative in light of recent developments underlining the importance of data and cloud services, placing it within the framework of Important Projects of Common European Interest. The letter also recognizes that, as a result of safeguards proposed by GAIA-X, the inherent anticompetitive effects of the consortium seem mitigated, leading the Commission to conclude that the

[16] Commission, 'Comfort letter: coordination in the pharmaceutical industry to increase production and to improve supply of urgently needed critical hospital medicines to treat COVID-19 patients' COMP/OG – D(2020/044003).

[17] Commission, 'Comfort letter: cooperation at a Matchmaking Event – Towards COVID-19 vaccines upscale production' COMP/E-1/GV/BV/nb (2021/034137).

[18] Commission, 'Feedback on the membership criteria and internal working rules of GAIA-X' COMP/C.6/SS/RI/vvd.

initiative generates no appreciable impact under Article 101. Another pertinent example is the recent *Emissions* case.[19] This case dealt with a cartel between automobile manufacturers that aimed to diminish technical progress in certain emission filtering systems. Since it was the first cartel decision concerned not with prices but technical development, the case presented novelties. As a result, Commissioner Vestager announced that the addressees of the decision, along with a fine, will receive a comfort letter outlining the correct way to cooperate on technical matters without breaching competition rules. The letter has also been published as guidance for similarly situated businesses.[20]

In addition to letters issued by the Commission, national competition authorities of EU Member States were also actively providing reassurance to businesses.[21] Whereas some of these initiatives indeed addressed public health-related concerns, others pertained to wholly different situations and industries.[22] In that regard, industries as diverse as automotive,[23] energy,[24] banking,[25] and real estate[26] received some form of letters that provide reassurance as to the compatibility of certain business practices with antitrust rules. Trends suggest that the re-emergence of comfort letters, even if they are considered 'soft law', had a clear impact on the practices of national authorities as well.[27]

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[19] *Car Emissions* (Case AT. 40178) Commission Decision C(2021) 4955 [2021] OJ C458.

[20] The question whether publication of a comfort letter increases the strength of its legal effects is addressed in the next chapter.

[21] Mina Hosseini, 'A Covid Competition Dilemma: Legal and Ethical Challenges Regarding the Covid-19 Vaccine Policies during and after the Crisis' (2021) 6 Public Governance, Administration and Finances Law Review 51.

[22] Enzo Marasa et al., 'The Italian Competition Authority Publishes its Communication on Cooperation Agreements in the Context of the Covid-19 Pandemic' (*Concurrences*, 27 May 2020) <https://www.concurrences.com/en/bulletin/news-issues/may-2020/the-italian-competition-authority-publishes-its-communication-on-cooperation> accessed 20 May 2022.

[23] 'The German Federal Cartel Office's Comfort Letter on COVID-19 Related Restructurings' (*Latham & Watkins Antitrust Briefing*, 10 June 2020) <https://de.lw.com/thoughtLeadership/TheFCOsComfortLetteronCOVID-19relatedRestructurings> accessed 20 May 2022.

[24] 'Fuel sales at motorway petrol stations – Tank & Rast's new award model does not violate competition law' (*Bundeskartellamt Press Release*, 9 March 2022) <https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2022/09_03_2022_Tank&Rast.html;jsessionid=58FC6BDCDE626BBF47E63E6557EC8EAF.2_cid387?nn=3591568> accessed 20 May 2022.

[25] Nicholas Hirst, 'Antitrust enforcement in Europe's real economy risks being put on hold' (*MLex*, 4 September 2020) <https://content.mlex.com/#/content/1220535?referrer=search_linkclick> accessed 20 May 2022.

[26] Pierre Arhel, 'Activité de l'Autorité de la concurrence en 2020' (*Actu Juridique*, 23 July 2021) <https://www.actu-juridique.fr/affaires/activite-de-lautorite-de-la-concurrence-en-2020/> accessed 20 May 2022.

[27] Stahler & Eliantonio (n 10).

It is true that, although some comfort letters do not concern issues related to the protection of public health, they are (particularly the ones issued by NCAs) nevertheless designed to cushion the harmful effects of the pandemic on unprepared enterprises. By contrast, the letters sent to GAIA-X and to automobile manufacturers, clearly do not rest on an urgency rationale. Here, it is possible to spot that, unlike the ones addressed to undertakings operating in the health sector, the Commission was careful not to title the documents sent to GAIA-X and to automobile manufacturers as 'comfort letters'. However, as will be examined further below, the fact that a document is not named in a certain way does not automatically mean that its contents are also substantially changed.[28] In European competition law, 'substance' trumps 'form'.[29]

2. Informal Guidance on Novel Practices

Many commentators lamented the diminished opportunities for the Commission to provide guidance to undertakings with the abrogation of Regulation 17.[30] In a bid to fill the vacuum, the Commission produced numerous notices and guidance documents, setting out the application of the *de minimis* principle, the 'effect on trade between Member States' concept, the assessment of agreements under Article 101 (3), and enforcement priorities regarding abuses of dominance. Coupled with a wealth of guidance from the Courts, the competition law landscape was considered adequately clear for undertakings to self-evaluate their conduct.

Nevertheless, the Commission reserved the right to issue informal guidance to undertakings, in exceptional circumstances, as a backstop. Despite the aforementioned sources of information, in situations presenting truly novel problems, undertakings are at freedom to seek individual support from the Commission as to the legality of a business initiative.[31] Thus, the pertinent question is how to reconcile such a system, which preserves the ability to issue individual guidance letters, with the re-emergence of comfort letters?

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[28] Indeed, commentators viewed both documents as comfort letters: Andrea Stahl, 'Gleiss Lutz Obtains a 'Comfort Letter' from the European Commission for the European Cloud Project Gaia-X' (*Gleiss Lutz*, 24 November 2021) <https://www.gleisslutz.com/en/Gleiss-Lutz_Gaia-X_Comfort-Letter.html> accessed 20 May 2022.

[29] Case C-99/79, *Lancome v Etos* [1980] ECR I-02511.

[30] Francesco Munari, 'Antitrust Enforcement After the Entry into Force of Regulation No. 1/2003: The Interplay between the Commission and the NCAs and the Need for an Enhanced Role of National Courts' in Bernardo Cortese (ed), *EU competition law: between public and private enforcement* (Kluwer 2014).

[31] Commission, 'Notice on informal guidance relating to novel questions concerning Articles 81 and 82 of the EC Treaty that arise in individual cases (guidance letters)' (2004/C 101/06).

At first glance, guidance letters and comfort letters display some similarities. Both provide administrative pathfinding to undertakings in exceptional circumstances; both letters are published; and neither generates internal or external binding effects. Hence, it is intriguing why the Commission did not resort to utilizing an existing mechanism, such as the one in question, instead of resurrecting an old system rife with controversies. The answer, as submitted by the Commission, relates to urgency. Indeed, due to potentially lengthy procedural requirements of those mechanisms, an ad-hoc system of comfort letters, conferring on the Commission the ability to rapidly issue recommendations and insurance to undertakings, seemed necessary.[32] Taken at face value, such an argument seems understandable. After all, in their current form, guidance letters represent an 'all loss, no gain' situation. The notice sets out a number of criteria, all of which have to be cumulatively satisfied, in order for the Commission to *consider* giving a guidance letter that ultimately provides little assurance to its recipient. As the Commission itself concedes, over the years since the entry into force of Regulation 1/2003, few undertakings approached it to obtain guidance letters, and none succeeded.[33]

However, the fact that an existing mechanism is too onerous to use should not distract from the controversies surrounding the comfort letters issued lately. While it is understandable for the Commission to explore alternatives to the guidance letter system, for concerns related to the public health emergency, the same cannot be said about technological or ecological initiatives. The sense of urgency surrounding the pandemic does not exist vis-à-vis the development of innovative cloud systems (at least under competition law). Therefore, it is worthy of note that the Commission shied away from using an existing mechanism, however arduous, to deal with novel competition law issues, such as non-price cartels, in favor of a supposedly ad-hoc system.

3. Non-infringement Decisions

As iterated earlier, the shift from individual and specific guidance to collective and general guidance precluded the provision of assurances to undertakings after Regulation 1/2003.[34] In the early days of the reform, scholars thought that the resulting deficiencies in predictability may be resolved by

[32] Commission, 'Report on Competition Policy 2020' (Staff Working Document) SWD(2021) 177 final.

[33] Commission, 'Ten Years of Antitrust Enforcement under Regulation 1/2003' SWD(2014) 230/2.

[34] Jonathan Faull & Ali Nikpay, *The EU Law of Competition* (3rd Edition, OUP 2014).

the Commission by adopting non-infringement decisions under Article 10.[35] However, these hopes have not materialized. As with guidance letters, recent comfort letters share some similarities with the non-infringement procedure. For instance, both hinge on public interests. Nevertheless, the fact that non-infringement decisions can only be issued at the Commission's own initiative, as opposed to 'on request' of undertakings, means that resurfaced comfort letters are inherently at odds with the Article 10 procedure. The Commission may be reluctant to answer clarification requests via non-infringement decisions lest the latter mutates into the old notification procedure.[36]

In addition to the aforementioned ambiguities, the new comfort letters also resurrect older concerns. For instance, agreements that are the subject of a letter may be challenged before national courts through private enforcement. This prospect effectively perverts the whole point of a comfort letter, which is to provide businesses with legal certainty. Moreover, as the Temporary Framework suggests, the Commission may also close a comfort letter by stating that the business arrangement in question is outside the remit of its enforcement priorities ('discomfort letter'). It is true that the Commission is rightfully to be accorded discretion when it comes to deciding on its priorities. However, case law also suggests that it may be difficult to reconcile the exclusion of anticompetitive agreements falling under the 'by object' category, as some of the arrangements contained within the newly issued comfort letters arguably do, with the Commission's administrative freedom, even in times of crisis.[37] As can be seen, it is difficult to decide whether the return of the comfort letter increases or decreases clarity for businesses. In that regard, the next chapter analyzes the problems surrounding comfort letters from a legal certainty perspective.

III. The Problem of Legal Certainty

Since the early days of integration, comfort letters have been the subject of dispute before the Union Courts with regard to their capability to produce legal effects. In particular, the intriguing question is whether comfort letters

[35] Bernardo Cortese, 'The Difficult Relationship between Administrative Authorities and the Judiciary in Antitrust Private Enforcement' in Cortese (ed), *EU competition law: between public and private enforcement* (Kluwer 2014).

[36] Alan Riley, 'EC Antitrust Modernisation' (2003) 11 European Competition Law Review 604.

[37] Case C-209/07, *Beef Industry Development Society and Barry Brothers* [2008] ECR I-08637. As regards the oil crisis in the 1970s, see Case 77/77, *BP v Commission* [1978] ECR 01513.

are to be accorded binding force. This chapter examines this question in light of case law dating back to the days of Regulation 17 with a view of the escalating reality of today.

The potentially binding effects of comfort letters was one of the most contentious questions surrounding the application of European competition law under the system laid down by Regulation 17.[38] Literature was divided on this issue. Several commentators argued that comfort letters were nothing more than informal administrative proceedings with little to no value; by contrast, other scholars asserted that such letters were capable of affecting the legal positions of their addressees, to such an extent that they should be classified as binding measures.[39] Of particular importance was the danger that, due to the principle of direct effect, affected parties were entitled to bring the contents of a comfort letter, such as an agreement, before a national court. As clarified by the Court of Justice in a series of judgments (known as the 'Perfumes' cases), although national courts were free to take into account a comfort letter issued for an agreement under scrutiny, they were nevertheless not bound by it.[40] In other words, the letters possessed no external binding qualities.[41] With that being said, in practice, national courts would rarely second-guess a comfort letter rendered by the Commission, due to the latter's 'psychological effect'.[42] For instance, in the case *Inntrepreneur v. Masons*, an English court distinguished situations where a comfort letter is issued by the European Commission.[43] Attaching considerable weight to the letter in question, the court ventured as far as to suggest that the Commission may have even '…intended national courts to take these letters as having an equivalent legal effect to formal decisions…'[44] Still, the fact remains that, despite practices to the contrary, comfort letters produced no external binding effects, since the Court of Justice explicitly equipped the national courts with the ability to issue contravening judgments.[45]

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[38] Eric Hinton, 'European Community Competition Law, Subsidiarity, and the National Courts' (1997) 11(2) Brigham Young University Journal of Public Law 301.

[39] Valentine Korah, 'Comfort Letters – Reflections on the Perfume Cases' (1981) 6 European Law Review 14.

[40] Case C-253/78, *Procureur de la République v Giry and Guerlain* [1980] ECR I-02327.

[41] Case C-70/93, *Bayerische Motorenwerke AG v ALD* [1995] ECR I-03439, Opinion of AG Tesauro.

[42] Pekka Leskinen & Kent Karlsson, 'Postal Joint Ventures and EC Competition Law Considerations' in Michael Crew & Paul Kleindorfer (eds), *Emerging Competition in Postal and Delivery Services* (Springer 1999).

[43] *Inntrepreneur Estates Ltd v Mason* [1993] 2 C.M.L.R. 293.

[44] Josephine Shaw & Aldo Ligustro, 'United Kingdom and Italy' in Peter Behrens (ed), *EEC competition rules in national courts* (Nomos 1992).

[45] Case T-241/97, *Stork Amsterdam v Commission* [2000] ECR II-00309.

The more pertinent question was whether comfort letters had an internal binding effect that obligates the Commission to stay faithful to an earlier letter.[46] In order to resolve this dilemma, a nuanced approach should be used with respect to comfort letters. It is true that not all comfort letters were created equal. Throughout their lifecycle, the Commission aspired to strengthen the legal value of comfort letters via recourse to procedural and substantive measures. In the early days of their adoption, comfort letters were indeed basic administrative letters, usually signed by an official of DG IV. These basic letters helped the Commission to alleviate its heavy workload by making it known that it had no intention to prosecute an agreement or behavior.[47] In other words, they were 'no-action' statements on behalf of the Commission.[48] As such, these comfort letters only provided administrative guidance and contained little to no legal reasoning, leading to the conclusion that they did not produce binding legal effects internally.[49] As a response to requests from the industry, the Commission wanted to change this enforcement landscape by introducing 'enhanced' or 'qualified' comfort letters.[50] Also called formal or reinforced letters, these letters constituted a response, on behalf of the Commission, to grant undertakings greater certainty so as to confer on the businesses the ability to reasonably plan ahead.[51] The distinguishing feature of enhanced comfort letters was the fact that they were made available to the public, which gave third parties, whose rights may have been affected by the issuance of such a letter, the chance to make their grievances known.[52]

Since the Perfume cases, the Court of Justice underlined that the Commission may not be stopped from taking further action due to a comfort letter it issued earlier.[53] Furthermore, the rulings in *BVGD* and *Diamanthandel* reaffirmed the position that the existence of a prior comfort letter cannot constitute an obstacle to an assessment of the same practice by the Commission

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[46] Ulrich Ehrike, 'The binding nature of negative clearances and of comfort letters in European law' (1994) 9 Journal of International Banking Law 339.

[47] Lee McGowan & Stephen Wilks, 'The first supranational policy in the European Union: competition policy' (1995) 28 European Journal of Political Research 141.

[48] Utz Toepke, 'EC Competition Law: Commentary' (1990) 59(2) Antitrust Law Journal 509.

[49] European Parliament, 'A Practitioner's View on the Role and Powers of National Competition Authorities' (IP/A/ECON/2016-06) <https://www.europarl.europa.eu/RegData/etudes/STUD/2016/578972/IPOL_STU(2016)578972_EN.pdf> accessed 20 May 2022.

[50] Richard Whish, *Competition Law* 2nd edition (Butterworth 1989).

[51] Mario Siragusa, 'The Millennium Approaches: Rethinking Article 85 and the Problems and Challenges in the Design and Enforcement of the EC Competition Rules' (1997) 21(3) Fordham International Law Journal 650.

[52] Case T-7/93, *Langnese-Iglo v Commission* [1995] ECR II-01533.

[53] *Lancome v Etos* (n 29).

later on.[54] Effectively, the Courts refused to apply the notion of *venire contra factum proprium* when the Commission wanted to go back on a comfort letter. For instance, *Langnese-Iglo* concerned the reopening of proceedings against a series of agreements, which were the subject of a comfort letter issued earlier by the Commission that were sent to assure the undertakings in question that the authority had no intentions to initiate an investigation. However, the Commission reopened proceedings and subsequently imposed a fine for the same agreements later on, arguing that there were appreciable changes affecting the legal or factual context in which the letter was formulated. In their appeal, the undertakings complained that the Commission should only be allowed to renege on its comfort letters if the factual situation has been substantially altered. This may be the case if the relevant market in question witnesses the entrance of new competitors, or the erection of entry barriers, for example.[55] However, if the Commission was to be given free rein to reopen proceedings 'merely because it changed its legal assessment', the rationale of a comfort letter would be compromised, and its purpose would be rendered inconsequential. The Court of First Instance rejected these arguments. Firstly, it explained that the comfort letter in question specifically stressed that the Commission was entitled to initiate proceedings should new factual evidence arise. Therefore, a comfort letter cannot entirely bar the Commission from pursuing what is essentially a new case. Secondly, the Court derived from the principle *in toto et pars continetur* that, in a system where formal decisions, such as individual exemptions, can be questioned with regards to their suitability vis-à-vis further developments, it would be inappropriate to confer greater protection to undertakings in possession of an inferior guarantee in the form of a comfort letter.

The judgment in *Langnese-Iglo* presented the perils of relying on a comfort letter to carry on with an arrangement. As pointed out by Korah, in the likely event that a green-lighted agreement turns out to be a successful enterprise and generates market shares for the undertaking, it would be easy for the Commission to declare that the facts of the relevant market have changed and to initiate proceedings. This perverse outcome would produce uncertainty rather than eliminating it.[56]

It is curious to note that the comfort letter in *Langnese-Iglo* was a basic one, addressed only towards the recipients without prior publication and debate. In

[54] Joined Cases T-108/07 and T-354/08, *Diamanthandel A. Spira BVBA* [2013] ECLI:EU:T:2013:367.

[55] Karen Yeung, 'Privatizing Competition Regulation' (1998) 18(4) Oxford Journal of Legal Studies 581.

[56] Valentine Korah, 'The Effect of the EEC Competition Rules on Distribution of Goods and Services in Europe' (1996) 1 International Intellectual Property Law & Policy 395.

fact, in its judgment, the Court repeatedly emphasized that a comfort letter cannot create legal certainty to the same extent as a formal exemption or a clearance decision, precisely for the lack of publication.[57] This may mean that publication is key for a comfort letter to emanate binding effects. In addition to requests from stakeholders, it is likely that this judgment induced the Commission to opt for a formalized (enhanced) version of comfort letters, in which the contents of the letter would be published for interested parties to comment on. Nevertheless, the question of whether these reinforced comfort letters would generate at least internal binding effects remained unsettled. Still, compared to basic comfort letters, scholarship was much more uniform on this matter. For instance, Brown argued that a publicized comfort letter would mean that the Commission would be even more unlikely to deviate from its contents.[58] Going a step further, Waelbroeck argued that publicly disseminated comfort letters should be *de facto* binding on the Commission.[59] The fact that third parties and the public were given a chance to be heard was at the heart of these arguments. The publication of the letters also increased transparency. Moreover, public letters were regarded as guidance, at least to a certain extent, for other industry players as well. This led to the argument that the Commission should not be given unfettered freedom to contravene the implications of such letters at its leisure. Based on these assertions, and since nearly all of the comfort letters recently issued by the European Commission and national competition authorities have been published, could it be argued that they produce binding effects, at least concerning the authorities?

Union Courts had a chance to evaluate these arguments in a number of cases, with *Van Den Bergh Foods* featuring a stark stance on behalf of the Court. In that case, the Commission took a favorable view of the applicant's distribution agreements, as amended, and made its view public both in a press release and through the Official Journal.[60] Two years later, the applicant received a statement of objections from the Commission that explained the agreements in question did not generate the expected results. In its appeal, Van Den Bergh Foods Ltd argued that the Commission's conduct contravened the principle of legitimate expectations. Recalling existing case law on the principle, the Court underlined that individuals given precise assurances from the Union administration have a right to entertain reasonable expectations.[61] However, according to the Court, the sole fact that a comfort letter was

[57] *Langnese-Iglo* (n 52), para 36.

[58] Adrian Brown, 'Notification of agreements to the EC Commission: whether to submit to a flawed system' (1992) 17(4) European Law Review 323.

[59] Waelbroeck (n 13).

[60] Case T-65/89, *Van Den Bergh Foods* [2003] ECR II-00389.

[61] Ibid para 192.

publicized cannot lead to a conclusion that legitimate expectations arise. Therefore, the Court saw no illegality in the Commission's opening of an infringement procedure despite the existence of an earlier reinforced comfort letter.[62] It seems the Court analogized the judgment in *Van Den Bergh Foods* to the ruling in *Hydrotherm/Andreoli*, in which a publication indicating an intention, on behalf of the Commission, to issue a comfort letter could not preclude a national court from taking action.[63]

Whereas the Court's position is rather clear on the matter, diverging views may be found in a number of subsequent Advocate-General (hereinafter: AG) opinions. For example, in *Austria Asphalt*, AG Kokott reasoned that, even though they are not binding, comfort letters establish grounds on which market actors can base their self-assessment exercises vis-à-vis the compatibility of their conduct with competition laws.[64] Furthermore, in *JCB Service*, AG Jacobs's opinion was that the issuance of a publicized comfort letter may give rise to a '…legitimate belief that the practices notified do not constitute an infringement…'.[65] In light of this ambiguity, the effects of reinforced comfort letters remain vague. Accordingly, it is unclear to what extent the newly issued comfort letters produce binding effects on the Commission.

It is reasonable to argue that the problem of (internal) legal effects cannot be examined only in the light of whether the comfort letter is publicized. The more appropriate route suggests that a letter's publication is one of a number of relevant considerations – it is necessary, but nevertheless insufficient on its own. After all, the classification of a Commission measure solely on the basis of its formality runs counter to the fact that European competition law is concerned with substance over form.[66] Instead, comfort letters should be assessed vis-à-vis other relevant factors (including, in addition to whether they were published and whether third parties were allowed to voice their opinions) that are the basis of the decision to issue the comfort letter; the wording and general substance of the letter; and whether the decision-maker adopting the letter was granted the authority to complete that task in an appropriate manner.[67] Such a comprehensive approach to comfort letters would conform

[62] The Commission is also not obliged to withdraw the comfort letter before initiating proceedings. See Case T-24/93, *Compagnie Maritime Belge Transports SA* [1996] ECR II-01201.

[63] Case C-170/83, *Hydrotherm Gerätebau GmbH v Compact del Dott. Ing. Mario Andreoli & C. Sas.* [1984] ECR I-02999.

[64] Case C-248/16, *Austria Asphalt* [2017], Opinion of AG Kokott.

[65] Case C-167/04 P, *JCB Service v Commission* [2006] ECR I-08935, Opinion of AG Jacobs.

[66] Pablo Ibanez-Colomo, 'Indispensability and Abuse of Dominance: From *Commercial Solvents* to *Slovak Telekom* and *Google Shopping*' (2020) 10(9) Journal of European Competition Law & Practice 532.

[67] This line of reasoning seems in line with the *Nefarma* judgment. See, Case T-113/89, *Nederlandse Associatie van de Farmaceutische Industrie "Nefarma" and Bond van Groothandelaren*

to the recent realist turn at the Court of Justice, where the Court accepts the superiority of contextual circumstances surrounding a case.[68]

To conclude, whereas it can be confidently stated that basic comfort letters carry no formal weight, especially externally vis-à-vis national courts, reinforced comfort letters whose contents were made publicly available for third parties to comment on, necessitate a deeper analysis. In that regard, having regard to the factual and legal context in which the letters were constructed, it may be possible to argue in some instances that a reinforced comfort letter should bind the Commission. For clarity, this does not mean that the Commission would relinquish all routes of enforcement after it issues such a letter. Similar to commitment decisions under Article 9 of the Regulation 1/2003, a material change in the facts supplied may require the reopening of proceedings. What it does mean, however, is that the *bona fide* reliance of the addressee of the letter on the conclusions to be drawn from the contents of that letter should be accorded a certain extent of protection.

IV. Discussion: What is the Rationale Behind the Resurrection of Comfort Letters?

As the preceding chapters highlighted, it is unclear what the Commission intends to achieve by resurrecting the use of comfort letters. Even though the Commission argues that it takes steps to increase legal certainty for businesses, it has been demonstrated that if anything, the renewed use of such letters gives rise to legal uncertainty. It is obvious that the Commission pursues administrative economizing. Comfort letters arguably provide fast and timely responses to undertakings in need of legal clarification. However, the ensuing benefits should be weighed against potential drawbacks, the primary element of which is uncertainty, and the potentially chilling effects on innovation and business initiative as a result. In light of this state of play, it seems reasonable to argue that the Commission is driven by another, ulterior motive, and one of the vehicles through which that goal is to be achieved is informal guidance in the form of comfort letters. This chapter argues that this goal is the introduction of non-economic considerations into EU competition law enforcement.

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in het Farmaceutische Bedrijf v Commission of the European Communities [1990] ECR II-00797. For an evaluation of delegation of duties, see Case 5/85, *AKZO Chemie BV* [1986] ECR I-02585.

[68] Damjan Kukovec, 'The realist trend of the Court of Justice of the European Union' EUI LAW Working Paper No. 2021/11 <https://cadmus.eui.eu/handle/1814/72658> accessed 20 May 2022.

The EU has been rather adamant in its goal never to let a crisis go to waste. Enshrined in the words of one of its founders, Jean Monnet, Europe is continuously being forged in crises, and is a sum of the solutions adopted as a response to those crises. As such, measures adopted in times of crisis tend to linger after the state of emergency elapses. For instance, the Next Generation EU program induced by the pandemic seeks to transcend the health crisis and extend into the future. Similar scenarios can be observed as regards some of the stability measures adopted for the Eurozone crisis, and the security mechanisms related to the recent migration crisis.[69]

The situation with the comfort letters presents a similar state of affairs. As iterated throughout this article, the newly issued comfort letters represent broader considerations that stretch beyond the boundaries of the health crisis induced by the pandemic. In that regard, support has to be given to authors claiming that the Commission's motives point towards the introduction of non-economic considerations into its enforcement paradigm. For instance, the Commission may use comfort letters as a tool to adopt a supportive approach towards projects with innovative potential, or that have a 'green' dimension.[70] Indeed, the objectives of the 'twin-transition', namely the digital and green reformulation of Union policy apparatus, provide fertile ground for the proliferation of informal guidance.[71] Among other tools, the Commission could then use comfort letters, to create 'normative breaks', and use them as springboards to break free of the burdens of economic efficiencies.[72] Aside from this normative goal, other motivations may be at play as well. One of these aspirations may be to remedy the informal guidance vacuum as created by the introduction of Regulation 1/2003. However, as specified, the merits and demerits of this approach invite careful examination.

As explained above, many commentators lamented the diminished opportunity for the Commission to enlighten undertakings on whether their conduct falls afoul of competition rules.[73] Indeed, in essence, serving undertakings with informal guidance as regards their business practices can

[69] Bruno de Witte, 'EU emergency law and its impact on the EU legal order' (2022) 59 Common Market Law Review 3.

[70] Malgorzata Kozak, 'Competition Law and the COVID-19 Pandemic – Towards More Room for Public Interest Objectives?' (2021) 17(3) Utrecht Law Review 118.

[71] Sven Galash, 'Protecting competition in times of crisis – the balancing act looked at from a land Down Under' (2021) 42(8) European Competition Law Review 445.

[72] Klaudia Majcher & Viktoria Robertson, 'Doctrinal Challenges for a Privacy-Friendly and Green EU Competition Law' (2021) SSRN <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3778107> accessed 20 May 2022; Francesco Costa-Cabral, 'Future Mapping the Three Dimensions of EU Competition Law: Legislative Proposals and COVID-19 Framework' (2020) 7(2) Journal of International and Comparative Law 307.

[73] Munari (n 30).

be rather valuable, especially in areas presenting novel challenges of legal classification or interpretation. This is especially true for less experienced jurisdictions, such as Member States that only recently joined the Union. It may simply be too much to ask from practitioners in emerging competition law jurisdictions to self-assess potentially highly complex business initiatives. As such, no objection is raised here against more guidance. What is objectionable, however, is the conduit with which the Commission decided to transmit that guidance. Aside from their deficiencies vis-à-vis legal basis and legal certainty, comfort letters also suffer from two other weaknesses.

The first pertains to equality. Issuing comfort letters is subject to the sole discretion of the European Commission. Furthermore, in light of the prevailing state of European law as inscribed by the Courts, comfort letters are incapable of being legally challenged. This renders their usage rather speculative. In particular, it would be unclear who gets a formal decision and who gets a comfort letter instead. While the European Commission may be trusted to act in conformity with the principle of equality before the law, it is necessary to be mindful of the fact that the Commission's actions double as an example for national competition authorities as well. As recently acknowledged by the General Court, the impartiality and independence of some of these authorities is questionable.[74] Thus, there is a clear danger that the renewed interest in comfort letters may provide a pretext for administrative actions whose compatibility with the rule of law may be dubious.

The second is an effect of the deficiencies of legal certainty examined throughout the article. Upon closer inspection, comfort letters share many similarities with the commitment procedure under Article 9 of Regulation 1/2003. Indeed, comfort letters are 'case-specific, evidence-based, preliminary assessments', entailing a participative process.[75] In this manner, many of the criticisms directed towards the commitment procedure may be applicable to comfort letters as well.[76] Specifically, the Commission may utilize comfort letters to 'twist the arm' of undertakings, extracting disproportionate concessions by mandating significant alterations to planned business initiatives as a prerequisite of issuing a green light in the form of a comfort letter. Viewed through this lens, comfort letters may be characterized as a softer iteration of

[74] Case T-791/19, *Sped-Pro S.A. v European Commission* [2022] ECLI:EU:202267.

[75] Alfonso Lamadrid, 'The Old New Competition Tool?' (*Chillin'Competition Blog*, 15 October 2020) <https://chillingcompetition.com/2020/10/15/the-old-new-competition-tool/> accessed 13 June 2022; Oliver Bethell, Gavin Baird, & Alexander Waksman, 'Ensuring innovation through participative antitrust' (2020) 8 Journal of Antitrust Enforcement 30.

[76] Florian Wagner-von Papp, 'Best and even better practices in commitment procedures after *Alrosa*: The dangers of abandoning the "struggle for competition law"' (2012) 49(3) Common Market Law Review 929.

the commitment procedure. By effectively managing a novel business initiative, the Commission can effectively use its 'word' as a carrot. The softer approach of a comfort letter may also double as a less interventionist and less aggressive form of market regulation. Since the contents of a comfort letter are essentially non-binding, any potentially disproportionate requirements included therein may be brushed aside as mere guideposts. However, the threat of a subsequent investigation is likely to rebut this claim – no sane undertaking would dare step outside the confines of a comfort letter, especially after equipping the Commission with considerable information related to its activities. Lastly, it is curious to note that comfort letters emerge after a period of criticism against the far-reaching implications of the commitment procedure. It is important to keep in mind that the Union Courts, probably reacting to such commentary, have also started to trim down the wide discretionary power that the Commission enjoys with the commitment procedure.[77] It is unclear whether the resurrection of comfort letters has been motivated by a dangerous attempt on the part of the Commission to fly under the commitment radar, or it is merely a by-product of a desire to engage more intensively with undertakings. However, it is rather clear that the two procedures share important similarities, which need to be addressed should a more institutionalized form of informal guidance enter the enforcement system.

V. Conclusions

Although the above analysis presented the plethora of questions surrounding the resurrection of comfort letters, they may be here to stay. In 2020, Olivier Guersent, Director-General of Competition at the Commission, stated that post-crisis, the EU may continue using comfort letters to 'enable green or digital projects.'[78] Very recently, Commissioner Vestager signaled that she wishes to overhaul the informal guidance notice by loosening its strict conditions to provide undertakings with bespoke advice.[79] These initiatives

[77] Case C-132/19, *Groupe Canal+ v Commission* [2020] ECLI:EU:C:2020:1007.

[78] Nicholas Hirst, 'EU might revive antitrust guidance post-crisis to enable green or digital projects, senior official says' (*MLex*, 8 September 2020) <https://content.mlex.com/#/content/1220934?referrer=search_linkclick> accessed 20 May 2022.

[79] Lewis Crofts & Nicholas Hirst, 'Keystone EU antitrust law will get fresh look for a "digital decade", Vestager says' (*MLex*, 31 March 2022) <https://content.mlex.com/#/content/1368865?referrer=search_linkclick> accessed 20 May 2022.

come after an opinion by the EU Court of Auditors, which advised the Commission to adapt its tools to novel developments in competition law.[80]

As apparent from the statements of senior Commission officials, the 'informal guidance mechanism' seems to be the likely candidate through which the resurrection of comfort letters will be formalized. This seems in line with the findings of the German Competition Law Commission, which recommended, in order to increase legal certainty, the introduction of a streamlined, voluntary notification procedure that concerns novel and economically significant questions on the application of European competition law.[81] Confirming this view, the Commission has just recently unveiled the fruits of its efforts to revise the informal guidance notice.[82] The revised document includes provisions that somewhat confirm the discussion in Part IV. For instance, unlike the older mechanism, the new notice highlights that, in deciding whether to issue guidance, the Commission may consider the Union interest. The explicit inclusion of this provision may represent the willingness to utilize the guidance mechanism as a vehicle to advance Union-wide goals, such as the twin transition. Still, the revised document suffers from several deficiencies as did its predecessor. For instance, the Commission overrules the conferral of any binding effects on guidance letters, including internal binding effects. Similarly, the Commission sets out that the issuance of a guidance letter may be predicated on '…the existence or absence of certain factual circumstances.'. While it is only natural for the Commission to base its decisions on facts, the provision simultaneously evokes the feeling that it may be abused by the Commission to micromanage business initiatives, similar to the commitment procedure.[83]

It has to be argued that, as an alternative or supplement to guidance letters, adopting Article 10 decisions also has significant potential. Firstly, the fact that non-infringement decisions are already grounded upon Regulation 1/2003 gives the Commission a head start. Secondly, as Recital 14 also envisages, the

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[80] European Court of Auditors, 'The Commission's EU merger control and antitrust proceedings: a need to scale up market oversight' (2020) Special Report No. 24 <https://www.eca.europa.eu/Lists/ECADocuments/SR20_24/SR_Competition_policy_EN.pdf> accessed 20 May 2022.

[81] Federal Ministry for Economic Affair and Energy, 'A new competition framework for the digital economy' (2019) Competition Law 4.0 Commission Report <https://www.bmwk.de/Redaktion/EN/Publikationen/Wirtschaft/a-new-competition-framework-for-the-digital-economy.pdf?__blob=publicationFile&v=2> accessed 20 May 2022.

[82] Commission, 'Update of the Informal Guidance Notice' (*European Commission*, 24 May 2022) <https://ec.europa.eu/competition-policy/public-consultations/2022-informal-guidance-notice_en> accessed 13 June 2022.

[83] Finn Kydland & Edward Prescott, 'Rules Rather than Discretion: The Inconsistency of Optimal Plans' (1977) 85(3) Journal of Political Economy 473.

non-infringement procedure intends to further Union interests, in particular through clarifying the legality of new practices against competition laws. Several scholars alluded that the public interest dimension may also be triggered by significant Union goals, such as large-scale infrastructure projects.[84] Therefore, Article 10 promises to be a suitable venue for green-lighting initiatives of Union interest, such as the GAIA-X consortium. Thirdly, even though Article 10 decisions are to be taken of the Commission's own accord, it may be possible to analogize non-infringement decisions to exemption decisions under older case law.[85] As the Court pointed out in *Automec II*, recipients of a favorable comfort letter can require the Commission to proceed to a formal decision.[86] Exemptions do not exist anymore, since only the Commission is empowered to adopt a non-infringement decision, and NCAs are unable to issue negative clearance decisions. Therefore, a case can be made that the Commission, if it granted a comfort letter, can be compelled to adopt a non-infringement decision when pressed.[87] Lastly, it would be all the more beneficial for undertakings and business certainty, if the Commission operates such a mechanism akin to a reasoned opinion, which would produce stronger legal effects.[88]

Another alternative to comfort letters may require a slight shift in the Commission's thinking. The comfort letter and the guidance letter mechanisms, currently under refurbishment, are horizontal tools. In other words, they apply to virtually all conduct falling within the scope of EU antitrust laws. An alternative approach may adopt a vertical outlook instead, based on the characteristics of specific industries. Comfort letters effectively flip the switch in EU competition law from a *sic utere* principle to a prior restraint principle. This effectively means that – instead of businesses acting freely and only being prosecuted once there is sufficient suspicion regarding the legality of their activities – the Commission is empowered to operate as a *de facto* 'priest of the market', giving a blessing to business ventures deemed fit.[89] This precautionary

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[84] Niamh Dunne, 'Public Interest and EU Competition Law' (2020) 65(2) The Antitrust Bulletin 256; Frank Montag & Andreas Rosenfeld, 'A Solution to the Problems? Regulation 1/2003 and the modernization of competition procedure' (2003) 2 Zeitschrift für Wettbewerbsrecht 107.

[85] Case T-24/90, *Automec Srl* [1992] ECR II-2223.

[86] Valentine Korah, 'Restrictions on conduct and enforceability: Automec v Commission II' (1994) 15(3) European Competition Law Review 175.

[87] Case C-375/09, *Tele2 Polska* [2011] ECR I-03055.

[88] Katarina Pijetlovic, 'Reform of EC antitrust enforcement: criticism of the new system is highly exaggerated' (2004) 25 (6) European Competition Law Review 356.

[89] Timothy Sandefur, 'Pushing Back Against a Permission Society' (*Discourse Magazine*, 1 August 2022) <https://www.discoursemagazine.com/politics/2022/08/01/pushing-back-against-a-permission-society/> accessed 2 August 2022.

approach is likely to prove either unfeasible or ineffective against certain industries, such as dynamic platform markets; by contrast, they might be useful for sectors where potential damages are greater and more certain, such as environmental issues.[90] For example, the recent proposal for a Corporate Due Diligence Directive envisages several provisions that authorize the Commission to issue informal guidance letters and voluntary model contractual clauses for undertakings, with potential ramifications reaching competition law as well.[91]

All in all, it is apparent that the resurrection of comfort letters brings about more uncertainties than clarifications. Although only time will tell the avenues through which the Commission ends up traveling to formalize the procedure, one thing seems solid: the post-post modernization era in European competition law has begun.[92] This article aspired to delineate the contours of the controversy surrounding only one aspect of this journey. In that regard, the proliferation of individual guidance, coupled with a robust framework with clear demarcation of legal effects, promises to be a valuable tool to render European competition law fit for the challenges that lie ahead.

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Enforcement of Competition Law in Times of Crisis: Is Guided Self-Assessment the Answer?

by

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CONTENTS

Abstract

One common criticism of the EU's competition regime is that it hinders adequate mitigation of crises by preventing a collaborative response to the problem. We suggest that this view is incorrect. We suggest that a collaborative response is unlikely to effectively mitigate most problems. Yet some forms of cooperation can facilitate a crisis solution. These may be at the margin of legality, giving uncertainty as to whether the proposed practice is permitted. With the possibility of significant penalties for competition infringements, most undertakings will not engage in such cooperative practices. There are significant legal and institutional impediments to providing this Guidance. Such gaps lead to uncertainty found in the nature of the EU competition rules and in NCA practice. We argue that the means forward is with greater engagement and guidance by the Commission and NCAs.

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Resumé

Une critique courante du régime de concurrence de l'Union européenne est qu'il entrave l'atténuation adéquate des crises en empêchant une réponse collaborative au problème. Nous suggérons que ce point de vue est incorrect. Nous suggérons qu'une réponse collaborative a peu de chances d'atténuer efficacement la plupart des problèmes. Pourtant, certaines formes de coopération peuvent faciliter la résolution d'une crise. Elles peuvent se situer à la limite de la légalité, ce qui crée une incertitude quant à savoir si la pratique proposée sera autorisée. Compte tenu de la possibilité de sanctions importantes en cas d'infraction à la concurrence, la plupart des entreprises ne s'engageront pas dans de telles pratiques de coopération. Il existe d'importants obstacles juridiques et institutionnels à la fourniture de ces orientations. Ces lacunes conduisent à l'incertitude que l'on retrouve dans la nature des règles de concurrence de l'Union européenne et dans la pratique des autorités nationales de la concurrence. Nous soutenons que la voie à suivre est celle d'un engagement et d'une orientation accrus de la part de la Commission et des autorités nationales.

Key words: Enforcement; Competition Law; Regulation 1/2003; Guidance; Crises; Sustainability.

JEL: D42, D43, H12, L21

I. Introduction[1]

One, perhaps cynical, view of life in the Twenty-First Century is that we are lunging from unprecedented crisis to another unprecedented crisis. The year 2000 opened with the 'Dotcom' crash, since then we have had the financial crash of 2008, the economic fallout of the Covid-19 pandemic, and we are now facing sustainability and climate crises. In addition to these economy-wide events, industrial sectors have faced their own crises. These latter sorts of crises are not unique to this Century, and likely endemic in any market-based

[1] This paper is based on some arguments and work contained in my forthcoming monograph *Competition Law in Crisis: The Antitrust Response to Economic Shocks* (Cambridge: Cambridge University Press, 2022) the writing of which was assisted by the British Academy / Leverhulme Trust Small Grants Programme (SRG20\201069). An earlier version of this appeared in the Jean Monnet Network on EU Law Enforcement Working Paper Series No. 02/22 and was presented at a conference, 'EU Competition Law Enforcement: Challenges to Be Overcome' held at the Centre for Antitrust and Regulatory Studies (CARS) of the Faculty of Management of the University of Warsaw on 26–27 May 2022, my thanks to commentators and participants for their helpful comments as well as to the anonymous reviewer of an earlier draft. Of course, any errors are my responsibility.

economy, reflecting the inevitable result of the competitive process: less efficient firms or industries which produce unwanted goods will (and should) exit the market.

In spite of inefficient firms and industries exiting the market, these crises have economic consequences: those employed by the firm, the firms' stakeholders, and others relying on the existence of the firm, all suffer some form of economic damage. Given this damage, there are inevitable calls for something to be done to mitigate these effects. And mixed with these calls is often the claim that if only competition laws were not in the way, the crisis-stricken industry could mitigate these effects. In the UK, we saw this during the early stages of the Covid pandemic. In March 2020, in the context of panic buying (in particular of toilet roll) and resulting shortages at the supermarkets, the *Financial Times* reported:

> Industry figures also said that the relaxation of competition rules confirmed by the government on Thursday should help them co-ordinate supplies better.
> 'It just means [for instance] that people from Tesco and Sainsbury's could sit and talk to Kimberly-Clark about toilet rolls without the fear of being prosecuted for collusion,' said one.[2]

Similar claims are made in the context of the current sustainability crisis. Insofar as it is perceived as hindering a solution, competition law is seen as at least part of the problem.

This paper argues that this is not the case. We will argue that not only is the 'relaxation' or suspension of competition law in the face of a crisis a mistake, as it cannot cure – or even mitigate – the cause of the crisis. The competition regime is generally well-suited to market-based resolutions of crises situations. In general, a collaborative response is unlikely to either solve or mitigate crises of the sort we are concerned about. However, there may be exceptions, where some forms of cooperation can facilitate a solution.

But such cooperation is typically at the margin of legality, and there may be significant uncertainty as to whether the proposed practice is permitted or proscribed. Regulation 1/2003[3] requires undertakings to self-assess the legality of their proposed actions. And in the face of the possibility of significant penalties for competition infringements, risk-neutral to risk-adverse undertakings will not propose or engage in such cooperative practices. Indeed, recent surveys of European undertakings indicate that uncertainty of this sort had prevented them from engaging in collaborative activity that may have

[2] Jonathan Eley and Judith Evans, "Supermarkets Raid Restaurants to Restock Shelves" *Financial Times*, 20 March 2020, accessed 24 August 2022.

[3] 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.

sustainability benefits. Our solution to this is through greater guidance by the Commission and the NCAs. Hence, guided self-assessment may be a more effective means of addressing crisis situations.

The remainder of this paper is structured as follows. In Section II, we examine competition law's place in the economy. Its purpose is to address the market failure caused by the monopoly problem and thereby increase social (consumer and /or producer) welfare in a particular market. Suspension of a competition regime does not generally address the causes of these crises. Nevertheless, we recognise that there may be some instances where some form of coordination can mitigate a crisis. In Section III, we consider the desire for and practical difficulties which undertakings may face in devising and implementing such coordination. Supposing such strategies do mitigate the crisis without welfare losses, such activities will be at the margin of legality. And in the face of potentially significant fines, a risk-neutral to risk-adverse actor may well rationally opt against this activity – thus the mitigation benefits may be lost. Section IV briefly examines two well-known cases where cooperative strategies were proposed, Irish Beef ('BIDS') and the Dutch 'Chicken of Tomorrow' initiatives. In both cases, market actors proposed cooperative responses to a problem. Their initial solution was at the margin of legality.

The Irish and Dutch competition authorities engaged with the players to very different degrees. In the Dutch case, after engagement with and guidance from the NCA, a solution consistent with the competition regime was achieved. In the Irish case, where the NCA did not engage, no such outcome resulted. Although in neither case did the NCA's engagement provide a solution, in the sense that the NCA was able to show the relevant undertakings how to 'adjust' their arrangements to bring them within the boundaries of Article 101(3), the greater engagement by the Dutch authorities provided added value to those parties. The Dutch authority's demonstration of how the proposed arrangement failed the 101(3) test served to guide the relevant undertakings towards another, more effective solution to the problem. This represents a partial step in the rights direction, which allows for our suggestions for improvement, namely greater engagement by NCAs in providing guidance. We end with these suggestions as concluding remarks.

II. Crises and the Role of Competition Law in a Market Economy

Market societies can be viewed as possessing two different elements: a system by which wealth is created, and another system by which wealth is redistributed. The former is created through the market, and the latter takes

place through a tax and transfer regime. The principles of orthodox price theory show that in a competitive market, the actions of all involved will led to an optimal, and wealth-maximizing, outcome for all involved.[4] However, the conditions of perfect competition are very rarely – if ever – realised and the resulting market failure will prevent the 'invisible hand' from directing market forces to achieve this outcome. In such a regime, the purpose of competition law is to eliminate (some of) these market failures, metaphorically releasing the invisible hand from its handcuffs. Hence the social goal of competition law is to increase surplus and reduce deadweight losses; in other words, to allow the market to 'grow' wealth via the elimination of market failures associated with monopoly.[5] To this end, antitrust law proscribes practices which reduce consumer welfare without providing a countervailing benefit.

Hence, to suggest that competition law be suspended or 'relaxed', as a solution to or mitigation of a crisis, is to suggest that too much competition is the source of the problem, which implies that the problem can be mitigated through an injection of further monopoly into the relevant market. This is unlikely to be the case.

Most industrial crises are caused by a sudden drop in demand. The Covid crisis experienced marked heterogeneous shifts in consumption patterns: by a significant decline in demand in some sectors of the economy (such as travel, entertainment, hospitality, in-person retail shopping), and an increase in demand in other sectors (for example anti-viral sanitisers at the start of the crisis). The financial crisis of 2008 was also marked by a mismatch of supply and demand, in particular in wholesale financing; its origin can likely be traced to regulatory failure. The environmental crisis is marked by market failure of externalities and inadequate incentives for investment in means which may abate the problem due to their nature as quasi-public goods. In none of these cases would the addition of monopoly into the situation abate the problem.

Two considerations speak against most collaborative solutions to crisis-driven supply problems. First, there is the assumption that collaboration in a crisis will be in the public interest. This is unlikely to be the case. Firms are motivated by profit, and it is the pursuit of profit that drives their activities.[6] The opportunities for activity that is both motivated by altruism and simultaneously

[4] See e.g. Wolfgang Kerber, 'Should Competition Law Promote Efficiency? Some Reflections of an Economist on the Normative Foundations of Competition Law' in Josef Drexl, Laurence Idot and Joël Monéger (eds) *Economic Theory and Competition Law* (Cheltenham: Edward Elgar, 2009) pp 93–120 at 96.

[5] In this regard, there may be an argument that the goal of competition law should be to promote total welfare; see Wardhaugh (n 1) at 11–14.

[6] On this point see Peter Ormosi and Andreas Stephan, 'The Dangers of Allowing Greater Coordination Between Competitors During the COVID-19 Crisis' (2020) 8 *Journal of Antitrust Enforcement* 299, 300.

successfully profit-seeking is, at best limited, as those interested in an adequate return on capital will note. [7]

This point is well-discussed in the literature. Schinkel and d'Ailly correctly remark:

> Altruistic initiatives are fragile. The problem is that in a corporate context, the profit motive is never far away. Even the most benevolent manager will have to report to the owners and shareholders, funders and lenders of his company, who require a rate of return on their investments. Before a company can sacrifice profit, these financially interested parties would need to agree to accept a lower rate of return than they can earn elsewhere in the economy. That is complex enough to achieve for a single firm, let alone for all involved in a cooperation. Rent seeking capital has the tendency to undermine low rate of return corporate social responsible activities, by management interventions and ultimately capital flight.[8]

Ormosi and Stephen apply this reasoning to the UK food industry and the apparent shortages faced during the early stages of the Covid pandemic:

> The relaxation of the present rules may even cause supermarkets to close some stores, to concentrate supply where it is needed most. Coordination will ensure that those closures do not overlap with each other (thereby ensuring that at least one supplier remains in each geographic location). But ensuring that there is at least one supplier in any area does not equate to ensuring that there is a sustained supply of food in these areas. On the contrary, economic theory would suggest that reduced competition is unlikely to lead to a sustained supply of food.[9]

Indeed, they could have added that this sort of coordinated strategy of store closing will result in a set of geographical monopolies – with corresponding prices, lack of choice and resulting consumer harm.

The market is a very effective means of distributing goods and services. Where demand is high, prices will rise or goods will be brought in to satisfy the demand.[10] If prices rise as a result of scarcity, this serves as a signal and

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[7] Maarten Pieter Schinkel and Abel d'Ailly, 'Corona Crisis Cartels: Sense and Sensibility' Amsterdam Law School Legal Studies Research Paper No. 2020-31 / Amsterdam Center for Law & Economics Working Paper No. 2020-03 (11 June 2020) (SSRN=3623154) at 9 accessed 24 August 2022.

[8] Ibid.

[9] Ormosi and Stephen (n 5) at 301.

[10] The UK experience showed some diversion of food supplies from the restaurant industry to grocery supplies. There was also diversion of distilled alcohol towards the production of hand gels. Food diversion was limited by packaging (the quantities purchased by the catering industry were far larger than those needed by households), logistics and labelling issues. These concerns would not be mitigated by reduced competition. Indeed enhanced competition

incentive for others to enter the market and alleviate the scarcity, resulting in a price drop. Cartels and cooperative activity among competitors do not have this effect. Cartel behaviour creates artificial shortages and the resulting scarcity to exploit higher prices. Cartelists will tend to erect market barriers to prevent other parties from entering the market and moving the cartelists' prices down.

Where supply problems are caused by a shortage of goods, suppliers have an incentive to seek new supplies from elsewhere or increase production, and to do so before their competitors do the same. When competitors cooperate, this race to supply is eliminated, and there is no fear that the resulting higher prices will subsequently be 'competed' down to a competitive price.

If cooperative activity could remedy crises without harming the public interest (that is, diminishing consumer welfare), that activity would not be precluded by competition rules. But more significantly, the encouragement of anti-competitive activity may well leave a post-crisis anti-competitive hangover hindering an effective recovery for the economy.

Indeed, given the possibility of 'crisis washing' (that is, dressing up a situation as a 'crisis', and using this to suggest that competition rules be disapplied) it is not evident that we can trust those who request such an exemption to act in the public interest. [11]

Second, anti-competitive collaboration typically results in a reduction in output. This is the main driver of the price increase leading to extra profit. In fact, if anything, collaboration is likely to prioritise production of those goods that experience the highest profit margins. The literature which appears in business and marketing journals seems to suggest this point. On one, we read, 'If competition laws are relaxed, firms should capitalise on the increased freedom to share resources and capabilities with their trustworthy

(e.g. providing retail-sized packaging and more agile logistics) would have been likely to solve the problem. See Jonathan Wentworth, 'Rapid Response: Effects of COVID-19 on the Food Supply System' UK Parliament Post (13 July 2020); <https://post.parliament.uk/effects-of-covid-19-on-the-food-supply-system/> accessed 24 August 2022. The diversion of alcohol towards antivirals was constrained by regulatory (including taxation) requirements in the production and distribution of ethanol and of hand sanitisers. This is not a competition law issue but may be an argument for a general reduction of the regulatory burden. See Health and Safety Executive (UK), 'Manufacture and Supply of Biocidal Hand Sanitiser Products during the Coronavirus Pandemic'; <https://www.hse.gov.uk/coronavirus/hand-sanitiser/hand-sanitiser-manufacture-supply.htm> accessed 24 August 2022.

[11] As an example, the two UK industries which were the main beneficiaries of exemptions during the Covid pandemic (the grocery and dairy industries) have a history of collusive activity (however, prosecution of this activity has not always been successful). See e.g. OFT Case CE/3094-03 (Decision 10 August 2011); *Tesco et al v OFT* [2012] CAT 31.

and complementary industry rivals for mutually-beneficial outcomes.'[12] Given that the publication is directed towards the business community, we presume that 'mutually-beneficial' is a euphemism for 'mutually-profitable'. We note that in March 2020 (during the early stage of the Covid-19 pandemic) one UK manufacturer of own-brand toilet and kitchen paper reduced its range of production 'from 120 to 30 so more can be manufactured quickly. Each supermarket it supplies now gets one type of kitchen roll and two of toilet roll.'[13] One need not be overly cynical to ask whether the least profitable lines were reduced, particularly given other industry statements assured that the Covid outbreak had no effect on the UK's production and supply of toilet paper.[14]

This exempted collusion may be time- and purpose-limited to the crisis at hand, but it may have lingering after-effects. It allows undertakings to glean information about their competitors' businesses that they would not have otherwise known. But further, it marks a cultural change in the industry to one where regular sharing of information is permitted, or even encouraged. As noted in an academic marketing journal:

> Owner-managers are encouraged to acknowledge that once this global pandemic is over (and the regulation of certain forms of competition is potentially enforced), it might be challenging to end their partnerships with rivals. Thus, they should agree on the extent to which they will cooperate, vis-à-vis, compete with their rivals in advance of changing circumstances.[15]

Nevertheless, it is not clear if post-crisis, any information shared could be 'unlearned' or that the industry's culture will return to the 'old ways'.[16]

Furthermore, any belief that competition rules prohibit all cooperation or coordination between competing undertakings is false. There is no binary

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[12] James M Crick and Dave Crick, 'Coopetition [sic] and COVID-19: Collaborative Business-To-Business Marketing Strategies in a Pandemic Crisis' (2020) 88 *Industrial Marketing Management* 206, 211.

[13] Jonathan Eley, 'Supermarkets take measures to control panic buying' *Financial Times*, 18 March 2020, accessed 24 August 2022.

[14] Edward Devlin, 'Don't Panic: Toilet Roll Production and Distribution Normal, Say Suppliers' *The Grocer* (10 March 2020) <https://www.thegrocer.co.uk/supply-chain/dont-panic-toilet-roll-production-and-distribution-normal-say-suppliers/602737.article> accessed 24 August 2022.

[15] Ibid.

[16] Ormosi and Stephen (n 5) at 301 remark:

> It is very hard to monitor coordination and allowing competitors to share key data will bestow a level of familiarity about one another that did not exist before. This means that even after the relaxing of competition rules ceases, there will still be an increased ability to continue colluding tacitly. This sort of behaviour has been observed in the past.

choice between competition and cooperation. Rather, the rules prohibit cooperative action when that activity is likely to lead to consumer harm. Beneficial cooperation is entirely consistent with the EU's (and other jurisdictions') antitrust regime(s); and – to this end – the Commission has promulgated a set of exemptions and guidelines on cooperation. It is noteworthy that the Oxford/AstraZeneca, Moderna and Pfizer-BioNTech vaccines (the first vaccine to be approved) are collaborative efforts, produced within a competitive environment of (consortiums of) undertakings developing competing products.[17] The design and production of ventilators, which were in short supply in the early stages of the pandemic, provide another illustration of this point.[18] The key difficulty with which this paper is concerned is that the line between permissible cooperation and welfare-destroying collusion. This line, particularly in novel situations, is not always easy (or costless) to discern.

III. Cooperation and Its Barriers

Nevertheless, we are open to suggestions that some form of cooperative activities could provide social or crisis-mitigating benefits. This arises in the context of environmental and sustainability concerns. A recent study for Linklaters showed that 'An overwhelming number of businesses want to work closely with peers when pursuing sustainability goals, with 9 in 10 saying that collaboration is key to achieve progress on ESG [environmental, social and governance] issues.'[19]

Yet collaboratively pursuing these ESG goals could be fraught with danger. Under the present regime (governed by Regulation 1/2003), undertakings are to self-assess the compatibility of their proposed agreement or arrangement with competition laws. To aid in this process, the Commission has promulgated a number of Block Exemptions and Guidelines which give very general direction to undertakings and their advisors about the legality of a proposed

[17] As a coda, one might consider the dangers of industry-wide cooperation in developing this vaccine. The success of the project may have been delayed if industry-wide cooperation steered research toward one (or a very limited set of) direction(s), had the preferred direction turned out to be a 'dead end'.

[18] On ventilator production and procurement in the time of Covid, see Fiona M Scott Morton, 'Innovation Incentives in a Pandemic' (2020) 8 *Journal of Antitrust Enforcement* 309.

[19] Linklaters, 'Competition Law Needs to Cooperate: Companies Want Clarity to Enable Climate Change Initiatives to be Pursued' (29 April 2020), <https://www.linklaters.com/en/insights/publications/2020/april/competition-law-needs-to-cooperate-companies-want-clarity-to-enable-climate-change> accessed 24 August 2022.

arrangement. While these publications may be useful in the majority of (clear) cases (including those cases which clearly violate competition rules), when the proposed arrangement is at the margin or affects a national market, their utility is minimal.

The consequences for an undertaking 'crossing the line', in spite of *bona fide* self-evaluation, can be dire. Engaging in activity which contravenes Article 101 TFEU (or its national law counterpart) risks a substantial fine. Even if undertakings are not fined (or if a nominal fine is meted out), defence costs in an investigation and/or hearing are non-trivial. In the face of this contingent cost, simple economics tells us that a risk-neutral actor will likely forego the activity, notwithstanding possible social benefits.

Experience confirms this theoretical observation. The Linklaters Report notes, '57% of sustainability leaders say that there are concrete examples of sustainability projects that they have not pursued because the legal risk was too high. As advisors, we see examples of companies walking away from genuinely beneficial projects because of competition law risk.'[20]

The impediments to self-assessment have both legal and institutional origins. The former has its origins in Article 101's object/effect distinction, the latter's origins rest in institutional practice which has evolved from Regulation 1/2003's self-assessment regime.

Article 101's object/effect distinction is a notorious source of difficulty for assessment.[21] Although there is significant CJEU case-law on this point, there is nevertheless uncertainty at the boundary. 'By object' restrictions are those which have been shown by experience (which presumably includes experience gleaned from economic analysis,[22] as opposed to – or supplementing – the casual empiricism of one's experiences in the marketplace) to have sufficiently likely detrimental effects so that further analysis is not needed. These are typically forms of horizontal collusion, which lead to reductions of output, increases in prices and thus harm to consumer welfare.[23]

The Court's guidance regarding by-effect restrictions is less clear. When an authority or court is required to analyse a 'by effects' restriction, this analysis is to take place in the light of the commercial context of the agreement, and evaluated against the counterfactual of what the state of competition would be

[20] Ibid.

[21] On this point see my *Competition, Effects and Predictability: Rule of Law and the Economic Approach to Competition* (Oxford: Hart, 2020) pp 99–106.

[22] See Opinion of AG Bobek in C-228/18, *Gazdasági Versenyhivatal v Budapest Bank Nyrt.*, ECLI:EU:C:2019:678, point 42 citing Opinion of Advocate General Wahl in C-67/13P, *CB v Commission*, EU:C:2014:1958, point 79.

[23] Case C-228/18 *Gazdasági Versenyhivatal v Budapest Bank Nyrt*. ECLI:EU:C:2020:265 paras 36–44.

in the absence of the agreement in question.[24] This applies to both inter- and intra-brand competition.[25] If the agreement is viewed as anti-competitive (or 'restrictive of competition'[26]) with a 'reasonable degree of probability'[27], the agreement would, after this evaluation, be considered as prohibited subject to the justification under 101(3) TFEU.

However, as stated above, the test is circular. There is a need to determine what is precisely meant by the term 'anti-competitive' or 'restrictive of competition'. Ibáñez Colomo identifies this criterion as:

> ...it has long been clear that anticompetitive effects amount to more than a mere competitive disadvantage and/or a limitation of a firm's freedom of action. Something more, namely a reduction of competitive pressure resulting from a negative impact on equally efficient firms' ability and/or incentive to compete, is required.[28]

This test is consistent with the approaches taken by the Commission in Article 102 TFEU and merger cases.

This test is a substantively more difficult and resource-intensive test than that deployed in the case of 'by object' restrictions. Competition authorities have limited resources and will seek to use them as efficiently as possible – obtaining the greatest possible return. The burden of proving an infringement of 101 TFEU rests on the competition authority (or other parties challenging the legality of the agreement). The confluence of these factors has led to under-enforcement of the prohibition against restrictions of competition 'by effect'.[29] A result of the (at best) under-enforcement of this provision is that the Commission has provided no guidance as to how to appropriately evaluate the effects of agreements in order to assist undertakings in their self-assessment. The lack of guidance and the fragmentary nature of discussions in case-law make *ex-ante* planning difficult.

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[24] See Case 56–65, *Société Technique Minière v Maschinenbau Ulm GmbH* ("*STM*") ECLI:EU:C:1966:38, at 249–250 and *Budapest Bank*, ibid, para 55, citing C-382/12P, *MasterCard and Others v Commission*, EU:C:2014:2201, paras 161 and 164.

[25] Alison Jones, Brenda Sufrin, and Niamh Dunne *Jones & Sufrin's EU Competition Law: Text, Cases, and Materials* (Oxford: OUP; seventh edn, 2019) at 240.

[26] Ibid.

[27] Ibid, citing Guidelines on the application of Article 81(3) of the Treaty [2004] OJ C-101/97, para 24.

[28] Pablo Ibáñez Colomo, 'Anticompetitive Effects in EU Competition Law' (2021) 17 *Journal of Competition Law & Economics* 309, 361.

[29] See Anne C. Witt, 'Public Policy Goals under EU Competition Law – Now Is the Time to Set the House in Order' (2012) 8 *European Competition Journal* 443, 435.

The object/effect distinction, and how a proposed arrangement is viewed in this context, is crucial for its analysis, as European competition lawyers know. We only need to recall the BIDS[30] case before the CJ to recognise the significance of the distinction – particularly in the context of cooperative attempts at crisis mitigation. The object/effect boundary is vague, to the detriment of certainty.

Article 101(3) provides a means by which anti-competitive arrangements, particularly those which are restrictions of competition 'by object', can be justified. However, there are significant difficulties in interpreting this paragraph.[31]

Providing guidance would be a straightforward means of resolving some uncertainty, particularly in novel situations. The CJEU is unlikely to be in a position to do so: it will rule only on matters before it, and is reluctant to provide what lawyers trained in the common law tradition term 'orbiter' comments. The second-best source of guidance is the Commission and NCAs. Although their guidance is not binding on Courts (CJEU and national), such guidance is self-binding.[32] However, there are issues of institutional unwillingness, inability and inconsistency which interfere with the authorities' ability to issue effective guidance that provides the needed certainty to undertakings which wish to engage in novel, and perhaps beneficial, practices.

At the outset and to be fair, the Commission provides a fair amount of guidance, and the relevant rule-making bodies also produce Block Exemption Regulations, which recognise the 'legality' of those arrangements that are brought within their scope. This aids self-assessment of some proposed arrangements.[33] However, this guidance is necessarily general and incomplete, as no set of guidance can *ex ante* envisage every situation. And while this guidance is updated from time to time,[34] it will remain incomplete. The

[30] Case C-209/07, *Competition Authority v Beef Industry Development Society Ltd and Barry Brothers (Carrigmore) Meats Ltd ('BIDS')* ECLI:EU:C:2008:643.

[31] On this point, the literature is voluminous, among which see e.g. Witt, ibid, Or Brook, *Non-Competition Interests in EU Antitrust Law: An Empirical Study of Article 101 TFEU* (Cambridge: Cambridge University Press, 2022), Bruce Wardhaugh, 'Crisis Cartels: Non-Economic Values, the Public Interest, and Institutional Considerations' (2014) 10 *European Competition Journal* 311 and Christopher Townley, *Article 81 and Public Policy* (Oxford: Hart, 2009).

[32] Joined Cases C-189/02 P, 202/02 P and 213/02 P *Danske Rørindustri A/S and Others v Commission*, ECLI:EU:C:2005:408; Case C-397/03 P *Archer Daniels Midland Co v Commission* ECLI:EU:C:2006:328; Case C-226/11 *Expedia v Authoritié de la Concurrence* ECLI:EU:C:2012:795; Case T-446/05 *Aann und Söhne GmbH and Co KG v Commission* ECLI:EU:T:2010:165.

[33] See e.g. European Commission, *XXXIVth Report on Competition Policy (2004)* (Luxembourg: Office for Official Publications of the European Communities, 2005) point 1.

[34] E.g. see the revisions to the Guidelines on the Applicability of Article 101 of the Treaty of the Functioning of the European Union to horizontal co-operation agreements (Brussels 1.3.2022 C(2022) 1159 final).

authors of the 2011 Guidelines on Horizontal Cooperation[35] could not have the foresight to consider a pandemic which would occur eight years later.

The existing Regulation 1/2003 regime allows for two ways that these gaps can be filled: one, the Commission could introduce supplementary guidance, or two, it can provide specific guidance in individual cases which raise a novel issue. In terms of supplementary guidance, the Commission can act fast when it is required to so do. As an example, we note that during the 2008 financial crisis, there was a need to use significant amounts of state aid to recapitalise financial institutions, and the Commission responded very rapidly. Lehman Brothers filed for bankruptcy on 14 September 2008, by the end of the month the magnitude of the crisis was becoming apparent. The European Council (in the configuration of ECOFIN, that is, the Economics and Finance Ministers) met on 6 and 7 October to coordinate the political response to the crisis.[36] And on October 13, the Commission published its initial guidance on how Member States would be able to provide aid to support troubled financial institutions.[37]

Yet there is no guarantee that the Commission will issue guidance. We note the case of environmental and sustainability agreements. While some guidance was given in the 2001 Guidelines,[38] this was withdrawn from the 2011 Guidelines, only to reappear in the 2022 draft Guidelines. This is in spite of the significance that sustainability and environmental concerns took on during the second decade of the Twenty-First Century.

Further, in novel cases, the Commission undertook to provide guidance letters to undertakings that feared their practices would infringe competition rules. Recital 38 to Regulation 1/2003 reads:

> Legal certainty for undertakings operating under the Community competition rules contributes to the promotion of innovation and investment. Where cases give rise to genuine uncertainty because they present novel or unresolved questions for the application of these rules, individual undertakings may wish to seek informal

[35] Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] OJ C-11/1.

[36] Council of the European Union, 'Immediate responses to financial turmoil Council Conclusions – Ecofin Council of 7 October 2008' (Luxembourg, 7 October 2008) 13930/08 (Presse 284) <https://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/misc/103202.pdf> accessed 24 August 2022.

[37] Commission, Press Release, 'State Aid: Commission gives guidance to Member States on measures for banks in crisis' (13 October 2008) (IP/08/1495), <https://ec.europa.eu/commission/presscorner/detail/en/IP_08_1495> accessed 24 August 2022. The guidance was published on 25 October 2008: Communication from the Commission, 'The application of State aid rules to measures taken in relation to financial institutions in the context of the current global financial crisis' [2008] OJ C-270/8.

[38] Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements [2001] OJ C-23/2.

> guidance from the Commission. This Regulation is without prejudice to the ability of the Commission to issue such informal guidance, …

To this end, the Commission has issued a Notice on the circumstances under which it will offer such guidance and issue comfort letters.[39] However, this 'guidance on guidance' and the use of comfort letters is illusory. The Commission issued its first comfort letter in April 2020 during the Covid pandemic.[40]

NCAs will also issue guidance and/or engage in a discussion with their stakeholders, albeit to varying degrees. European principles surrounding reasonable expectations entail that such guidance is binding on the issuing authority, there need not be absolute consistency among national guidance or with the guidance promulgated by the Commission.[41] In spite of the fragmentated manner of NCA response, it nevertheless shows a way forward, through greater engagement with stakeholders, particularly in novel situations.

In the next section, we consider briefly two such situations, the Irish Beef case (hereinafter: *BIDS*) and the Dutch 'Chicken of Tomorrow' (hereinafter: *CoT*) initiative. Both cases involved novel concerns. The former resulted from a crisis in that country's beef processing industry, the latter raised animal welfare concerns; and its significance cannot be understated. These animal welfare concerns were novel, and as such did not fit well into existing competition analysis; but more significantly, these concerns mirror some of the concerns which underlie cooperative sustainability proposals. There was a stark difference in the engagement of the NCAs with the parties, and – perhaps not coincidentally – a similarly stark difference in their outcome.

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[39] Commission Notice on Informal Guidance Relating to Novel Questions Concerning Articles 81 and 82 of the EC Treaty that Arise in Individual Cases (Guidance Letters) [2004] OJ C-101/78, points 3 and 4.

[40] Commission (DG Comp) to Medicines for Europe, Comfort letter: coordination in the pharmaceutical industry to increase production and to improve supply of urgently needed critical hospital medicines to treat COVID-19 patients (8 April 2020) <https://ec.europa.eu/competition/antitrust/medicines_for_europe_comfort_letter.pdf> accessed 24 August 2002; see also Gianni De Stefano, "Covid-19 and EU Competition Law: Bring the Informal Guidance On" (2020) 11 *Journal of European Competition Law and Practice* 121 and Jacques Buhart and David Henry, 'COVID-20: The Comfort Letter Is Dead. Long Live the Comfort Letter?' (2020) 43 *World Competition* 305.

[41] For instance, the Netherlands' requirement that long-term considerations be taken into account in assessing sustainability initiatives may be an example of one such practice that is not consistent with other Member States' practices. See Decision of the Minister of Economic Affairs of 6 May 2014, no. WJZ / 14052830- (Government Gazette 2014, 13375).

IV. Guidance: Failure and Success

1. The 'Irish Beef' Case

The facts of this case are presented in some detail in McKechnie J's judgment, who – as a High Court Judge – heard the proceedings instigated by the Competition Authority against the Beef Producers.[42] Post-EEC entry, Irish farmers could obtain the numerous benefits of the Common Agricultural Policy (hereinafter: CAP).[43] Among these benefits, the CAP provided for price supports and grants to the beef industry. Traditionally cattle were slaughtered in autumn months, reflecting the cycle of breading and outdoor grazing, requiring plants to have sufficient peak capacity for production during these months.[44] There were early incentives to build slaughterhouses for these peaks. But as part of the 1992 reforms to the CAP, farmers received financial incentives to reduce delivery of cattle during peak periods, smoothing out demand (and need for capacity) in production, entailing that capacity designed for peak periods would be superfluous.[45]

This led to a situation where the incentives for beef production were divorced from market realities.[46] By the late 1990s, the severity of the situation was apparent.[47] Representatives of the industry and the Irish Government engaged the consulting firm McKinsey to produce a report on the state of the industry.[48] The Report noted severe overcapacity and resulting unprofitability. McKechnie J summarises these points:

> In 1997, with 32 plants operating, the industry had an estimated capacity to kill 66,000 head of cattle per week. This compares with an actual maximum throughput

[42] *Competition Authority v Beef Industry Development Society Ltd & Anor* [2006] IEHC 294, paras 8–31; see also Okeoghene Odudu, 'Restrictions of Competition by Object – What's The Beef?' (2009) 8 *Competition Law Journal* 11; and Conor Talbot, 'Finding a Baseline for Competition Law Enforcement during Crises: Case Study of the Irish Beef Proceedings' (2015) 18 *Irish Journal of European Law* 55.

[43] *BIDS* (High Court), ibid, para 9.

[44] Ibid, para 17.

[45] Ibid.

[46] Ibid, para 11.

[47] But the poor state of the beef industry resulting from public interventions had been noticed earlier. See Seamus J. Sheehy, 'The Impact of EEC Membership on Irish Agriculture' (1980) 31 *Journal of Agricultural Economics* 297, 310.

[48] *BIDS* (High Court) (n 40) para 13–26 (this contains a good summary of the Report's details), see also Conor Talbot, Finding a Baseline for Competition Law Enforcement during Crises: Case Study of the Irish Beef Proceedings" (2015) 18 *Irish Journal of European Law* 55, 56–57.

> of 45,000 and an average throughput of 32,000 per week. In addition, there were a number of dormant plants which if activated would add to this overcapacity.[49]

The Report further recommended coordinated action to reduce total capacity by 32% per annum, with those remaining in the industry ('stayers') compensating those leaving ('goers'). In turn, the Government recognised the need for rationalisation and provided indications of its support.[50] In May 2002, the Beef Industry Development Society Limited (hereinafter: BIDS) was established to implement the rationalisation strategy suggested by the McKinsey Report, and was, at least implicitly, supported by the Irish Government.

After the BIDS programme was agreed upon, its members informed the Competition Authority of the programme and provided submissions as to the programme's compatibility with Irish and EC competition law. BIDS and its members attempted to engage with the Competition Authority (and cooperated with it throughout its investigation).

The plan was proposed prior to the self-assessment regime of Regulation 1/2003, and BIDS sought clearance (under the domestic equivalent of Regulation 17) of the programme. Yet, the Authority did not vet these proposals and 'declined to engage in this way'.[51] The Competition Authority took the view that these arrangements were contrary to domestic provisions mirroring Article 81(1) TEC (now 101(1) TFEU) and could not benefit from the equivalent of 81(3) TEC (now 101(3) TFEU).[52] In the end, the Authority commenced proceedings.

In the High Court, McKechnie J held that these restrictions were not restrictive of competition by their object and found that the programme met 81(3)'s criteria. McKechnie J's judgment was appealed to the Supreme Court, which made a reference to the ECJ for a preliminary ruling. At issue was whether agreements possessing features of the BIDS arrangements are anti-competitive 'by object' alone, or whether it is also necessary to demonstrate the anti-competitive effects of the agreements.[53]

The ECJ held that the BIDS arrangements had as their object the restriction of competition.[54] Hence the compatibility of this crisis cartel with EU competition law relied on a 101(3) TFEU justification. The Irish Supreme

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[49] *BIDS* (High Court), ibid, para 18.

[50] *BIDS* (High Court), ibid, para 28.

[51] Ibid, para 87.

[52] These provisions are Ireland, *Competition Act 2002* (No 14 of 2002), ss 4(1) and 4(5), respectively.

[53] *BIDS* (ECJ) (n 29) para 14.

[54] Ibid, para 34.

Court referred the case to the High Court to consider the 101(3) issue *de novo* and in light of the ECJ's judgment.[55] The High Court heard these arguments in 2010. It ultimately did not issue a ruling, as in January 2011 BIDS withdrew its action against the Competition Authority.

In concluding our brief discussion of the *BIDS* case, we make two points. First, the cause of the overcapacity was a result of the distortive effects of subsidies. Subsidies created an artificial floor for beef prices, underwrote the cost of expansion of processing plants, and smoothed out the demand for capacity during the year. It is hardly a surprise that the industry acquired too much capacity. Second, and more significantly, we note the lack of engagement by the Irish NCA. This lack of engagement is significant.

Although the lack of engagement was not the sole reason why the BIDS arrangement failed, we suggest that greater engagement may have provided the parties with an opportunity to revise the arrangements in a manner which could pass Article 101(3) scrutiny. We note that even an explanation given to parties by an NCA, on how and why (at least in the NCA's view[56]) the proposed arrangement fails the test, can be useful to parties for a future redesign of their proposal. Indeed, as we will next see, the Dutch Autoriteit Consument en Markt's (hereinafter: ACM) 'negative guidance' (or explanation of why a particular proposal failed 101(3) scrutiny) can assist the parties in developing an acceptable alternative.

2. The Dutch 'Chicken of Tomorrow' Initiative

The Dutch Chicken of Tomorrow (CoT) initiative arose from a February 2013 agreement among Dutch poultry farmers, processors and supermarkets to enhance sustainability and welfare in broiler chicken production.[57] This was not a 'crisis cartel' in the standard sense. It was a buying arraignment among Dutch supermarkets, motivated by non-economic concerns of enhancing welfare and environmental sustainability in chicken production. This initiative

[55] *The Competition Authority v Beef Industry Development Society Ltd and Barry Brothers (Carrigmore) Meats Ltd* [2009] IESC 72.

[56] Note that although an NCA may have a particular view on what is or is not acceptable under 101(3), this view is not binding on the European Courts and therefore may or may not reflect the law. Nevertheless, a prudent undertaking may wish to accept and follow NCA guidance (if and when available) as a litigation-avoidance strategy.

[57] Autoriteit Consument en Markt (hereinafter: ACM), Memo: Welfare of today's chicken and that of the 'Chicken of Tomorrow' (13 August 2020), p 3 <https://www.acm.nl/sites/default/files/documents/2020-08/welfare-of-todays-chicken-and-that-of-the-chicken-of-tomorrow.pdf> accessed 24 August 2022.

is regarded as a test case for competition law's ability to take into account non-economic values.

The goal of the CoT agreement was to phase out entirely the sale of regularly produced broiler chicken by 2020, in an effort to replace it with meat produced according to the CoT standard. The immediate consequences of this would be that supermarkets would pay more for such chicken, and these costs were later passed on to consumers.[58]

This initiative was popular with the Dutch public.[59] The ACM was asked to provide an informal opinion (similar to a comfort letter[60]) regarding this initiative. The Authority opined that the arrangement would deny customers the freedom of choice regarding their chicken purchases and would 'have a considerable effect (real or potential) on the consumer market for chicken meat.'[61] Further, given that supermarkets would sell only chicken raised according to the CoT standard, this would preclude the sale of chicken imported from neighbouring Member States.[62]

The measures violated both Article 101(1) TFEU and its Dutch counterpart.[63] As such, the compatibility of the initiative with Dutch and European competition law rested with whether or not they could be exempted under Article 101(3) TFEU (and its domestic equivalent). The ACM's analysis found that the proposed CoT standard would not satisfy any of the 101(3) criteria.

The starting point of the ACM's analysis of Article 101(3)'s first criterion (improvement in productive or distributive efficiencies) is that any such efficiencies are efficiencies only to the extent that customers are actually willing to pay for them. Accordingly, the Authority collected data to determine consumers' willingness to pay for the animal welfare, environmental and public health benefits which would accrue from the arrangement.[64] As the costs of the

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[58] Jacqueline M Bos, Henk van den Belt, and Peter H Feindt, 'Animal Welfare, Consumer Welfare, and Competition Law: The Dutch Debate on the Chicken of Tomorrow' (2018) 8 *Animal Frontiers* 20, 20.

[59] See e.g. Anna Gerbrandy, 'Solving a Sustainability-Deficit in European Competition Law' (2017) 40 *World Competition* 539, 540.

[60] Ibid at 541 fn 6; see also ACM, 'ACM procedure regarding informal opinions' (Dutch Government Gazette No. 11177 – 26 February 2019), <https://www.acm.nl/sites/default/files/documents/2019-07/acm-procedure-regarding-informal-opinions.pdf> accessed 24 August 2022.

[61] ACM's analysis of the sustainability arrangements concerning the 'Chicken of Tomorrow', ACM/DM/2014/206028 (January 2015) p. 4.

[62] Ibid.

[63] Mededingingswet (22 May 1997) Art 6(1), English Translation available at <http://www.dutchcivillaw.com/legislation/competitionact.htm> accessed 24 August 2022, and ACM, Sustainability Arrangements (n 58) p. 4.

[64] Machiel Mulder, Sigourney Zomer, Tim Benning en Jorna Leenheer, 'Economische effecten van "Kip van Morgen" Kosten en baten voor consumenten van een collectieve afspraak

initiative to the consumer exceed its benefits, it could not be said to improve production or distribution of a good. In light of this cost-benefit balance, the initiative also failed the second criterion (consumers obtaining a fair share).

As the ACM noted, its findings were subject to criticism and discussions from all corners, domestically and internationally.[65] But the immediate consequence of this intervention was that it forced supermarkets and producers to work, without colluding or otherwise restricting competition, to improve chicken-welfare standards of their product. In May 2014, the largest Dutch supermarket chain, Albert Heijn, became the first chain to introduce higher-welfare chicken. Jumbo, (the second largest) followed suit in October 2014.[66] In August 2020, the ACM published a stock-taking exercise to assess the extent to which sustainability and welfare goals had been achieved in the absence of the Chicken of Tomorrow initiative.

The results of the study showed that 'the welfare conditions of the current selection of chicken meat sold in Dutch supermarkets more than exceeds the minimum requirements of the Chicken of Tomorrow.'[67] This was achieved thanks to competition among the main supermarkets (representing over 97% of the market) over chicken-welfare standards. Though these vary, all are in excess of those that the Chicken of Tomorrow programme would have established.[68] In addition to these own-brand standards, supermarkets also sell chicken certified under market-wide labels (the Better Life Label – with three levels, initiated by the Dutch Society for the Protection of Animals – and the organic label), these also exceed the CoT standard. The participation of organisations such as that society added trust and made consumers more willing to pay for the more sustainable, higher-welfare product.[69]

In this regard, the approaches of the Dutch and Irish competition authorities are worth contrasting. In CoT, the Dutch authorities were in a position to provide an informal opinion to the industry about the legality of the proposed arrangements, and – when they determined that the proposal likely contravened competition rules – to engage with them and provide suggestions as to how to move forward. While the ACM's guidance was primarily negative,

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in de pluimveehouderij' (Office of the Chief Economist ACM, October 2014), <https://www.acm.nl/sites/default/files/old_publication/publicaties/13759_onderzoek-acm-naar-de-economische-effecten-van-de-kip-van-morgen.pdf> accessed 24 August 2022.

[65] ACM, Welfare of today's chicken and that of the 'Chicken of Tomorrow (13 August 2020) p. 3.

[66] Berrie Klein Swormink, 'Chicken of Tomorrow is here today' *Poultry World* (13 March 2017), <https://www.poultryworld.net/Meat/Articles/2017/3/Chicken-of-Tomorrow-is-here-today-103092E/> accessed 24 August 2022.

[67] ACM, Memo: Welfare of today's chicken (n 62), p. 2.

[68] Ibid, pp. 5–8.

[69] Ibid, p. 15.

demonstrating that the initial proposal was anti-competitive, this negative guidance had utility. By closing off a collaborative path, it forced the parties to seek an alternative solution.

However, in the *BIDS* case, there was no such engagement, despite the fact that the old (notification) regime had not yet expired. This was a cause for comment for McKechnie J. One can only speculate what the eventual outcome may have been, had the Irish Authority engaged in a dialogue with market participants. Indeed, to go forward, this difference between the two cases shows the need for competition authorities to engage with stakeholders in times like this.

V. Conclusion

We seem to be in a continuous process of facing crises; and in particular our present climate crisis calls out for action. Although we are sceptical about coordinated efforts, we nevertheless recognise that there may be some instances where our general scepticism is unwarranted. To this end coordination among stakeholders may aid in meeting some of the challenges. Article 101 TFEU does not prohibit coordinated efforts – it prohibits such efforts which are harmful to competition. There is room within the Article for coordinated activity which may promote the resolution of an economic or some other form of crisis.

The Dutch 'Chicken of Tomorrow' initiative suggests the general suitability of standards as a means of achieving such goals. In addition to animal welfare labelling, as in the Dutch case, coordinated approaches could permit the development of, for instance, recyclability and carbon footprint standards. Yet standardisation requires consistency – presupposing agreement – among the metrics used in expressing these standards.[70]

Although standardisation may be one means forward (as was seen in the CoT case), standardisation is not the exclusive method by which undertakings may collaborate to achieve socially desirable outcomes in a manner consistent with he competition rules.

In its 2020 submission to the OECD, which focused on sustainability goals, the Dutch Competition Authority noted:

[70] See also Simon Holmes, 'Climate Change, Sustainability, and Competition Law' (2020) 8 *Journal of Antitrust Enforcement* 354, 382–383.

With respect to competitors starting collaborations related to sustainability initiatives, there are at least four avenues to explore by competition authorities, without the need to adapt competition laws.

For example, authorities can indicate what types of agreements are, in general, not anti-competitive, such as agreements that incentivize undertakings to make a positive contribution to a sustainability objective without being binding on the individual undertakings. Another category concerns covenants by which companies bind themselves and their suppliers to comply with laws abroad in areas such as labour rights or the protection of the environment, and for which the companies, for example, jointly organize oversight by an independent body. Also, agreed codes of conduct, joint trademarks or logos promoting environmentally-conscious or climate-conscious practices are, in general, not anti-competitive if the participation criteria are transparent, and access will be determined on the basis of reasonable and non-discriminatory criteria.[71]

The need for guidance is important and the more specific guidance, the better. It is by providing such guided self-assessment that Authorities can alleviate significant enforcement problems. Not only that, but guidance also adds certainty, reducing risk and encouraging investment in strategies which have socially beneficial outcomes, that is, aid in crisis mitigation.

Indeed, for novel or unusual arrangements, specific guidance might be appropriate. The ACM recognises this.[72] It is unfortunate that other NCAs have yet to share this recognition. Although it is true that the post-Regulation 1/2003 regime imposes a duty on undertakings to self-assess proposed arrangements, in novel cases, such self-assessment is difficult. Given the costs of running afoul of the competition regime, it would be prudent and risk-neutral to risk-adverse, if there were doubts, to forgo entering into such measures. This approach may therefore hinder, if not thwart, the development and implementation of measures to advance otherwise beneficial aims.

Providing guidance for novel situations or arrangements is not inconsistent with a general duty for undertakings to self-assess. The Commission recognises this and suggests that in novel or uncertain cases, undertakings approach the Commission in order to seek informal guidance,[73] and as the Commission notes, this adds certainty and promotes investment.

[71] Organisation for Economic Co-operation and Development, 'Sustainability and Competition–Note by the Netherlands' contribution for 134th OECD Competition Committee meeting on 1–3 December 2020 DAF/COMP/WD(2020)66 (Paris: OECD, 2020) paras 8–9, see also para 2.

[72] Ibid, paras 11–13.

[73] 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.

Although certainty interests would suggest more than infrequent use of guidance, the Commission's practice has not even approached that threshold. Until the 2020 Covid crisis, the Commission had not provided any informal guidance. There is no point in suggesting that undertakings may be able to obtain guidance, if its availability is chimaera. Additionally, the same concerns can also be raised with the practice of National Competition Authorities, given their analogous role. Our discussion of Irish Beef suggested that the Irish Competition Authority could have acted to guide the parties towards an appropriate resolution of the problem. At a minimum, this would have imposed less cost on all parties – including the NCA itself.

Our suggestion does not entail that we return to the 'old' regime represented by Regulation 17 and require every agreement which may restrict competition to be vetted by Competition Authorities. The experience since the implementation of Regulation 1/2003 shows that the self-assessment regime works well, save in cases which are near the margin. The importance of these marginal cases is that they are often (but not exclusively) driven by social concerns, such as sustainability, economy or industry-wide concerns. Given the general success of the present regime, Competition Authorities may wish to focus their guidance on those cases which reflect these broad concerns. Further, we emphasise that there will likely be very few cases near or at the margin which will (or could) pass scrutiny: collaborative efforts to 'solve' crisis situations almost always result in consumer welfare-destroying restrictions of output.

The Dutch ACM's willingness to engage in the Chicken of Tomorrow matter is commended and may be taken as an example of best practice. Although this engagement did not result in an NCA written solution to the undertakings' problem (and expecting such extensive involvement by NCAs would be unrealistic), the ACM's engagement showed the parties why their proposal ran contrary to Article 101(3) TFEU. As a result, the parties could pursue other strategies.

While the parties' first choice of solutions proved to be anti-competitive, this did not entail that no solution could be found. Indeed, through dialogue involving multiple stakeholders, including the ACM and the Government, the parties found a solution, which – it must be added – went further than the original one to achieving the stated goal, with fewer anti-competitive effects, than was the case with the parties' first choice. This is clearly the way forward and shows that crisis response (and mitigation) also requires an adjustment of NCAs' behaviour, to develop a greater willingness to provide guidance to undertakings thereby demonstrating – at least in part – that the competition regime and authorities are also part of the solution.

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Personal liability of managers of undertakings for infringements of competition law in the Republic of Lithuania: the sanctions regime from the perspective of the principle of legal certainty

by

Raimundas Moisejevas*, Justina Nasutavičienė** and Andrius Puksas***

CONTENTS

Abstract

This article focuses on the personal liability of managers of undertakings for breaches of competition law. This article starts with a review of the sanction regime for managers of undertakings according to the Competition law of the Republic of Lithuania. Reviewed are legal provisions and judicial practice of the Lithuanian

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courts starting from 2017, that is, when the first request to sanction a manager of an undertaking was submitted to the court by the Competition Council (CC). It is pointed out that in most cases the courts do not fully accept the requests of the CC with respect to the severity of the sanctions to be imposed on managers. The second part of the Article comprehensively analyses the case-law of administrative courts of the Republic of Lithuania, and presents key elements of the imposition of sanctions on company managers. Firstly, in exceptional circumstances, courts may impose a lower penalty than the one specified by competition law. Secondly, the courts may impose both, the main sanction as well as an additional one, or any of them. Thirdly, the level of sanctions should be determined the light of the fines imposed on undertakings for their infringements of competition law. The article concludes with a short summary.

Resumé

Cet article se concentre sur la responsabilité personnelle des dirigeants d'entreprise pour les infractions au droit de la concurrence. Cet article commence par l'examen du régime de sanction des dirigeants d'entreprises selon la loi sur la concurrence de la République de Lituanie. Nous examinons les dispositions légales et la pratique judiciaire des tribunaux lituaniens à partir de 2017, date à laquelle la première demande de sanction à l'encontre d'un dirigeant d'entreprise a été déposée. Il est souligné que dans la plupart des cas, les tribunaux ne satisfont pas entièrement les demandes du Conseil de la concurrence en ce qui concerne la sévérité des sanctions imposées aux dirigeants. Dans la deuxième partie de l'article, nous analysons en détail la jurisprudence des tribunaux administratifs de la République de Lituanie et révélons les éléments clés pour l'imposition de sanctions aux dirigeants. Premièrement, dans des circonstances exceptionnelles, les tribunaux peuvent imposer une sanction inférieure à celle prévue par la loi. Deuxièmement, les tribunaux peuvent imposer à la fois des sanctions principales et des sanctions supplémentaires ou n'importe laquelle d'entre elles. Troisièmement, le niveau des sanctions doit être déterminé à la lumière des amendes imposées aux entreprises pour des infractions au droit de la concurrence. L'article se termine par un bref résumé.

Key words: personal liability; infringements of Competition Law; Competition Council; administrative courts; principle of legal certainty; sanctions.

JEL: K42

I. Introduction

It is well known that the US and EU approaches regarding individual liability for competition law infringements differ: US antitrust enforcement

is known for its use of criminal sanctions against individuals (from fines to imprisonment); by contrast, EU competition law exclusively focuses on infringements of competition law by 'undertakings' (the Commission can only sanction undertakings)[1]. However, the divergence between the two major competition law systems is rapidly diminishing. In a number of EU countries, fines or even prison sentences might now be imposed on individuals for their participation in anti-competitive arrangements, irrespective of whether these arrangements were prohibited by national or EU competition law. Therefore, individual employees engaging in antitrust infringements within the EU face the risk of being severely sanctioned[2]. As noted by Andrea Coscelli, the chief executive of the UK's competition enforcer (the Competition and Markets Authority), 'individuals are far less likely to break the law if they know they may be held directly responsible for it. And the public rightly expects there to be personal responsibility for very serious wrongdoing in firms.'[3]

According to a survey conducted almost a decade ago, the liability of natural persons for infringements of competition law was already then established in the legislation of 25 EU Member States[4]. Nevertheless, the forms of liability differ: some of the Member States include imprisonment – the longest sentence, 8 years, is provided for in the Czech Republic, though fines are applied most often – with the largest caped at 1 million EUR in Germany[5]. Some Member States have also established certain other restrictions and prohibitions as a form of liability of natural persons for infringements of competition law: for instance, a restriction to hold a managerial position for a certain period of time (the longest period of such restriction, up to 15 years, exists in the UK) or a prohibition of natural persons to take part in public procurement procedures[6].

The Law on Competition of the Republic of Lithuania was amended already back in 2011, recognizing that managers of undertakings might be held individually liable for the most serious infringements of the Law

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[1] Slotboom M., 'Individual Liability for Cartel Infringements in the EU: An Increasingly Dangerous Minefield' (*Kluwer Competition Law Blog*) <http://competitionlawblog.kluwercompetitionlaw.com/2013/04/25/individual-liability-for-cartel-infringements-in-the-eu-an-increasingly-dangerous-minefield/>

[2] Ibid.

[3] Holmes M. C., Mackenzie R., Weeden E., Adlakha A., Westrup M., Augusto A., Pittas D., 'Personal liability and competition law around the world' <https://www.reedsmith.com/en/perspectives/2021/01/personal-liability-and-competition-law-around-the-world>

[4] Bruneckienė J., Pekarskienė I., Guzavičius A., Palekienė O., Šovienė J., *The Impact of Cartels on National Economy and Competitiveness: A Lithuanian Case Study* (Springer, 2015, 123).

[5] Ibid.

[6] Ibid.

on Competition (conclusion of anti-competitive agreements and abuse of a dominant position). The new provision of the Law on Competition provided that for the contribution of an undertaking to a prohibited agreement concluded between competitors or to the abuse of a dominant position, the right of the manager of that undertaking to become the manager of a public and/or private legal entity, or a member of a collegial supervisory and/or governing body of a public and/or private legal entity, may be restricted for a period from three to five years. For the contribution of an undertaking to a prohibited agreement concluded between competitors or to an abuse of a dominant position, the manager of that undertaking may also receive a fine of up to 14481 EUR[7].

The Explanatory Memorandum for the Amendment of the Law on Competition (hereinafter: Explanatory Memorandum), specified that the managers of undertakings are quite often able to avoid liability for cartels or abuse of dominance and do not experience any adverse effects because of the violation. Therefore, to ensure effective and efficient competition protection in a state governed by the rule of law, according to the national legislator, the law must establish the liability of a natural person – the manager of the undertaking concerned for violations of the rules of fair competition to which the manager contributed[8].

Even though the said amendment of the Law on Competition was adopted already in 2011, the Competition Council of the Republic of Lithuania (hereinafter: the CC) has, for the first time, submitted a request[9] to the Vilnius Regional Court to impose sanctions on an individual manager of an undertaking only on 15 June 2017. Although the jurisprudence of administrative courts of the Republic of Lithuania regarding the application of personal liability of managers of undertakings for infringements of competition law is not yet extensive, the practice of applying liability of this kind is accelerating. Such 'young' legal institution, which regards the application of certain sanctions, raises questions on the predictability, clarity, and precision of the relevant regulations for those who might face them. Therefore, it is important to consider the sanctions' regime applicable to managers of undertakings under competition law in the Republic of Lithuania from the perspective of the principle of legal certainty.

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[7] Originally the amount of the fine was set to 50 000 litas. Law on Competition of the Republic of Lithuania (version of 2021-04-29, No XIV-279), Article 40, paragraph 1. At https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.77016/asr [2022-05-10].

[8] The Explanatory Memorandum of the Amendment of the Law on Competition, para 1, 3. Available at https://e-seimas.lrs.lt/portal/legalAct/lt/TAK/TAIS.383107?jfwid=icq8nerem [2022-05-10]

[9] Resolution No 1S-61 (2017) of the CC of 15 June 2017, para 23. Available at https://kt.gov.lt/uploads/docs/docs/2954_c97c0ce821e74bcc247cf2fbc0591540.pdf [2022-05-10].

II. Sanctions regime for managers of undertakings under competition law in the Republic of Lithuania: law and administrative practice

Any fining policy must be transparent, objective, guaranteeing that the sanctions imposed are proportionate, individualized and in accordance with principles of, *inter alia*, justice, reasonableness and fairness. The need to assess the rules on liability from the perspective of the principle of legal certainty (the principle which protects persons from arbitrary actions of the State and helps individuals stay away from breaking the law[10]) clearly is of the utmost importance. This is the cornerstone of a democratic society abiding by the rule of law and is recognized as a key principle of EU law.[11]

According to the Court of Justice of the European Union (hereinafter; CJEU), the principle of legal certainty requires that rules of law should be clear, precise, stable, certain and predictable[12]. Case law of the European Court of Human Rights (hereinafter; ECoHR) provides that the clarity of a law is assessed having regard not only to the wording of the relevant provision but also to the clarification provided by the published case law.[13] The fact that a law confers discretion to the competent authority is not in itself inconsistent with the requirement of foreseeability, provided that the scope of the discretion and the manner of its exercise are indicated with sufficient clarity, having regard to the legitimate aim in question, to give the individual adequate protection against arbitrary interference[14].

Regarding sanctions imposed under Regulation No 1/2003 EU, the CJEU noted that although Article 23(2) of the Regulation grants discretion to the Commission, it still establishes objective criteria to which the Commission must adhere. Thus, first, the amount of the fine that may be imposed on an undertaking is subject to a quantifiable and absolute ceiling, so that the maximum amount of the fine that can be imposed on a given undertaking can be determined in advance. Secondly, the exercise of that discretion is limited by the rules of conduct which the Commission imposed on itself in the Leniency

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[10] Bouzoraa, Y. 'Between Substance and Autonomy: Finding Legal Certainty in Google Shopping' (2022) 13(2) Journal of European Competition Law & Practice 144–153 <https://doi.org/10.1093/jeclap/lpac009>.

[11] See e.g Lifante-Vidal, I., Is legal certainty a formal value? (2020) 11(3) Jurisprudence 456-467, 456, DOI: 10.1080/20403313.2020.1778289.

[12] See e. g. Van Meerbeeck, J. 'The principle of legal certainty in the case-law of the European Court of justice: From certainty to trust' (2016) 41 European Law Review 275-288, 275.

[13] See, to this effect, *G. v. France*, (ECtHR, 27 September 1995) § 25, Series A no. 325-B.

[14] *Margareta and Roger Andersson v. Sweden* (ECtHR, 25 February 1992) § 75, Series A no. 226-A.

Notice[15] and the Guidelines[16]. Furthermore, the Commission's well-known and accessible administrative practice is subject to unlimited review by the European Union judicature. A prudent person, if need be, by taking legal advice, can thus foresee in a sufficiently precise manner the method of calculation and the order of magnitude of the fines which he incurs for a given line of conduct. The fact that the person cannot know in advance the precise level of fines, which the Commission will impose in each individual case, cannot constitute a breach of the principle whereby penalties must have a proper legal basis[17].

In other words, these could be regarded as useful criteria, proposed by the CJEU, according to which it is worth assessing (*mutatis mutandis*) the legal institution of personal liability of mangers for violations of competition law in Lithuania in the light of the principle of legal certainty.

The legal institution of personal liability of managers for infringements of competition law in the Republic of Lithuania is quite new. As already mentioned, the provision of the Law on Competition that enshrined personal liability of managers was introduced in 2011, but the practice of the CC, and the administrative courts in this field, started only in 2017. The analysis of national provisions and practice relevant for this legal institution reveals a sizable deficit of effective safeguards as regards the principle of legal certainty.

As already mentioned, paragraph 1 of the Article 40 of the Law on Competition provides that:

> 'For a contribution of an undertaking to the prohibited agreement concluded between competitors or abuse of a dominant position, the right of the manager of the undertaking to be the manager of a public and/or private legal entity, or a member of the collegial supervisory and/or governing body of a public and/or private legal entity may be restricted for a period from three to five years. For the contribution of the undertaking to the prohibited agreement concluded between competitors or abuse of a dominant position, the manager of the undertaking may, apart from the restriction of the right specified in this paragraph, be also imposed a fine of up to EUR 14 481.'[18]

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[15] Commission notice on immunity from fines and reduction of fines in cartel cases (OJ 2002 C 45, p. 3).

[16] Commission notice entitled 'Guidelines on the method of setting fines imposed pursuant to Article 15 (2) of Regulation No 17 and Article 65(5) [ECSC]' (OJ 1998 C 9, p. 3).

[17] See case C-501/11 P *Schindler Holding Ltd and Others v European Commission* EU:C:2013:522, para 58. Also see Hasic, F. 'The European Commission's Fining Guidelines and their Legal Challenges' (*A dissertation submitted to Ghent University in partial fulfilment of the requirements for the degree of Master of Laws*) (2020) 59 < https://libstore.ugent.be/fulltxt/RUG01/002/835/942/RUG01-002835942_2020_0001_AC.pdf> [2022-06-17].

[18] Law on Competition of the Republic of Lithuania (version of 2021-04-29, No XIV-279), *supra* note 7.

It should be stressed that there is no specific law regarding the calculation of sanctions that are imposed on a manager of an undertaking under Article 40(1).

According to Article 4 1(5) of the Law on Competition, when imposing sanctions specified in Article 40(1) of this Law on the manager of an undertaking, the court shall act in compliance with the principles of justice, reasonableness and fairness and take into consideration the following: 1) the gravity of the infringement committed by the undertaking; 2) the duration of the infringement committed by the undertaking; 3) the nature of the involvement of the manager of the undertaking in the infringement committed by the undertaking; 4) the behaviour of the manager of the undertaking in the course of the investigation carried out by the Competition Council in relation to the infringement committed by the undertaking; 5) other relevant circumstances.[19]

The very first resolution of the CC to refer to the Vilnius Regional Administrative Court an application for the imposition of personal liability provided for in Article 40(1) on a manager of an undertaking was adopted on 15 June 2017. The CC requested the imposition of personal liability on the former manager of *Žagarės inžinerija*, for his direct involvement in the anti-competitive agreement between the undertaking he worked for and its competitor, by restricting his right to occupy managerial positions in the public or private sector for four years and by way of a fine of 9 000 EUR[20]. The CC's proposition was based on considerations that: i) *Žagarės inžinerija* committed a very grave violation of competition law (together with its competitor rigged their bids in the public procurement for the purchase of technical equipment and, thus, infringed the Law on Competition); ii) the violation lasted six months[21]; iii) the former manager of that undertaking directly contributed to that violation with his active actions; iv) the former manager did not obstruct the ongoing investigation, nevertheless, he did not take any actions that would have assisted the CC in its investigation[22]. It is clear that the circumstances that were considered important for the imposition of sanctions on the former manager of *Žagarės inžinerija*, literally reflected the wording of Article 41(5) of the Law on Competition. Nevertheless, the content of the short and concise

[19] Ibid., Article 41 (5).

[20] Resolution No 1S-61 (2017) of the CC of 15 June 2017, para 23. Available at https://kt.gov.lt/uploads/docs/docs/2954_c97c0ce821e74bcc247cf2fbc0591540.pdf [2022-05-10].

[21] Meaning not the actual duration of the infringement but the one which is considered to have been established for the purposes of calculating the fine under the para 12 of Rules on setting the fine. This provision sets: 'A period of less than six months shall be deemed to be half a year.'

[22] Resolution No 1S-61 (2017) of the CC of 15 June 2017, *supra* note 20, paras 22–23.

resolution of the CC (3.5 pages long) did not actually provide any tangible guidance on the methodology for calculating the sanction proposed on the former manager of that undertaking.

In the next resolution of the CC (which was adopted only a few months later than the *Žagarės inžinerija* case), the CC stated that the duration of the restriction of the right to occupy managerial positions in the public or private sector should be determined on the basis of the average of the minimum and maximum sanction provided for in Article 40(1), taking into account circumstances relevant to the imposition of that sanction[23]. However, in the light of the rather homogeneous circumstances this time, the CC proposed to restrict the right to occupy managerial positions in the public or private sector of the relevant managers for a period of four years with no additional fines[24]. In this case, three undertakings – *Baltic Transport Service*, *Convertus* and *Gedarta* – committed a very grave violation of competition law, which lasted for six months. The managers of those undertakings directly contributed to the infringement by their active actions. The managers did not obstruct the ongoing investigation, nevertheless, they did not take any actions that would have assisted the CC in its investigation.

Unfortunately, the subsequent resolutions of the CC on personal liability of managers for infringements of the Law on Competition have not been made public, so no reasonable conclusions can be drawn regarding the development of the 'general formula' for calculating sanctions or refining more specific criteria that may lead to an adjustment of the average of the sanction to one side or the other. And while it is true that some data from these resolutions is actually reflected in the subsequent administrative court decisions, it is too fragmented to allow any reasonable conclusions to be drawn in that matter. For instance, the judgment of the Vilnius County Administrative Court reveals that quite similar circumstances (very grave violation of competition law, which lasted for six months, to which the managers of those undertakings directly contributed by their active actions) led the CC to propose a restriction on the right to occupy managerial position in the public or private sector on the manager of *Nebūk briedis* – for a period of 5 years with an additional fine of 14000 EUR. In subsequent cases, the CC proposed to place a restriction on the managers of *Media medis* and *Ministerium* – for a period of 4 years and an additional fine of 8000 EUR; and on the manager of *TV Europa* – for a period of 3 years with additional fine

[23] Resolution No 1S-112 (2017) of the CC of 31 October 2017, para 34. Available at https://kt.gov.lt/uploads/docs/docs/3182_54758a5af21ab9a5fbb9f305e5e6e14e.pdf [2022-06-06].

[24] Ibid., para 35.

of 7000 EUR[25]. It is apparent that the different regime of sanctions for all those managers was due, *inter alia*, to the varying degrees of intensity of their direct involvement in the infringements of competition law. Nevertheless, the judgment lacks far more detailed information to identify any elements that have had a decisive influence on CC's proposal to impose financial penalties overall, what the rationale was to propose the average (and more) of the range of the fine set out in Article 40(1), etc. It should be noted that this is not due to the issue of the quality of judicial reasoning – the judgment itself is critical of the lack of reasoning of the CC resolution, therefore, no wonder that the proposal of the CC was drastically modified[26].

To sum up, legal norms applicable in the field of the liability of managers of undertakings in the Republic of Lithuania indicate only first, the possible limits of the sanctions and second, the non-exhaustive list of circumstances to be considered relevant when those sanctions are imposed; the resolutions adopted by the CC in this context are not public, and so there is no way to learn (even in very general terms) its methodology of calculating sanctions. As a result, it is only possible to form a vague idea on the basis of the rather fragmented information provided for in the case-law of the administrative courts.

In the light of the above-mentioned criteria enshrined in the jurisprudence of the CJEU, it is notable that the exercise of the discretion of the CC in this regard is actually not limited by any rules of conduct. The administrative practice of the CC cannot be regarded as familiar and accessible, hence it is not possible to estimate in a sufficiently precise manner the method of the calculation and the magnitude of the sanctions that are imposed on managers of undertakings under Article 40(1) of the Law on Competition. As a result, the criticism of the institution of personal liability of managers of undertakings under the Law on Competition must be taken as a fact. This is so considering the universal requirement of every fining policy to be transparent and objective, in order to guarantee that the sanctions imposed are proportionate, individualized and in accordance with principles of, *inter alia*, justice, reasonableness, and fairness, not to mention the principle of legal certainty.

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[25] See judgment of Vilnius County Administrative Court 26 April 2018, administrative case No eI-1194-815/2018 together with the order of the Supreme Administrative Court of the Republic of Lithuania of 18 December 2019, administrative case eA-2005-624/2019, para 3.

[26] The Court imposed fines of EUR 900 and EUR 920 on the managers of (respectively) *Ministerium* and *Media medis*; the case was terminated with respect to the managers of *Nebūk briedis* and *TV Europa* due to the missed deadline for submitting to the court the request to impose sanctions set for in Article 40(1).

III. Sanctions regime for managers of undertakings under competition law in the Republic of Lithuania: the powers of the court

Turning back to the wording of the Article 40(1) of the Law on Competition, it is clear that according to this provision the manager of an undertaking may be subject to a restriction of her right to occupy managerial position in the public or private sector and, apart from that, also subject of a fine. Therefore, it seems appropriate to call these sanctions accordingly 'the main' and 'the additional' sanction (the restriction being 'the main' and the fine being 'the additional' sanction). It does not appear from the wording of this provision that the main and the additional sanctions should be considered as alternatives. Therefore, one can argue that an additional sanction (a fine) can be imposed only if the main one (a restriction of the right to occupy managerial position in the public or private sector) is imposed.

Such a position would also seem to be substantiated in the light of the intentions of the legislator. The Explanatory Memorandum provided that '[t]he draft proposes to supplement the Law on Competition with a new Article 44^1, which stipulates that the manager (natural person) of an undertaking (legal entity) may be subject to a single and indivisible sanction for contributing to a prohibited agreement or abuse of a dominant position – restriction of the right to hold the position of the head of a public and/or private legal person, to be a member of the collegial supervisory and / or management body of a public and/or legal person. Restriction of this right can be applied for 3 to 5 years. This restriction may be accompanied by an additional sanction – a fine.'[27]

Therefore, it is particularly interesting to note that, following the jurisprudence of the Constitutional Court of the Republic of Lithuania, the administrative courts of the Republic of Lithuania have adopted quite a different approach, based on the constitutional principle of justice.

The very first judgment regarding the liability of managers of undertakings for the infringement of competition rules in the Republic of Lithuania was adopted on 30 March 2018 by the Vilnius County Administrative Court (hereinafter; the Court). Some important aspects of this judgment should be highlighted regarding the imposition of the sanctions.

In this case, the CC referred a request to the Court to impose a restriction of the right to occupy managerial position in the public or private sector on

[27] The Explanatory Memorandum of the Amendment of the Law on Competition, *supra* note 8.

managers of three undertakings[28] for a period of 4 years. The Court referred to, *inter alia*, paragraphs 2, 4 and 5 of Article 41, which state that:

> '2. The resolution referred to in paragraph 1 of this Article shall contain the circumstances forming the basis for the application together with the supporting evidence attached thereto as well as a reasoned proposal in relation to the imposition of the sanctions provided for in Article 40(1) of this Law and their scope. In adopting a decision to impose sanctions, the court shall not be bound by the proposal of the Competition Council in relation to sanctions and their scope.
> <…>
> 4. Upon examining the application of the Competition Council, the court shall adopt one of the following decisions:
> 1) to apply the sanctions specified in Article 40(1) of this Law;
> 2) to reject the application.
> 5. When imposing the sanctions specified in Article 40(1) of this Law on the manager of an undertaking, the court shall act in compliance with the principles of justice, reasonableness and fairness and take into consideration the following:
> 1) the gravity of the infringement committed by the undertaking;
> 2) the duration of the infringement committed by the undertaking;
> 3) the nature of involvement of the manager of the undertaking in the infringement committed by the undertaking;
> 4) the behaviour of the manager of the undertaking in the course of investigation carried out by the Competition Council in relation to the infringement committed by the undertaking;
> 5) other relevant circumstances.'[29]

In accordance with these provisions, the Court concluded that it may, but is not obliged to impose the sanctions requested by the CC on the relevant manager, and, after examining all the circumstances of the case, the Court may reject the request of the CC. In the Court's view, it also follows that in the case of approval of the CC's request, the Court is not bound by the CC's proposal on the sanctions and their scope, and must impose sanctions in accordance with the principles of justice, reasonableness and fairness, also having regard to all the circumstances referred to in Article 41 (5) of the Law on Competition, an exhaustive list of which has not been provided by the legislator.

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[28] The undertakings were held liable for violating competition law by concluding anti-competitive agreements in the field of public procurement. The duration of the violation was half a year. Fines of 25 000 Lt and 20 800 Lt (approximately EUR 7246.37 and EUR 6029) were imposed on those two undertakings. See order of the Supreme Administrative Court of the Republic of Lithuania of 3 August 2017, administrative case No A-417-822/2017.

[29] Paragraphs 2, 4 and 5 of Article 41 of the Law on Competition, *supra* note 7.

In other words, the Court may impose the sanction requested by the CC or reduce it, it may also, after considering all the circumstances of the case, impose a higher sanction than that requested by the CC. In the Court's view, this provision follows directly from the constitutional powers and imperatives of the administration of justice of the court, under Article 109 of the Constitution of the Republic of Lithuania. This means that in each individual case, the court has a constitutional duty to properly individualize the sanctions imposed on individuals for legal violations, and to individualize any restrictions imposed on them by the law. However, it must do so in a reasoned manner and, in cases of this nature, it cannot disregard the 'Rules concerning the setting of the amount of a fine imposed for the infringement of the Law on Competition of the Republic of Lithuania.'[30]

The Court made a reference to the jurisprudence of the Constitutional Court of the Republic of Lithuania, where the latter stated that not only can the legislator not establish legal provisions that would restrict the court's ability to properly individualize restrictions of the rights of individuals; but also the court itself cannot fail to fulfil the obligation to properly individualize restrictions imposed in each case. Legal provisions must create legal preconditions for the court to examine all the circumstances relevant to a case and make a fair decision. Conversely, legal provisions cannot be such that a court is not allowed to make a fair decision and thus administer justice, while considering all relevant circumstances of a case, in accordance with the law and without violating the imperatives of justice and reasonableness arising from the Constitution. Otherwise, the powers of the court to administer justice arising from the Constitution would be violated, and this would deviate from the constitutional concept of the court as an institution administering justice on behalf of the Republic of Lithuania, as well as from the constitutional principle of the rule of law[31].

Nevertheless, after taking into consideration the direct contribution of the managers to the infringements of competition law committed by their represented undertakings as well as the absence of mitigating circumstances relevant to the individualisation of the sanction, the Court completely accepted the request of the CC in this case[32]. This judgment wasn't appealed to the Supreme Administrative Court of the Republic of Lithuania (hereinafter: the Supreme Administrative Court) and became final.

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[30] Judgment of Vilnius County Administrative Court of March 30, 2018, administrative case No eI-767-1063/2018.

[31] Ruling of the Constitutional Court of the Republic of Lithuania of 14 April 2014, case No. 22/2011-28/2011.

[32] Judgment of Vilnius County Administrative Court of March 30, 2018, *supra note* 30.

The legal instrument of the individualisation of sanctions emphasized in this case has been employed and developed effectively by administrative courts in their subsequent case-law on the liability of managers under competition law. However, its influence is probably best seen in cases where the judiciary did not agree with the sanctions proposed by the CC. For instance, in its judgment of 28 April 2018, the Court not only significantly adjusted the sanctions proposed by the CC, but also did so by interpreting relevant norms of the Law on Competition in a quite unexpected way with regard to the intentions of the legislator.

In this case, the CC submitted to the Court a request to impose on the managers of two undertakings[33] a restriction of their right to occupy managerial position in the public or private sector for a period of 4 years and to impose fines of EUR 8 000 on each of them[34]. Firstly, the Court compared these sanctions with those provided for in the Criminal Code and in the Code of Administrative Offenses, which led to the conclusion that sanctions proposed by the CC serve a criminal rather than economic, compensatory and disciplinary function, as is the case with economic sanctions for infringements of competition law by undertakings[35]. Secondly, the Court elaborated that within the meaning of Article 41(5) of the Law on Competition, an infringement committed by an undertaking must be assessed not only formally, that is, that a cartel agreement is prohibited (formally the most serious infringement within the meaning of competition law). It is also necessary to assess the financial expression of the prohibited agreement, as well as the economic sanction for the infringement committed by the undertaking itself, since it indicates the seriousness of the infringement committed by the undertaking (if an undertaking's gross annual income is very small, according to the Court, the effect of such an undertaking on competition and the market, even in the case of a serious infringement of competition, is not particularly serious)[36].

Then the Court stressed that, under Article 40(1) of the Law on Competition, the Court has the right to impose the following sanctions: first, to impose only a restriction of rights; second, to impose only a fine; third, to

[33] The CC had requested to impose sanctions on more managers of other undertakings, but the Court terminated part of the case regarding the CC's request concerning those managers. As regards the liability of undertakings: they were held liable for violating competition law by concluding anti-competitive agreements in the field of public procurement. The duration of the violation was half a year (actually, only 8 days) and those two undertakings were fined EUR 4000 and EUR 4200. See order of the Supreme Administrative Court of the Republic of Lithuania of 15 September 2017, administrative case No eA-909-552/2017.

[34] Judgment of Vilnius County Administrative Court of 28 April 2018, administrative case No eI-1194-815/2018, para 1 of part II.

[35] Ibid, para 2.1. of part II.

[36] Ibid, para 3 of part II.

impose both sanctions together[37]. Actually, this argument of the Court was not accompanied by any further explanations and so it seemed at odds in the light of the wording of the Article 40(1) provision as well as the text of the Explanatory Memorandum.

The Court assessed the proposed sanctions through the prism of the possibility to fairly, righteously and reasonably differentiate such sanctions in the future. According to the Court, the imposition of the said sanctions would create the conditions and preconditions for the formation of inconsistent case-law, based on a formal understanding of the dangers of prohibited agreements. Therefore, the Court compared the fines imposed on the defendants' undertakings with those imposed on various other undertakings for violations of competition law and, accordingly, assessed that the degree of the gravity of an infringement that was committed by the undertakings that were managed by the defendants in this case, 'was not particularly grave'[38]. Arguably, this was the starting point for finding the right balance to assess the proportionality of the sanctions proposed by the CC.

The Court ruled that the defendants in this case could not be sanctioned by imposing the restriction proposed by the CC, as it would disproportionately restrict their rights in comparison with the gravity of the violation committed by the undertakings. Moreover, the Court noted that this would disproportionately restrict the rights of the defendants in choosing an employment activity. In the light of those arguments, the managers of both undertakings were sanctioned with fines of EUR 900 and EUR 920. The Court added that under Article 41(6) of the Law on Competition, the list of managers on whom the sanctions provided for in Article 40(1) of this law had been imposed by a final court ruling, is published on the website of the CC. In the Court's view, this will particularly deter defendants from committing future infringements of competition law[39].

The CC brought an appeal to the Supreme Administrative Court claiming, *inter alia*, that according to the Law on Competition, the Court could not impose only additional sanctions (fines). However, the Supreme Administrative Court did not uphold this position. The Court referred to the jurisprudence of the Constitutional Court of the Republic of Lithuania, which had been followed in the aforementioned case-law of the Vilnius County Administrative Court. On this basis, the Supreme Administrative Court concluded that interpreting Article 40(1) of the Law on Competition so that a manager of an undertaking, who contributed to a prohibited agreement or abuse of a dominant position concluded by that undertaking, may be subject to the main sanction only

[37] Ibid.
[38] Ibid.
[39] Ibid, para 5 of part II.

(a restriction of his right to occupy managerial positions in the public or private sector), with its lower and upper limits of 3 to 5 years – without the court having the discretion, when imposing sanctions in a given case, to take into account all the relevant circumstances and to impose a lower (main) sanction than that prescribed by the said provision or even, not to impose a sanction at all – would raise doubts as to the incompatibility of such legal provision with the rule of law[40]. Accordingly, the Supreme Administrative Court stated that Article 40(1) of the Law on Competition did not establish an imperative to impose both sanctions (the main and the additional one) and the court may decide not to impose a main sanction or an additional sanction or impose a less severe sanction than the main sanction and/or an additional sanction provided in the legal provisions etc.[41] On the other hand, the Supreme Administrative Court stressed that the imposition of a lesser basic sanction, than the one provided for in the law, is not a rule but an exception. As emphasized in constitutional doctrine regarding legal liability, the court may impose a lesser sentence than that prescribed by law only in the case of special mitigating circumstances, which must be taken into account because otherwise the imposition of a penalty as prescribed by law would be manifestly unfair. The court has a duty to apply the institution of a lesser sentence than that prescribed by law with the utmost care and diligence, so as not to harm the interests of the victim, the society and the state. In each individual case, the court's decision to impose a less severe sentence than that prescribed by law must be reasoned. An unjustified and/or unreasonable imposition of a lesser sanction than that prescribed by law would not result in justice; hence it would be in conflict with justice, a constitutional principle of the rule of law[42].

An excellent example of the individualisation of a sentence, where the Court significantly reduced the sanction proposed by the CC (although not deviating from the lower limit of the sanction enshrined in the Article 40(1)) was set in the judgment of 3 July 2019 of the Vilnius County Administrative Court[43]. This case actually concerned the very first decision of the CC on the liability of the manager of an undertaking under Article 40(1), and,

[40] Order of the Supreme Administrative Court of the Republic of Lithuania of 18 December 2019, administrative case No eA-2005-624/2019, para 33.

[41] Ibid, para 34.

[42] Ibid, para 35. Nonetheless, it should be noted that the Supreme Administrative Court reversed the judgment of the Vilnius County Administrative Court and imposed fines of EUR 2000 and EUR 4000 on those managers. Moreover, the right of both managers to occupy managerial positions in the public or private sector was lowered to six months.

[43] Judgment of Vilnius County Administrative Court of 3 July 2019, administrative case No eI-92-1063/2019.

incidentally, Court took this circumstance into account for the purpose of the individualisation of the sanction[44].

In this case, the CC adopted a resolution to refer an application to the Court for the imposition of a sanction – a restriction of the right to occupy managerial positions in the public or private sector for a period of four years as well as a fine of EUR 9000 – on one manager of the undertaking[45]. According to the Court, such sanction was of a criminal nature rather than for deterrence, the purpose of which could have been the protection of the market from dishonest managers. The Court also took into account that, at the time of the violation, the defendant was a young manager without legal education, and he became historically the first manager to face a CC referral to the Court that requested the imposition of sanctions. Moreover, the practice of imposing such sanctions was not known, and could not be known, by the said manager. The Court was also persuaded, by the annual income declarations submitted by the defendant, that the imposition of a sanction would disproportionately damage that person's financial situation. Finally, Court stated that the duration of the violation (23 April 2014 – 15 July 2014) was also a significant factor deciding on the amount of the sanction: the said duration wasn't regarded as long in comparison with other cases dealt with by the CC[46].

To sum up, in the light of such circumstances, the Court concluded that the proposed sanction was not proportionate and that its mitigation would be in accordance with the principles of justice, reasonableness and fairness (Article 41(5) of the Law on Competition). It is worth bearing in mind that, at that time, a case-law on sanctions on managers of undertakings under Article 40(1) of the Law on Competition was not yet in place. According to the Court, the application of the sanction proposed by the CC would prevent fair differentiation of sanctions imposed on managers whose infringements are incomparably more significant, and would create preconditions for the formation of erroneous case-law based on a formal understanding of the dangers of cartels. Overall, the Court imposed a restriction to hold a managerial position for three years and rejected the request of the CC to

[44] The hearing of this case was postponed and, as is apparent from the information already presented in this paper, during that time the administrative courts of Lithuania had adopted several decisions on the liability of managers under Article 40 (1) of the Law on Competition.

[45] This undertaking was held liable together with one other for violating competition law by concluding anti-competitive agreements in the field of public procurement. The duration of the violation was half a year (actually, less than 3 months) and a fine of 33400 litas (approximately EUR 9681) was imposed on this undertaking. See judgment of the Vilnius County Administrative Court of 27 April 2017, administrative case No eI-1923-476/2017.

[46] Judgment of Vilnius County Administrative Court of 3 July 2019, *supra* note 43.

impose a fine of EUR 9000[47]. This judgment was fully upheld by the Supreme Administrative Court[48].

One more relevant element for the evaluation of sanctions imposed on managers of undertakings was formulated and developed in the jurisprudence of administrative courts of Lithuania. In its judgment of 11 October 2019, the Vilnius County Administrative Court stated that it is the given undertakings that commit the most dangerous violations of competition law, by concluding prohibited agreements or committing an abuse of a dominant position. Under the provisions of the Law on Competition, managers commit their own infringement by contributing to the infringements of the undertakings. However, according to the Court, such infringements are less dangerous and cannot be sanctioned more severely than the primary infringements of the undertakings.[49]

Therefore, taking into account that three companies – *Elmis*, *Ledevila* and *Vortex Capital* – were fined respectively, EUR 1, EUR 2100 and EUR 12600 for violating competition law, the Court did not agree with the CC's proposal to impose, on every manager of those companies, a restriction of their right to occupy managerial position in the public or private sector for a period of 4 years and also a fine of EUR 6000. Instead, the Court ruled to impose the said restriction on the manager of *Elmis* (the undertaking, which was fined EUR 1) for a period of 6 months; on the manager of *Ledevila* (the undertaking, which was fined EUR 2100) for a period of 2 years; and on the manager of *Vortex Capital* (the undertaking, which was fined EUR 12600) for a period of 3 years. The manager of the latter undertaking was also fined EUR 1000.[50] Yet in another case, where the undertaking was sanctioned almost twice as much as the fine imposed on *Vortex Capital* (that is, EUR 26600; albeit the undertaking did not contest the CC's decision on its corporate sanctions for violating competition law, nor did its manager contested the CC's resolution to request the Court to pursue liability under Article 40(1)), the Court fully agreed with the proposal of the CC and imposed a restriction of the right to be a manager for 3 years[51].

In another case, the Court agreed that, bearing in mind the fines imposed on the two relevant undertakings for violating competition law (EUR 3685 900

[47] Ibid.

[48] Order of the Supreme Administrative Court of the Republic of Lithuania of 15 March 2021, administrative case No. eA-254-822/2021.

[49] Judgment of Vilnius County Administrative Court of 11 October 2019, administrative case No. eI-3264-815/2019, para 4.2. See also order of the Supreme Administrative Court of the Republic of Lithuania of 3 March 2021 in administrative case No eA-383-502/2021.

[50] Judgment of Vilnius County Administrative Court of 11 October 2019, *supra* note 49, paras 5.1, 5.2, 5.3.

[51] Judgment of Vilnius County Administrative Court of 26 October 2021, administrative case No. eI4-2766-463/2021.

on *Irdaiva*; EUR 8513500 on *Panevėžio statybos trestas*), the request of the CC was proportionate to impose sanctions on the managers of those undertakings (EUR 11000 in addition to 4 years of restriction on the manager of *Irdaiva*; EUR 14481 in addition to 5 years of restriction on the manager of *Panevėžio statybos trestas*)[52]. This ruling was upheld by the Supreme Administrative Court very recently. Assessing the proportionality and scope of sanctions imposed on managers of undertakings, the Supreme Administrative Court *inter alia* stressed that the undertakings which participated in the prohibited agreement were among the largest Lithuanian construction companies, they have committed a grave violation of competition law, and the sanctions imposed on those undertakings reached the maximum prescribed under the Law on Competition[53]. Accordingly, as it can be seen, the manager of *Panevėžio statybos trestas* was also sanctioned with a maximum penalty set out in Article 41(1) of the Law on Competition, and became the first manager to receive such a severe punishment.

In another case, the Court took into account that the investigated undertaking was fined EUR 209800 for violating competition law, that the relevant manager was in office for three years[54], and although he did not obstruct the investigation and provided the required information, he did not take any active steps to assist the CC. Having regard, *inter alia*, to those circumstances, the Court ruled that the CC's proposal was proportionate to impose on the said manager a restriction of his right to be a manager for 5 years and a fine of EUR 3620[55]. Thus, the case-law of administrative courts of the Republic of Lithuania reveals three important elements in the context of imposing sanctions on the managers of undertakings for infringements of competition law: firstly, in exceptional circumstances, courts have jurisdiction to impose a lower penalty than the prescribed by law. Secondly, irrespective of the wording of Article 40(1) of the Law on Competition, that presupposes a regime of basic and additional sanctions to be imposed on the managers of undertakings, the courts may actually impose any of them (as well as both of them). Thirdly, the level of sanctions to be imposed on managers of undertakings under Article 40(1) of the Law on Competition should be determined in the light of the fines imposed on the relevant undertakings.

[52] Judgment of Vilnius County Administrative Court of 22 December 2020, administrative case No eI4-4592-815/2020, para 5.

[53] Order of the Supreme Administrative Court of the Republic of Lithuania of 17 February 2022, administrative case No eA-105-822/2022, para 29.

[54] Though the violation of competition law, by way of concluding anti-competitive agreements in the field of public procurement concluded by the undertaking, lasted from 2012 to 2017.

[55] Judgment of Vilnius County Administrative Court of 1 March 2021, administrative case No. eI4-2037-815/2021, para 7.

All this can presumably serve as a defence strategy for managers of undertakings who are facing the enforcement of the sanctions regime under Article 40(1). The relationship of the level of sanctions imposed on managers and those on their undertakings, as introduced in the jurisprudence of administrative courts, sheds some light on the requirements under the principle of legal certainty. Sanctions under Article 40(1) are of criminal nature and are applied towards natural persons. For that reason, guarantees of the principle of legal certainty need more attention in legal practice.

IV. Conclusions

The legislation relevant to the liability of managers of undertakings for infringements of competition law, and the non-public nature of the administrative practise of the Competition Council of the Republic of Lithuania, makes it impossible to foresee in a sufficiently precise manner the method of calculating and the magnitude of potential sanctions. The case-law of administrative courts does not provide much clarity due to the fragmented nature of the information provided therein, which can hardly be related to the quality of the court's reasoning, but rather is caused by (likely) limited reasoning of the CC resolutions.

The court has the power to impose a smaller penalty than the one specified by law. It may also impose only a fine, irrespective of the wording of the Competition law and the intentions of the legislator, whereby a restriction of the right to occupy managerial positions in the public or private sector should be regarded as the main sanction for managers and a fine – as an additional one. According to the jurisprudence of administrative courts, the imposition of a smaller basic sanction than prescribed by law is not the rule, but an exception. Therefore, doing so can only take place in the light of special mitigating circumstances.

According to the jurisprudence of the administrative courts, the level of severity of sanctions imposed on managers of undertakings should be determined in the light of the fines imposed for the relevant infringements of competition law on the specific undertakings. This criterion sheds some light on the requirements of the principle of legal certainty. Nevertheless, there are so many elements unknown to the public in the methodology for calculating antitrust sanctions that one can argue that the regime of sanctions imposed on managers of undertakings for infringements of competition law in the Republic of Lithuania, is quite deficient with regard to the principle of legal certainty.

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Does the 'more appropriate' authority need to be independent? Rule of law implications for case referrals with respect of concentrations

by

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CONTENTS:

Abstract

In the recent *Sped-Pro* judgment, the General Court ruled that in order to guarantee effective judicial protection of the complainant, the Commission is obliged to examine the given national competition authority's independence, and overall rule of law concerns, when it rejects complaints regarding Article 102 TFEU and concludes that such an authority is 'best placed' to hear the case. This contribution aims to discuss whether such obligation applies to case referrals from

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the Commission to Member States with respect of concentrations. On one hand, these are the same national competition authorities and the same standards should apply. On the other – the case referral system differs from the characteristics of the Articles 101–102 TFEU framework. Thus, this paper contains a discussion on the General Court's judgment in *Sped-Pro*, the legal framework and practice regarding merger referrals, and, finally, the consequences of the judgment for the future approach of the Commission in the discussed matter.

Resumé

Dans le récent arrêt Sped-Pro, le Tribunal a jugé qu'afin de garantir une protection juridictionnelle efficace du plaignant, la Commission est tenue d'examiner l'indépendance de l'autorité nationale de la concurrence concernée, ainsi que les préoccupations générales en matière d'État de droit, lorsqu'elle rejette des plaintes au titre de l'article 102 du TFUE et conclut qu'une telle autorité est «mieux placée» pour connaître de l'affaire. Cette contribution vise à discuter si une telle obligation s'applique aux renvois d'affaires de la Commission aux États membres en matière de concentrations. D'une part, il s'agit des mêmes autorités nationales de concurrence et les mêmes standards devraient s'appliquer. D'autre part, le système de renvoi des affaires diffère des caractéristiques du cadre des articles 101 et 102 du TFUE. Ainsi, cet article discute de l'arrêt du Tribunal dans l'affaire Sped-Pro, du cadre juridique et de la pratique concernant les renvois en matière de concentrations et, enfin, des conséquences de l'arrêt pour l'approche future de la Commission dans la matière discutée.

Key words: referrals of concentrations; national competition authority; regulator's independence; rule of law; EU merger regulation; control of concentrations; European Competition Network; effective judicial protection; internal market.

JEL: K21

I. Introduction

The present contribution aims to examine whether the recent judgment of the General Court (hereinafter: GC) in the *Sped-Pro* case[1] implies any changes in the assessment of requests for case referrals with respect to concentrations under Article 4 (4) EU Merger regulation (hereinafter: EUMR).[2] In the said judgment, the GC concluded that the European Commission, when rejecting a complaint regarding an abuse of dominant position and concluding that a

[1] Case T-791/19 *Sped-Pro v Commission* EU:T:2022:67.

[2] Council Regulation 139/2004 on the control of concentrations between undertakings, [2004] OJ L 24/1.

national competition authority (hereinafter: NCA) is best placed to hear the case on the basis of EU legislation, shall have regard to the right to effective judicial protection and thus is obliged to examine, in a specific and accurate manner, the rule of law concerns raised in the course of the proceedings. In *Sped-Pro*, these concerns related to the independence of the Polish competition authority (hereinafter: UOKiK) in this specific case, given the fact that UOKiK is a governmental body but the complaint concerned alleged abuse of a dominant position held by a state-owned enterprise, PKP Cargo.

This recent example, along with Union's secondary legislation,[3] the Court's case law in this regard,[4] communications from EU institutions[5] and earlier calls voiced in the literature,[6] confirms that the discussion on the application of Article 2 TEU, the Union's values and the rule of law in particular, is not of abstract and indirect nature, as it indeed streams from such areas as internal market and competition law.

The *Sped-Pro* judgment concerns a specific legal framework related to the prohibition to abuse a dominant position that, in the discussed context, applies also to large extent to anticompetitive agreements. That framework includes Articles 101–102 TFEU, Regulation 1/2003,[7] Regulation 773/2004[8] and Directive 1/2019.[9] As discussed below, when enforcing these fundamental prohibitions, the Commission and the NCAs cooperate closely

[3] Regulation 2020/2092 of the European Parliament and of the Council on a general regime of conditionality for the protection of the Union budget, [2020] OJ L 433I/1.

[4] See cases C-156/21 *Hungary v. European Parliament and the Council* EU:C:2022:97; C-157/21 *Poland v. European Parliament and the Council* EU:C:2022:98.

[5] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 2020 Rule of Law Report – The rule of law situation in the European Union, 30.9.2020, COM(2020)580 final.

[6] See *inter alia*: D. Kochenov, Bard, 'Rule of Law Crisis in the New Member States of the EU: The Pitfalls of Overemphasising Enforcement', Reconnect Working Papers No. 1 (2018), M. Bernatt, 'Rule of Law Crisis, Judiciary and Competition Law', Legal Issues of Economic Integration (2019) 46(4), 345–362; L. Spieker, 'Breathing Life into the Union's Common Values: On the Judicial Application of Article 2 TEU in the EU Value Crisis,' German Law Journal (2019), 20(8), 1182–1213, K. Lenaerts 'New Horizons for the Rule of Law Within the EU', German Law Journal (2020), 21(1), 29–34; M. Bernatt, 'The double helix of rule of law and EU competition law: An appraisal', European Law Journal, 2022, https://doi.org/10.1111/eulj.12422.

[7] Council Regulation No 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.

[8] Commission Regulation 773/2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, [2004] OJ L 123/18 (as further amended).

[9] Directive 2019/1 of the European Parliament and of the Council to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, [2019] OJ L 11/3.

and they both may apply directly effective Union provisions to anticompetitive conducts.[10]

For concentrations, the legal framework and conditions for the cooperation between the Commission and the NCAs are different.[11] Commonly, that cooperation takes the shape of case referrals from the Commission to Member States' NCAs or the other way. The main differences, as detailed in this article, include the application of national competition laws in cases referred from the Commission to the NCAs, or the scope of effective judicial protection granted by applicable EU legislation or national laws.

Thus, the purpose of this article is to examine whether the *Sped-Pro* judgment impacts the assessment standard in case referrals with respect to concentrations by extending the Commission's obligation to guarantee full effectiveness of individuals' rights by a requirement to assess rule of law concerns and, in particular, the NCAs' independence.

The scope of assessment in this contribution is limited to case referrals under Article 4 (4) EUMR, that is, referrals made on request of the merging parties before the transaction is notified to the Commission. These are referrals from the Commission to NCAs, that is, instances where rule of law concerns can be raised. As requests are submitted by the merging parties, this involves different perspectives on effective judicial protection, compared to the legal framework of the *Sped-Pro* case.

II. The General Court's judgment in Sped-Pro

1. Overview of the case

The *Sped-Pro* case concerns an action for the annulment of the Commission in the matter AT.40459 (Rail freight forwarding in Poland). Sped-Pro is a company seated in Poland, active in the freight forwarding market. In its business conduct, Sped-Pro relied on transportation services provided by PKP Cargo, a Polish state-owned rail company, holding a dominant position on the rail transport market in Poland. In its complaint filed to the Commission

[10] More on the interplay between decentralized system of EU competition law and the rule of law, including the consequences of the *Sped-Pro* judgment: Bernatt, 'The double helix…', 14–18.

[11] However, calls are voiced that in the context of the rule of law crisis, and following the *Sped-Pro* judgment, the Commission should act towards concentrations similarly to what it is obliged to do when Articles 101–102 TFEU are applied, see: Bernatt, 'The double helix…', footnote 138.

in November 2016, Sped-Pro claimed that PKP Cargo abused its dominant position by refusing to conclude a contract with Sped-Pro and to grant the complainant the requested, non-discriminatory rebates.

Given the circumstances of the case, the Commission concluded that UOKiK would be more appropriate to review this matter and, therefore, decided to reject the complaint, acting on the basis or Article 7 (2) of Regulation 773/2004. The Commission found that UOKiK was a better placed authority to assess the complaint (due to earlier proceedings conducted vis-à-vis PKP Cargo) and that the alleged practices concerned only relevant markets in Poland.

The Commission discussed also other arguments raised by Sped-Pro that are relevant for this article. In particular, it referred to an argument concerning Poland's violation of the rule of law (including proceedings under Article 7 TEU) and the lack of independence by UOKiK. The Commission concluded, however, that Sped-Pro's arguments were unsubstantiated and that the complainant did not submit any convincing evidence in this regard. In particular, in the Commission's view, the fact that the President of UOKiK is appointed by the Polish Prime Minister did not suffice to conclude that UOKiK would not be independent in proceedings regarding a state-owned company.

Indeed, in the course of the proceedings, Sped-Pro argued that UOKiK would be indulgent towards a state-owned company, also given the fact that it is appointed by the Prime Minister for an undefined term and they can be dismissed at any time. Additionally, Sped-Pro argued that PKP Cargo was one of the those that funded the Polska Fundacja Narodowa (the Polish National Foundation), which was funded by the largest Polish state-owned companies and conducted several media campaigns advocating the recent changes in the Polish judicial system (questioned from the perspective of the rule of law by the EU Courts and the Commission on several occasions).

In the action for annulment, Sped-Pro raised three pleas, two of which deserve further discussion. The second plea concerned an infringement of the right to effective judicial protection, by failing to have regard to the reasonable doubts as to the upholding of the rule of law in Poland and, in connection with this, the independence of the courts and of UOKiK. In the third plea, Sped-Pro argued that the Commission committed manifest errors in the assessment of the interest of the European Union and in the delimitation of the relevant market in this case.

The GC acknowledged the pleas regarding the obligation to guarantee effective judicial protection, and a precise assessment of rule of law concerns. The GC found that the Commission limited its assessment of UOKiK's independence to a general conclusion that the concerns raised by Sped-Pro were unsubstantiated and not supported by evidence. In particular, the GC

noted that such conclusions did not prove that the Commission conducted a substantive analysis of the premises raised by the complainant. It also did not explain why the Commission has considered all these premises as unsubstantiated.

Thus, the GC concluded that the decision did not prove that the Commission would concretely and precisely assess the complaint's arguments with respect to rule of law concerns in Poland. Such concise conclusions did not allow the complainant to understand the precise reasons underlying the rejection. It also did not allow the GC to effectively control the compatibility of the decision with EU law, and to examine whether there were serious and verified grounds to conclude that the complainant's rights would not be negatively affected if the case was dealt with by national authorities.

2. The Union's interest in maintaining the case

The discussed plea concerned essentially the interpretation of the notion of Union's interest in retaining the infringement proceedings, within the meaning of Article 102 TFEU, Articles 17 (1) and 7 (2) of the Regulation 773/2004, Article 7 of the Regulation 1/2003 and their full effectiveness. Although the plea was ultimately dismissed, the GC made two observations that are relevant for this contribution.

Firstly, Sped-Pro raised the argument that the Union's interest in retaining the case with the Commission resulted from the fact that Polish law does not grant any judicial remedies against UOKiK's orders dismissing complaints regarding an infringement of Articles 101–102 TFEU.

In this regard, the GC relied on the Court's settled case-law, confirming the principal conclusion that by Article 19 (1) paragraph 2 TEU, Member States committed themselves to provide in their national laws remedies that sufficiently ensure effective legal protection in the fields covered by Union law. Therefore, it is not for the Commission to remedy the possible defects in national laws in that regard by initiating Articles 101–102 TFEU investigations. Indeed, such conclusion has been consistently maintained by the Court in many different contexts regarding the effectiveness of national and EU legal remedies.[12]

Secondly, the GC confirmed the Commission's wide margin of discretion when deciding on the Union's interest in accepting or refusing a complaint regarding an infringement of Articles 101–102 TFEU. This discretion is limited by the obligation to investigate fully factual and legal circumstances included

[12] See e.g. cases C-619/18 *Commission v. Poland* EU:C:2019:531, paras 48-50; C-583/11 *P Inuit Tapiriit Kanatami* EU:C:2013:625, paras 97–102.

in the complaint, as well as by guidelines issued by the Commission itself.[13] However, in a specific case, the Commission's margin of discretion allows it to select and apply specific criteria stemming from the Court's case-law and omit the other.[14]

Admittedly, observations regarding the Union's interest, within the meaning of the Articles 101–102 TFEU legal framework, do not translate directly into such considerations in merger control and case-referrals specifically. In particular, the application of the former is regarded as a matter of public policy.[15] At the same time, it is debatable if such public interest can be observed in the case of merger referrals, and whether it would imply the need for the Commission to maintain its jurisdiction in specific matters.

In any event, one should bear in mind the two discussed observations from the *Sped-Pro* judgment. Firstly, the Commission enjoys a wide margin of discretion when applying specific criteria regarding Union's interest. Secondly, any potential flaws in national legislation should be examined from the perspective of Article 19 TEU and not remedied by Commission proceedings.

3. Rule of law and the competition authority's independence

In the discussed plea, Sped-Pro claimed that the Commission's refusal decision infringed the claimant's right to effective judicial protection, as stipulated in Article 2 TEU, Article 19 (1) paragraph 2 TEU and Article 47 of the Charter of Fundamental Rights of the European Union. Specifically, the Commission should have retained the case if systemic and general anomalies in respecting the rule of law in Poland and, in particular, the lack of independence of UOKiK and of Polish courts having jurisdiction in that area, were confirmed. For UOKiK, Sped-Pro raised the general and already discussed issue of the authority's subordination vis-à-vis the executive. For courts having jurisdiction to review UOKiK decisions (from SOKiK, the court of first instance for competition matter, to the appropriate chamber of the Supreme Court), Sped-Pro claimed that these courts did not enjoy adequate guarantees of independence and impartiality, as defined in the Court's case-law regarding changes in the Polish judicial system.

The GC firstly reflected on whether the verification of a NCA's independence should be conducted with the use of, by analogy, the two criteria set out in

[13] Ibid, paras 39–40. See to that effect the Commission Notice on cooperation within the Network of Competition Authorities, [2004] OJ C 101/43.

[14] Case T-791/19 *Sped-Pro v Commission* EU:T:2022:67, paras 55–60.

[15] See e.g. recital 1 of Directive 2019/1; case C-126/97 *Eco Swiss* EU:C:1999:269, para 39.

the Minister for Justice and Equality case (or, the *LM* case).[16] In that regard, Poland argued that the said judgment concerned a very different case, namely the cooperation between courts in criminal matters, and thus it could not be compared to a rejection of a complaint in a competition law matter, which has an administrative character.

The GC acknowledged the differences between criminal proceedings and competition matters. However, it concluded that there were several significant reasons justifying the application, by analogy, of the LM criteria in the assessment whether a NCA is more appropriate then the Commission to hear a case on the basis of Articles 101–102 TFEU.

Firstly, the GC reconfirmed the principle that all Member States share, respect and promote common values, as referred to in Article 2 TEU. As a result, the Union is built on mutual trust that these values are respected in all Member States.[17] That fundamental basis remains effective in the relations between the Commission, NCAs and national courts in the context of the application of Articles 101–102 TFEU. It is so, because, just like the provisions regarding the area of freedom, security and justice, the legal framework establishing the European Competition Network and regulating the cooperation between national courts and the Commission, establishes a system of strict cooperation between respective bodies, which is based on the principles of mutual recognition, mutual trust and sincere cooperation.

In the context of the application of Articles 101–102 TFEU this fundamental basis is further specified in secondary law and other Union principles. First, Regulation 1/2003 grants the NCAs parallel competences to apply Articles 101–102 TFEU. In that context, the NCAs are obliged to secure full effectiveness of these provisions, and to cooperate with each other closely. Secondly, Article 4 of Directive 2019/1 expressly requires that the NCAs shall be independent when applying Articles 101–102 TFEU, that is, perform their duties impartially and in the interest of the effective

[16] Case C-216/18 *PPU Minister for Justice and Equality* EU:C:2018:586. Importantly, the Court concluded that when assessing the independence of a national court, a twofold test needs to be performed. Firstly, it needs to be examined on the basis of information that is objective, reliable, specific and properly updated concerning the operation of the justice system in a given Member State, whether there is a real risk, connected with a lack of independence of the courts of that Member State on account of systemic or generalized deficiencies therein, of the fundamental right to a fair trial being breached. Secondly, if the first criterion is met, it is necessary to assess specifically and precisely whether, in the particular circumstances of the case, there are substantial grounds for believing that, following the judiciary's surrender to the Member State, a given person will run the risk of a breach of the essence of her fundamental right to a fair trial (para 68).

[17] The General Court referred to that effect to case C-619/18 *Commission v. Poland* (quoted above).

and uniform application of those provisions, subject to proportionate accountability requirements, and without prejudice to the close cooperation between competition authorities in the European Competition Network.[18] Third, Articles 101–102 TFEU are directly effective and constitute a source of rights, which has been directly conferred on individuals, which need to be protected by national courts.[19]

Secondly, the settled case law allows the Commission to reject a complaint if the effects of the alleged Article 101–102 TFEU infringement are limited to the territory of a given Member State, and its NCA has conducted proceedings on the given infringements. In such circumstances, there is no Union interest to retain the case, provided that rights of the complainant are adequately protected by national bodies (including both competition authorities and courts). In this context, the GC noted that if systemic or generalised deficiencies that threaten the independence of those bodies existed, the complainant's rights would be exposed to a real risk of being infringed.[20]

Thirdly, the right to an effective remedy and to a fair trial, as stipulated in Article 47 of the Charter, has particular significance for the effective application of Articles 101–102 TFEU. In that regard, national courts are obliged to review the legality of a competition authority's decisions on one hand, and to apply these provisions directly on the other. This is further reflected by Article 19 (1) TEU and the Member States' obligation to ensure effective legal protection in the fields covered by Union law, including competition law.[21]

Consequently, the GC concluded that the Commission needs to take into account the issue of compliance with the rule of law when it makes a decision that NCAs are more appropriate to deal with Articles 101–102 TFEU matters. In its assessment, the Commission may apply, by analogy, the criteria set out in the LM judgment.

Further, the GC referred to arguments made by the claimant in relation to UOKiK's general lack of independence vis-à-vis Polish state-owned enterprises and PKP Cargo in particular. The GC concluded that it could not be deduced

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[18] On UOKiK's independence, also within the context of the discussed provision, see: M. Kozak, 'Raz, dwa, trzy, niezależny będziesz ty… O konieczności szerszego spojrzenia na niezależność polskiego organu antymonopolowego w świetle dyrektywy ECN+', iKAR 2019, 6(8), 23–38 or more broadly: I. Małobęcka-Szwast, 'The Appointment and Dismissal Procedure of the Polish NCA in the Light of EU and International Independence Standards'. Wroclaw Review of Law, Administration & Economics (2018) 7(2). On the NCAs' independence under the ECN+ Directive see: M. Patakyová, I'ndependence of National Competition Authorities – Problem Solved by Directive 2019/1? Example of the Antimonopoly Office of the Slovak Republic', Yearbook of Antitrust and Regulatory Studies (2019) 12(20), 127–148.

[19] Case *T-791/19 Sped-Pro v Commission* EU:T:2022:67, paras 84–88.

[20] Ibid, paras 89–90.

[21] Ibid, para 91.

from the rejection decision whether the Commission actually verified these arguments and properly assessed UOKiK's independence in that specific case. Since the GC found a violation of the general obligation to take into account rule of law and independence matters, it annulled the Commission's decision to reject the requested referral.

The present contribution does not aspire to reflect on the adequacy of the LM criteria to be applied, even by analogy, to NCAs and national competition courts[22]. Due to the specific context of that judgement, and extremely severe consequences of a potential declaration that a given national court lacks independence, the LM test is strict and still difficult to apply in practice.[23] It seems to be even more challenging to apply it in order to assess the independence of a given NCA or of national competition courts.[24] That concerns particularly the second criterion, namely establishing if there are substantial grounds for believing that, following the authority's surrender to the government of its Member State, a given undertaking will face the risk of an infringement of the essence of the fundamental right to a fair trial. For national competition courts these considerations might be too indirect and hypothetical, when conducted in circumstances similar to the *Sped-Pro* proceedings or merger referrals. For the NCAs, one may try to establish that such risk materializes when the other party is a state-owned undertaking (or otherwise connected to the State Treasury), and the practice of a given NCA is to treat such entities leniently (give them a favoured treatment). Such arguments would, however, require a further in-depth discussion taking into consideration *inter alia* Commission practice regarding the concept of state-owned enterprises[25] or Article 345 TFEU, and the principle of neutrality of the Treaties with regard to the system of property ownership in Member States.

[22] See on that point: Bernatt, 'The double helix…', 7–10.

[23] For further discussion see: Filipek, 'Rozproszona europejska kontrola przestrzegania prawa do rzetelnego procesu sądowego w świetle zasady wzajemnego zaufania i wyroku C-216/18 PPU LM', Europejski Przegląd Sądowy (2019) (2) 14–31.

[24] Especially given that in many Member States NCAs have not been independent in a broader sense, also before the discussion on the relation between that factor and the rule of law or effective judicial protection took place, see: M. Guidi, 'Delegation and Varieties of Capitalism: Explaining the Independence of National Competition Agencies in the European Union'. Comparative European Politics, (2014) 12(3).

[25] Critically on the Commission's approach towards Polish SOEs: A. Svetlicinii, 'Ownership-neutral or ownership-blind? The case of Polish state-owned enterprises in EU merger control', Journal of Antitrust Enforcement 2022.

III. Case referrals under Article 4 (4) EUMR

1. Purpose and effect of Article 4 referrals

Before discussing in detail rules governing the application of Article 4 (4) EUMR, it is worth outlining the key purposes, features and effects of case referrals under this provision. Similarities and differences between these aspects, on one hand, and the rules regarding the application of Articles 101–102 TFEU, on the other, need to be taken into account when commenting on the relevance and applicability of the *Sped-Pro* case to the scope of the Commission's obligations and competence when conducting Article 4 (4) EUMR proceedings.

With respect to concentrations, the system of case referrals serves the purpose of facilitating the reattribution of cases between the European Commission and Member States. It is designed to appropriately adjust the default mechanism for jurisdiction and case allocation, that result from the fixed turnover criteria defined in Article 1 paras (2) and (3) EUMR. These adjustments are made in line with the principle of subsidiarity, in order to ensure that the authority is more appropriate to deal with the case carry out particular merger control proceedings.[26]

Both Article 4 paras (4) and (5) EUMR concern pre-notification referrals, and cover, respectively, referrals from the Commission to Member States and from Member States to the Commission. As a result, in these instances, the request for a referral (or, the reasoned submission) can only be submitted by the parties to the envisaged concentration.[27] Thus, these are the merging parties that identify their interest in the reattribution of jurisdiction, and preliminarily assess the fulfilment of applicable criteria in the reasoned submission.

Therefore, in regular circumstances, the parties will not regard the change of jurisdiction as leading to the limitation of their rights resulting from directly effective Union law. By contrast, they will request that change to obtain the expected benefits resulting from a more effective allocation of the case. As a result, a case referral, even to a non-independent NCA, would not adversely impact rights and legal status of the decision's addressees. However, it may be regarded as potentially affecting third parties' or (Union) public interest.

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[26] Commission Notice on Case Referral in respect of concentrations (2005/C 56/02), [2005] OJ C 56/2 (Notice on referrals) paras 3, 5. On broader reasons underlying referrals from the Commission to Member States, see: M. Mainenti, 'Delegation in EU merger control: The determinants of referrals to national competition authorities (2004–2012)', Public Policy and Administration 2019, 34(3), 329–348.

[27] Notice on referrals, paras 47, 49.

Similarly to other merger proceedings, initial contacts with the Commission, taking place before the formal submission of a referral-request, are of vital importance.[28] Indeed, many aspects of the case can be debated and decided at this early stage. This may apply to rule of law issues and the NCA's independence considerations, if conducted in such proceedings.

Importance of such initial contacts results also from the shortness of statutory deadlines. The Commission has 25 working days for a decision whether or not to refer the case to NCAs. It also communicates the reasoned submission to all Member States, which then have 15 days to express their agreement or disagreement on the referral.

As it follows from the statistics published on the Commission's website,[29] from 2004 to date, the Commission received 211 reasoned submissions, 200 of which were decided positively (full or partial referral) and only one was refused.[30] The remaining requests might have been withdrawn after the initiation of proceedings, probably when the requesting parties learned from the Commission that they would be refused. It can be presumed that the Commission has been approached by the merging parties more times than the reported 200+ cases, and that effectively the requests were not submitted at all due to an informal refusal from the Commission.

This may confirm that the requesting parties accept the fact that the Commission enjoys a wide degree of discretion when deciding on case referrals, and that chances for challenging a formal refusal decisions are limited.

The discussed margin of discretion granted to the Commission results from the wording of Article 4 (4) subparagraph 3 EUMR. It provides that unless the Member State identified in the request disagrees with the referral, and when the Commission concludes that legal requirements for a referral have been fulfilled, the Commission 'may decide to refer the whole or part of the case to the competent authorities of that Member State.' Therefore, even if all criteria established by Article 4 (4) EUMR are met, the Commission may still refuse to refer the case as requested by the merging parties. Some authors criticise the exercise of these discretionary powers by the Commission. On one hand, in the event of refusal, it leads to asserting jurisdiction in certain areas[31], despite the fulfilment of legal requirements, and therefore affects legal certainty. On

[28] On the importance of such contacts before the notification of the merger see: J. Leitenberger, M. Zedler, 'Making Merger Review Work' in J. Kokott, Pohlmann, R Polley (eds), *Europäisches, Deutsches und Internationales Kartellrecht' Festschrift für Dirk Schroeder zum 65. Geburtstag* (1st edn, Verlag Dr. Otto Schmidt KG 2018), 466–467.

[29] See: https://ec.europa.eu/competition-policy/mergers/statistics_en, accessed 29 June 2022.

[30] *MOL / OMV SLOVENIJA* (M.10438).

[31] V.K. Kigwiru, 'Case Referrals under the European Union (EU) Merger Regime' (2020), available at SSRN: http://dx.doi.org/10.2139/ssrn.3534985.

the other, it may serve shifting the blame for policy failures,[32] and thus expose the referral decisions to risk of being more political than substantive.

A very important feature of case referrals under EUMR is that they result not only in the change of forum, but also in the change of applicable competition law.[33] It follows from Article 4 (4) EUMR subparagraphs 3 and 5 that the Commission 'may decide to refer (…) the case to the competent authorities of [the Member State referred to in the reasoned submission] with a view to the application of that State's national competition law' and that 'if the Commission decides (…) to refer the whole of the case, no notification shall be made pursuant to paragraph 1 and national competition law shall apply'. That is reflected in settled case-law of the Court confirming that 'by adopting a referral decision, the Commission terminates the procedure applying [EUMR] to those aspects of the concentration which are the subject of the referral and transfers exclusive competence to the NCAs to assess those aspects on the basis of national law. It thus loses any power to deal with those aspects.'[34] This is significantly different from rules provided for in Regulation 1/2003,[35] where the NCAs apply EU competition rules to anti-competitive practices.

2. Requirements for referral and scope of examination by the Commission

Article 4 (4) EUMR provides for two legal requirements for a case referral to a Member State: 'that [1] the concentration may significantly affect competition in a market within a Member State [2] which presents all the characteristics of a distinct market and should therefore be examined, in whole or in part, by that Member State.' Essentially, the first requirement means that within a given Member State, there must be a market significantly affected by the envisaged concentration and so, the transaction deserves a more detailed scrutiny and competitive assessment. According to the second criterion, the market affected by the envisaged concentration should be national or narrower

[32] See: M. Mainenti, 'Delegation in EU merger control: The determinants of referrals to national competition authorities (2004–2012)', Public Policy and Administration (2019), 34(3), 329–348.

[33] It can be debated if that change involves only a change of the law applicable to the scope of the notification duty and the assessment of the case, or additionally to a wider scope of matters, such as a breach of standstill obligations, or gun jumping. However, this discussion is of secondary relevance for the purposes of the present contribution.

[34] Case T-380/17 *HeidelbergCement* EU:T:2020:471, para 684.

[35] See Article 3 (3) of the Regulation 1/2003.

in scope, and thus covered by the jurisdiction of a Member State referred to in the reasoned submission.[36]

While the interpretation and application of these substantive requirements deserves separate discussion,[37] they will not be further examined in the present contribution, as they do not fall within the scope of the question whether the independence of a NCA needs to be examined in the course of the application of Article 4 (4) EUMR.[38]

Apart from the said two legal requirements, when deciding on a referral, the Commission takes into account other guiding principles, as referred to in Recital 11 EUMR and further specified in the Notice. Paragraph 8 of the Notice provides that decisions on a referral need to 'take due account of all aspects of the application of the principle of subsidiarity in this context, in particular which is the authority more appropriate for carrying out the investigation, the benefits inherent in a "one-stop-shop" system, and the importance of legal certainty with regard to jurisdiction'. Moreover, when exercising its discretion, the Commission will be guided with 'the need to ensure effective protection of competition in all markets affected by the transaction.'

The assessment whether the NCA is a 'more appropriate authority' includes specific characteristics of the case, but also tools and expertise available to that authority.[39] The Notice reads further that 'particular regard should be had to the likely locus of any impact on competition resulting from the merger' and that 'regard may also be had to the implications, in terms of administrative effort, of any contemplated referral', such as costs of/and time delays as well as risks of conflicting assessments if the case is examined by several authorities.

Thus, the discussed criterion of 'more appropriate authority' does not explicitly refer to the authority's independence. At the same time, the notion remains open for a wide interpretation, especially if the Commission were to assume that troubles with meeting the independence criteria may impact the given NCS's substantive assessment and, consequently, lead to a clearance (a prohibition) that would have (would have no) adverse effect on competition.

Further, a case referral should not undermine the benefits inherent in the 'one-stop-shop' approach. Therefore, a case shall be handled by a single authority, and the fragmentation of cases through referrals, need to be

[36] O. Bretz, M. Leppard, 'EU Merger Control' (2019), available at SSRN: http://dx.doi.org/10.2139/ssrn.3385447, 33–34.

[37] For instance, the question whether the existence of affected markets wider than national in scope precludes the possibility to refer the case. To that effect, see the Commission's decisions: M.8971 INA/PPD/Petrokemija, paras 21, 33; M.9952 PKN ORLEN / PGNiG, paras 51–67.

[38] For an in-depth analysis of the discussed legal requirements see: U. von Koppenfels, D. Dittert in Ch. Jones, L. Weinert, *EU Competition Law Volume II: Mergers and Acquisitions*, (3rd edn, Elgar 2021), 169–194.

[39] Notice on referrals, par 9.

avoided if possible. That contributes to efficiencies from both perspectives of administration and the undertakings concerned, who avoid multiple filings.[40]

According to the principle of legal certainty, 'referral should normally only be made when there is a compelling reason for departing from "original jurisdiction" over the case in question.'[41] As it follows from paragraph 14 of the Notice, this principle applies also to the referral criteria. For pre-notification requests, the criterion implies that referrals should be limited to cases where it is rather straightforward to assess, from the outset, the fulfilment of the substantive legal requirements, and thus promptly decide on the request.

Additionally to the legal requirements and guiding principles, paras 19–23 of the Notice discuss other factors to be considered when specifically assessing a request made under Article 4 (4) EUMR. These factors mainly concern the preliminary competitive assessment of the transaction, and its impact on markets other than those of the Member State referred to in the request.[42]

One of these criteria applies to NCAs as it concerns the authority's 'specific expertise concerning local markets, or be examining, or about to examine, another transaction in the sector concerned.'[43] This may include a given NCA's expertise resulting from previous cases conducted with respect to, either the markets affected by the envisaged transaction, or the parties concerned. Additionally, national legislation may provide that authority with specific (or sectorial) competences on a given market, which helps the NCA to be better placed in understanding its specific features, and conducting a competitive assessment of the case. Since this criterion discusses the characteristics of a particular NCA, it may be argued that 'lack of independence' could negatively impact the exercise of that very expertise, and so this specific condition needs to be taken into account also when deciding on the referral to a given Member State.

To conclude on this part, neither the legal requirements explicitly provided in Article 4 (4) EUMR, nor other criteria and guiding principles specified in the Notice, refer to the independence of NCAs as a factor requiring examination when deciding on a merger case referral. However, the criterion of 'more appropriate authority' seems to be wide and flexible enough to cover the discussed matter, in particular if the lack of such independence could lead to the issuance of decisions adversely impacting competition. Moreover, one could argue that problems with the independence of NCAs could negatively affect the exercise of specific expertise or competences resulting from previously conducted cases or from particular competences. On the other

[40] Ibid, paras 11–12.
[41] Ibid, para 13.
[42] Ibid, paras 19–22.
[43] Ibid, para 23.

hand, it may be argued that the principle of legal certainty, as referred to in Recital 11 EUMR, specified in the Notice and applied to the referral criteria, opposes the development of additional conditions – such as independence – to be taken into account within an assessment of a given referral request. In any event, neither the EUMR nor the Notice establish or foresee a duty of the Commission to assess the independence of a NCA during referral proceedings.

Similar conditions apply to case referrals under Article 9 EUMR.[44] Although this type of referrals is not subject to an analysis in the present article, it suffices to conclude that neither the EUMR, nor the Notice require, in particular, for the Commission to examine the independence of a NCA when assessing its request for a post-notification case referral.

3. The Commission's decisional practice

Following legislation and soft law, it is worth reviewing the Commission's decisional practice. This makes it possible to verify if concerns regarding the independence of NCAs were taken into account in the past and whether the Commission had examined any factors other than those expressly provided in the EUMR or the Notice.

Firstly, this section focuses on recent positive referral decisions in the matters *PKN ORLEN*/*PGNiG* and *PKN ORLEN*/*RUCH*, as they seem to be particularly relevant in the context of the questions contemplated in this article. Secondly, the Commission's decision in *MOL*/*OMV SLOVENIJA* is briefly discussed, which constitutes the only instance so far of a refusal to refer the merger proceedings to a given NCA. Thirdly, this section concludes with an overall analysis of all other Article 4 (4) EUMR referral decisions, in order to verify which criteria were assessed when referring given matters to Member States.

The cases *PKN ORLEN*/*PGNiG* of 25 March 2021 and *PKN ORLEN*/*RUCH* of 12 February 2020 concerned referral requests submitted by PKN ORLEN, an undertaking with a significant shareholding of the Polish State Treasury. PKN ORLEN is a Polish oil company, which adopted a multi-utility strategy and started its expansion on different (mostly energy-related) markets. Although in the *PKN ORLEN*/*Grupa LOTOS* merger decision of 14 July 2020, the Commission did not conclude that PKN ORLEN was controlled by the Polish State Treasury,[45] it is undisputed that regardless of the current political setting, the discussed undertaking has always been strongly connected with

[44] Ibid, paras 33–41.

[45] And it remained skeptical with respect to arguments regarding the State's *de facto* control over PKN ORLEN. See: *PKN ORLEN* / *Grupa LOTOS* (M.9014), paras 26–37.

the State Treasury and Poland's policy.[46] On the other side, the transactions involved PGNiG, the state-owned incumbent on the Polish gas markets (the merger between PKN ORLEN and PGNiG was, after it was referred to UOKiK, the largest one in the history of UOKiK) and RUCH, one of the largest distributors of printed press as well as owner of kiosks and newsagents located in Poland.

It could be assumed in *PKN ORLEN*/*PGNiG* that any clearance of the transaction would be conditional, given the market positions of the parties (*inter alia* PGNiG being the largest natural gas supplier in Poland while PKN ORLEN is the largest customer on that market) and the Commission's earlier decisional practice in similar cases.[47] Therefore, it cannot be excluded that a change of forum might impact the ultimate shape of commitments required by a given competition authority, especially due to the transaction's strategic meaning for the Polish government and the subtle nature of markets affected by the envisaged concentration. As a result, the discussed case seems to be particularly relevant when reflecting on the independence assessment of a NCA in the course of referral proceedings.

Importantly, the *Sped-Pro* case had been pending before the GC for over a year, while the Commission was proceeding the *PKN ORLEN*/*PGNiG* referral to the UOKiK, the independence of which was questioned by *Sped-Pro*.

Moreover, almost parallel to the M.9952 PKN ORLEN/PGNiG referral proceedings, in another national merger decision from 5 February 2021, *PKN ORLEN*/*Polska Press*, the UOKiK cleared PKN ORLEN's acquisition of Polska Press, a press publishing house particularly present in regional press segments. The UOKiK approved the concentration despite statements given in the course of the proceedings by the Commissioner for Human Rights and some other market participants. They argued, *inter alia*, that the merger would threaten media pluralism and competition on several media markets due to PKN ORLEN's strong connection with the State, governmental control over public media and the its overall hostility with respect to media other than pro-governmental. In a wide public debate following that decision, the UOKiK was criticised for not taking into consideration the broader context of the transaction and insufficient competitive assessment. Some of the arguments were directly questioning UOKiK's independence. The Commissioner for Human Rights brought an action for judicial review of that decision, which is a highly exceptional instance in merger proceedings in Poland, as well as proves the significance of that case in terms of scope of the competitive

[46] See: A. Svetlicinii, 'State-Controlled Entities in the EU Merger Control: the Case of PKN Orlen and Lotos Group', Yearbook of Antitrust and Regulatory Studies 2020, 13(22), 204.

[47] *E.ON* / *MOL* (M.3696), *DONG* / *Elsam* / *Energi E2* (M.3868) or *Gaz de France* / *Suez* (M.4180).

assessment in merger proceedings, and the impact of current State policy on UOKiK's decisions[48].

The Commission's referral decision in *PKN ORLEN/PGNiG* was issued on 25 March 2021, a little later than a month after UOKiK's decision regarding the acquisition of Polska Press by PKN ORLEN and the intense debate surrounding the latter decision witnessed in Poland. In the decision, the Commission extensively and precisely examined the fulfilment of the substantive legal requirements for a referral. The wide scope of the assessment resulted from the high number of markets affected by the envisaged transaction, and the fact that, technically, some of these markets were wider than national in scope and thus, *prima facie*, not meeting the second legal condition of a referral.

Further, the Commission assessed additional factors, as provided in paras 19–23 of the Notice. Firstly, it followed the conclusions from the preliminary competitive assessment that the effects of the transaction were likely to be confined to Poland and that UOKiK was thus well placed to review the transaction. Secondly, it relied on evidence submitted in the reasoned submission confirming UOKiK's experience in assessing competition in the affected markets, as it examined several concentrations and competition-related conducts in the Polish energy sectors in recent years.[49] Additionally, the Commission positively verified if following the referral, the benefits of the 'one-stop-shop' would be preserved.[50]

Therefore, in PKN ORLEN/PGNiG, the Commission did not apply any other criteria (such as the independence of UOKiK) than the requirements and factors explicitly provided in the EUMR and the Notice. By taking such approach, it relied on its well-settled practice of examining referral requests. This is particularly relevant given the slightly earlier UOKiK decision in *PKN ORLEN/Polska Press*, and the fact that *PKN ORLEN/PGNiG* involved a merger between a company controlled by the Polish State Treasury and another undertaking strongly connected with that State Treasury.

The Commission's referral decision in *PKN ORLEN/RUCH* was delivered on 12 February 2020. Similarly, it includes an assessment of legal requirements[51]

[48] This article does not seek to comment or analyze in detail UOKiK's decision, which however remains subject to debate in Poland from several perspectives. From the viewpoint of the present contribution, the decision is relevant to the extent that it was delivered while a referral request of a relatively political and significant case regarding the same undertaking and the same NCA was pending before the Commission, so it might have been reflected in the application of the referral criteria. In any event, UOKiK's decision was upheld by the relevant Polish court of first instance (SOKiK) on 8 June 2022. The Ombudsman announced that it would not appeal against that judgment.

[49] *PKN ORLEN / PGNiG* (M.9952), para 73.

[50] Ibid, para 74.

[51] *PKN ORLEN / RUCH* (M.9561), paras 19–31.

and additional factors.[52] With regard to the former, the Commission noted that the competitive assessment would require a detailed examination of the 32 affected local markets in Poland, and that UOKiK had conducted several merger proceedings involving daily consumer markets. It also concluded that the UOKiK had relevant expertise to assess the level of competition between fuel stations (PKN ORLEN) and newspaper kiosks (RUCH) as well as to conduct a competitive assessment of the vertically affected press distribution markets. Finally, the Commission found that the 'one-stop-shop' principle would be maintained.

The decision does not discuss such factors as the independence of the Polish NCA, nor its unwillingness to acknowledge the negative impact of the transaction on the markets for the distribution of press or media pluralism.

To date, the only decision issued under Article 4 (4) EUMR where the Commission refused to refer a case to the relevant NCA regards the matter *MOL/OMV SLOVENIJA*. The parties to the concentration requested the transaction to be examined by the Slovenian Competition Protection Agency. However, in the course of the proceedings Slovenia disagreed with the request. As discussed above, the agreement of the relevant Member State constitutes a procedural condition for the case to be referred. Since this had not been fulfilled, the Commission issued a negative decision – refused the referral request – without conducting any further assessment of the referral requirements or factors. The decision does not elaborate on the reasons why Slovenia did not agree to the referral.

The analysis of all other referral decisions issued on the basis of Article 4 (4) EUMR leads to the conclusion that, so far, the Commission has been adopting a similar, well-settled approach when assessing reasoned submissions in all these cases. It firstly examines the fulfilment of legal requirements provided in the discussed provision; and secondly, it assesses other factors as referred to in paragraphs 19–23 of the Notice. Thus, the Commission verifies if the NCA has specific expertise to hear the case, and whether the 'one-stop-shop' principle would be preserved. None of these assessments includes an examination of any other factors, such as the independence of the named NCA.

It is worth noting that the Commission followed the same pattern in referral decisions delivered after the *Sped-Pro* judgment: Euroapotheca/Oriola[53] (referral to the Swedish NCA), *PPF/MMB*[54] (Czechia), *ITM/MESTDAGH*[55] (Belgium). Thus, to date, the *Sped-Pro* case and the assessment of the

[52] Ibid, paras 32–36.

[53] *EUROAPOTHECA / ORIOLA* (M.10677), paras 29–36 on legal requirements and paras 37–40 on additional factors.

[54] *PPF / MMB* (M.10668), paras 35–41; 42–45.

[55] *ITM / MESTDAGH* (M.10631), paras 21–30; 31–35.

independence of a NCA has not been reflected in the Commission's later decisions to refer merger cases to Member States.

Although referrals made under Article 9 EUMR are not subject to this contribution, analysis of these decisions makes it possible to conclude that the Commission does not consider in such cases a standalone independence condition. In particular, when deciding on a refusal to refer a case to a given Member State, the Commission relies on arguments such as: the margin of discretion it enjoys in these cases, the Commission's particular interest to ensure that competition is preserved in a given market or sector, the fact that the Commission itself is well placed to examine the transaction, the fact that it has already, post-notification, been investigating the transaction (including conduct of a market test or other important substantive and procedural steps), or the need to avoid additional administrative efforts for the parties, especially when they already have started complying with the procedure under the EUMR, having submitted large amounts of information, internal documents or data to the Commission.

To conclude, effective judicial protection or the independence of a NCA has not been a criterion examined by the Commission so far in the course of proceedings under Article 4 (4) EUMR. It is neither foreseen in this provision, nor discussed in the Notice. In particular, it was not applied in *PKN ORLEN/PGNiG*, even though the matter concerned two Polish companies strongly connected with the State Treasury, was highly political and took place while *Sped-Pro* was already pending before the GC as well as shortly after the controversies surrounding UOKiK's clearance of Polska Press. Additionally, until the date of handing in this article, the independence of the NCA had not been contemplated in Commission decisions following the *Sped-Pro* judgment.

IV. Implications for merger referrals

Neither the EUMR, nor Regulations 1/2003 or 773/2004 require the Commission to examine the independence of a NCA when deciding that the NCA may be more appropriate to hear a given case. However, as discussed above, in *Sped-Pro* this obligation was inferred from Article 2 TEU and the individuals' right to effective judicial protection. However, given the significant differences between the application of Articles 101–102 TFEU, on one hand, and the merger control regime, on the other, it deserves separate reflection whether these conclusions apply to referral proceedings under Article 4 (4) EUMR.

One may draw three alternative preliminary conclusions in that regard. Firstly, it follows from *Sped-Pro* that the Commission is obliged to assess the independence of the named NCA also when deciding on referral requests to that authority. Failure to fulfil this obligation constitutes grounds for an annulment of the positive referral decision. Secondly, the Commission is not under an obligation to assess the independence of a NCA, but may exercise its competence in this regard. Thus, if the lack of independence of the given NCA was the reason for refusing the referral, this factor would not constitute grounds to seek an annulment of the rejection decision by the requesting parties. Thirdly, the Commission has neither obligation, nor competence to assess the independence of a NCA in the course of referral proceedings. The refusal of a referral on this basis would, in turn, constitute grounds for an annulment of the decision. These alternative conclusions are further discussed below.

In *Sped-Pro*, Article 2 TEU and the idea that Member States share EU values, so they can mutually trust each other, was further specified with respect to three already discussed characteristics of Articles 101–102 TFEU. These were the key arguments making it possible to conclude that rule of law and the independence of a NCA should have been taken into account by the Commission, in order to guarantee effective judicial protection for individuals. However, these features do not seem to occur in the context of the application of Article 4 (4) EUMR.

Firstly, EU law does not grant NCAs competences to apply EU merger legislation. To the contrary, the result of a case referral is that the NCA applies its own, national competition law to examine the concentration. Thus, in this context, the NCA is not under an obligation to guarantee full effectiveness of any piece of EU legislation, whether on the substantive assessment of the case, or on judicial protection of individuals in the proceedings.

Secondly, contrary to the discussed Article 4 of Directive 2019/1, no provisions of EU legislation expressly require for NCAs to be independent when dealing with merger cases. Looking at this part from a more systemic viewpoint, one may conclude that such requirement results directly from Article 2 TEU. On the other hand, the lack of such requirement seems to be coherent with the fact that NCAs apply their national laws when examining the referred case. It can be argued, therefore, that inferring such requirement from general EU provisions would be disputable regarding the division of competences between the Union and its Member States.

Thirdly, a merger referral does not seem to undermine the full effectiveness of rights of the undertakings concerned. Indeed, in the discussed procedure, these are the parties to the concentration that request a referral from the Commission to the NCA before the case is even notified to the Commission.

Therefore, it is difficult to assume that the parties would be voluntarily acting to their own detriment. Moreover, even if one distinguishes individuals' rights that require protection in such matters, it follows from the Court's established case-law that EU law does not prevent entities from agreeing to limit the full effectiveness of their rights.[56] Consequently, effective judicial protection of the requesting parties does not seem to imply the obligation to assess the independence of a NCA.

However, the conclusion on effective judicial protection of the merging parties needs to be supplemented by the perspective of other undertakings potentially affected by the referral, and, more broadly, the overall Union interest in maintaining the Commission's jurisdiction over given proceedings.

The level of protection of third parties in referral cases is rather low. They normally do not participate in the proceedings in other way than providing replies to the Commission's requests for information. However, third parties do have the right to bring an action for annulment of the referral decision. To do so, they firstly need to prove their legal interest in that application.[57] In practice, such legal interest is accepted, for example, in the case of the competitors of the merging parties, as their commercial position might be affected by the Commission decision.[58] Furthermore, a third party needs to prove, as stipulated by Article 263 (4) TFEU and interpreted in well-known case law of the Court, that they are directly and individually concerned by a referral decision. In the context of merger cases and, similarly, referrals, it is the competitors[59] or potential competitors[60] of the parties, or undertakings active in upstream or downstream markets[61] that are most likely to prove their direct and individual concern.[62]

Third parties may argue that a referral of the case would imply a more lenient (for instance, unconditional clearance or moderate remedies compared to what would have been expected from the Commission's practice) approach of the NCA towards certain types of merging parties (for example, when the State Treasury is an important shareholder or the Member State has any other interest in the merger). However, the EUMR does not grant third parties

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[56] See e.g. cases C-126/97 *Eco Swiss* EU:C:1999:269; C-102/81 *Nordsee* EU:C:1982:107.

[57] Case T-79/12 *Cisco Systems* EU:T:2013:635, para 35; see also J. Faull, A. Nikpay, D. Taylor, Faull & Nikpay: *The EU Law of Competition*, (3rd edn, 2014) 5.1140.

[58] See cases T-177/04 *easyJet* EU:T:2006:187 and T-79/12 *Cisco Systems*, para 36.

[59] See cases T-2/93 *Air France* EU:T:1995:45; T-119/02 *Royal Philips Electronics* EU:T:2003:101; T-79/12, *Cisco Systems* EU:T:2013:635.

[60] Case T-114/02 *Babyliss* EU:T:2003:100.

[61] Case T-158/00 *Arbeitsgemeinschaft der öffentlich-rechtlichen Rundfunkanstalten der Bundesrepublik Deutschland* EU:T:2003:246.

[62] To the effect that these conclusions also apply to referrals, see: I. Kokkoris, H. Shelanski, *EU Merger Control. A Legal and Economic Analysis* (1st edn, OUP 2014) 564.

such rights, the effectiveness of which would have been threatened by a case referral. Even if they may bring an action for an annulment of the referral decision, this takes place within the framework of Article 263 TFEU, with the primary objective to protect and observe EU law, rather than protect individual rights.[63]

Third parties could also argue that under national laws (as it stands, for example in Poland) their access to judicial review and complaints towards a clearance decision is much weaker than under EU law. This argument, however, does not seem to be very successful given settled case-law regarding Article 19 TEU and the Member States' duty to ensure effective judicial protection in their national laws, as confirmed also in the GC's conclusions on the third plea in *Sped-Pro*.

In *Sped-Pro*, these conclusions do not seem to be altered by the GC's observation on the relevance of Article 47 of the Charter and the right to an effective remedy and to a fair trial, for the effective application of Articles 101–102 TFEU. As discussed, for concentrations, the referral of a given case results in the application of national competition law to that matter. Since Union law ceases to apply, the matter will not fall within the scope of the Charter.[64] At the same time, it seems that Article 47 of the Charter does not allow the Commission to assess the third parties' perspectives on judicial remedies and fair trial under national law when the case follows Article 4 (4) EUMR proceedings.

As a result, the effectiveness of judicial protection of the merging parties, or third parties, does not seem to translate into the obligation to assess the independence of a NCA in case referrals.

However, it needs to be assessed whether Union's interest implies the obligation, or at least the competence, of the Commission to examine rule of law and independence concerns in the course of merger referral proceedings. In this context, the Union's interest could be understood broadly as a matter of public policy, and the principles of open market economy and free competition, to which the Treaty and the EUMR refer to. Such approach would thus imply a switch of perspective from the protection of the rights of individuals (as in *Sped-Pro*) to public considerations. This is, however, questionable for a number of reasons.

The first concern results from the characteristics of the referral system. The Commission's jurisdiction is based on rather technical and fixed turnover criteria, which may be verified on the basis of substantive, legal requirements included in Article 4 (4) EUMR (that the concentration may significantly affect competition in a market within a Member State which presents all the

[63] Ibid, 559.

[64] Article 51 of the Charter.

characteristics of a distinct market). Therefore, if these conditions are met, and following the principle of subsidiarity, it would be difficult to identify overall Union interest in maintaining the Commission's jurisdiction to assess a case that is substantively limited to that Member State.

Second, as merger referral results in the transfer of the competence to examine the concentration on the basis of national law, the system is based on the assumption that Union law ceases to apply if the discussed referral requirements and criteria are fulfilled, and the Commission issues a positive referral decision in this regard. Thus, one may identify a systemic assumption that no Union public policy concerns persist in concentrations affecting only a national (or narrower) market.

Third, the Commission enjoys a margin of discretion when identifying Union interest or when taking actions to ensure the effectiveness of EU law. This naturally results not only from Sped-Pro and the case-law quoted therein, but also from the Commission's general role and competence as the guardian of the Treaties. As noted by the GC, this discretion is limited by the obligation to protect the effectiveness of individuals' rights, as well as by guidelines issued by the Commission itself. However, these limitations do not seem to apply to merger referrals. Therefore, *Sped-Pro* does not seem to modify the discretion granted to the Commission in this regard.

Therefore, given all the discussed systemic differences between Articles 101–102 TFEU and case referrals under the EUMR, it seems that the *Sped-Pro* judgment should not be interpreted as implying that the Commission has the duty to examine the independence of a NCA in the course of Article 4 (4) EUMR proceedings, even if such concerns are raised.

At the same time, it does not seem that EU law would prevent the Commission from conducting an 'independence assessment' when deciding on merger referral. As recently noted by the Court, 'the European Union must be able to defend those [contained in Article 2 TEU, including the rule of law] values, within the limits of its powers as laid down by the Treaties.[65] At the same time, the EUMR grants the Commission a wide margin of discretion when examining the legal requirements and other criteria that might be relevant in a specific case. Indeed, those additional criteria are discussed in the Notice on referrals and no other factors have been reflected so far in the Commission's practice. However, this does not mean that the Notice includes an exhaustive list of these criteria and that the Commission cannot infer from the Court's case-law and the wording of the EUMR the requirement that NCAs are capable of hearing the case independently.

[65] Case C-157/21 *Poland v. European Parliament and the Council* EU:C: 2022:98, para 145.

Specifically, the referral system operates as a corrective mechanism, ensuring that a case is dealt with by the most appropriate authority. It remains, however, an exception to general rules on jurisdiction, and thus should be interpreted strictly. Therefore, the application of criteria that maintain such narrow approach would not be regarded as contrary to the principles governing the concentrations referral system.[66]

At the same time, the 'more appropriate authority' criterion may include an 'independence assessment' as long as it serves effective reattribution of jurisdiction in light of the principle of subsidiarity. Since the Commission holds primary jurisdiction over the case, it needs to have adequate tools to assess if, in specific matters, a NCA will be able to examine the concentration so that effective protection of competition would be ensured.

Therefore, the *Sped-Pro* judgment does not imply that the Commission has a duty to assess the independence of a NCA, or other rule of law concerns, when processing a referral request with respect of a given concentration. However, the *Sped-Pro* judgment should be read as confirming the Commission's competence to conduct such an assessment in a specific case. Thus, refusal to refer a case for such reasons would not constitute an infringement of the Treaties within the meaning of Article 263 TFEU, nor would it become grounds for an annulment of such decision.

V. Conclusion

To conclude, the *Sped-Pro* judgment does not seem to bring any significant change to the standard of assessment that the Commission is obliged to follow in proceedings regarding requests for case referrals with respect to concentrations. In particular, the judgment does not supplement existing merger law, nor the decisional practice of the Commission, with an obligation to examine the independence of a NCA, and other rule of law concerns, in the course of Article 4 (4) EUMR proceedings.

Given the significant differences between the characteristics and the application of Articles 101-102 TFEU and Article 4 (4) EUMR, the settled practice with respect to the latter will most likely remain the same. As discussed in this article, arguments on Article 2 TEU, which led the GC to conclude on the Commission's obligation to examine the independence of the NCA with respect to the former legal framework, do not apply directly to merger

[66] Which is in line with the postulate that the Commission shall decide on a referral 'when a compelling reason to deviate from the original jurisdiction (…) exists', R. Whish, D. Bailey, *Competition Law* (8th ed OUP) 890.

referrals. This results from the fact that post-referral, NCAs would not apply EU merger legislation, thus its full effectiveness would not be threatened. Contrary to Articles 101–102 TFEU, no specific piece of merger legislation requires for the NCAs to be independent. Additionally, a case referral would not result in undermining the effectiveness of judicial protection of the undertakings concerned. Such conclusion would not be altered when taking into consideration the interests of third parties or the overall interest of the Union.

However, *Sped-Pro* can be read as confirming that the Commission has the competence to interpret the notion of 'more appropriate authority' as including the independence of a given NCA, and thus to examine that matter in a specific case. The principles underlying the referral system require that jurisdiction is reattributed most efficiently, in light of the principle of subsidiarity and to ensure that competition is not distorted. These clearly allow the Commission to take into consideration rule of law concerns when they seem to be particularly relevant in a given case. In that respect, the judgment in *Sped-Pro* may invite the Commission to conduct such examination with respect to referral requests to Member States that have been encountering problems respecting the rule of law.

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The Comparison of the US and EU Agricultural Antitrust Exemptions

by

Martin Milán Csirszki*

CONTENTS

Abstract

The article aims to compare the sectoral antitrust exemption for agriculture that exists in the United States (US) and the European Union (EU). The roots for the privileged position of agriculture under antitrust laws date back to 1914. Section 6 of the Clayton Act was the first US law which exempted certain cooperatives. In 1922, the protection was extended to a broader range of agricultural entities by the Capper-Volstead Act. These two acts have since then determined the scope and extent of the US exemption but have evolved through judiciary interpretation. The EU has had a similar exemption for agriculture since the beginnings of European integration. After presenting briefly the likely explanations for the privileged treatment of this sector under antitrust, the article aims to analyse the regulations in force in order to explore their similarities and differences. The analysis also

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seeks to answer the question of whether the 'accusation' that EU competition law – in contrast with the US antitrust regime – is not purely based on efficiency considerations can also be extended to the agricultural sector's privileged treatment. In the end, the rules in force of the two jurisdictions are compared and conclusions drawn.

Resumé

Cet article vise à comparer les exemptions sectorielles des règles de concurrence pour l'agriculture qui existent aux États-Unis (US) et dans l'Union européenne (UE). Les origines de la position privilégiée de l'agriculture au regard du droit de la concurrence remontent à 1914. La section 6 du Clayton Act a été la première loi américaine à exempter certaines coopératives. En 1922, la protection a été étendue à un plus large éventail d'entités agricoles par le Capper-Volstead Act. Ces deux lois ont depuis lors déterminé la portée et l'étendue de l'exemption américaine, mais ont évolué par le biais de l'interprétation judiciaire. L'UE dispose d'une exemption similaire pour l'agriculture depuis les débuts de l'intégration européenne. Après avoir présenté brièvement les explications probables du traitement privilégié de ce secteur dans le cadre du droit de la concurrence, l'article vise à analyser les réglementations en vigueur afin d'explorer leurs similitudes et leurs différences. L'analyse cherche également à répondre à la question de savoir si l'»accusation» selon laquelle le droit européen de la concurrence – contrairement au régime antitrust américain – n'est pas purement fondé sur des considérations d'efficacité peut également être étendue au traitement privilégié du secteur agricole. Enfin, les règles en vigueur dans les deux juridictions sont comparées et des conclusions sont tirées.

Key words: antitrust exemption; agriculture; European Union; United States; comparison.

JEL: K21, Q18

I. Introduction

The relationship between agriculture and antitrust has remained uncertain in many aspects ever since antitrust law has come to the fore at the end of the 19th century. However, it became clear early on that general antitrust provisions should not apply to the sector unconditionally, because primary agricultural production has its own burdens. The question whether agriculture's privileged position under antitrust is justified, first of all from an economic perspective, does not have an unequivocal answer. The ambiguity has further increased with the appearance of the consumer welfare paradigm and the

more economic approach, which have not escaped criticism regarding their effects on agri-food markets.[1]

The article aims to provide a comparative legal analysis on the sectoral agricultural exemption of the United States and the European Union, in the expectation that the juxtaposition may deepen the knowledge of the peculiar relationship between antitrust and the agricultural sector. The term 'comparative method' is understood as the functional, structural and hermeneutical methods used in comparative law. The functional one, as the name implies, aims to examine which function a certain provision fulfills in a legal system, and how this function is fulfilled in another legal system. Functionality is 'the basic methodological principle of all comparative law.'[2] The structural method is concerned with the question of the structure in which a legal norm is embedded in a legal system, and how it differs from the structure of another legal system built around a similar legal norm. The hermeneutical method concentrates on textual interpretation of laws. This comparison is not genealogical in nature, because the compared jurisdictions do not have a common ancestor. Instead, it is analogical, which may rather result in weaker conclusions, but 'these weak concepts may in turn be gateways to more profound research which could result in epistemological insights.'[3]

Of course, functional, structural and hermeneutical methods all interrelate in the course of the comparison and so it may be difficult to draw a firm dividing line between the methods. This comparison is based on the functional and structural methods rather than on the hermeneutical one.

The one and only comparison between the agricultural antitrust exemption of the EU and that of the United States was published more than 15 years ago,[4] and since then a number of developments have taken place regarding the issue; it is, therefore, worth giving fresh impetus to the discourse. Furthermore, it takes a political economy approach, rather than comparing the provisions in detail from a legal perspective.

The article is divided into three main parts. First, a concise explanation is provided on the two opposite approaches towards the exempted nature of agriculture under antitrust laws. It is necessary to briefly present that the viewpoints on this issue vary to a great extent, which results in indissoluble

[1] Valeria Sodano and Fabio Verneau, 'Competition Policy and Food Sector in the European Union' (2014) 26(3) Journal of International Food & Agribusiness Marketing 170.

[2] Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law* (Tony Weir tr, 3rd edn, OUP 1998) 34.

[3] Geoffrey Samuel, *An Introduction to Comparative Law Theory and Method* (Hart Publishing 2014) 57–58, 65–120.

[4] Arie Reich, 'The Agricultural Exemption in Antitrust Law: A Comparative Look at the Political Economy of Market Regulation' (2006–2007) 42(3) Texas International Law Journal 843–874.

debates on the sector's competition-related treatment. Second, the paper puts together the current antitrust treatment of the agricultural sector, in terms of both legislation and enforcement, in order to compare the two analysed jurisdictions. Regarding the United States, Section 6 of the Clayton Act[5] and the Capper-Volstead Act[6] are scrutinised, while as to the European Union, attention is directed at the relevant provisions of the TFEU[7] and two EU Regulations, the single common market organisation (hereinafter: the CMO Regulation[8]) and the Regulation setting up antitrust derogations for the agricultural sector (hereinafter: the Agri-Food Competition Regulation[9]). The analysis provides the possibility to explore the similarities and differences between the two sides of the Atlantic. Third, an in-depth comparison is provided for two reasons. First, in order to answer whether it is true that EU competition law does not only operate with efficiency-based assessment in its antitrust applying to the agricultural sector, and second, in order to update the discourse on agricultural antitrust exemptions and fill the analitical gap concerning their comparison.

II. Explanations behind the privileged position of agriculture

Antitrust law contains special provisions exclusively applying to the agricultural sector. These rules aim to put market players of this sector in a more favourable market position. The increased protection is typically provided for farmers, that is, those at the starting point of the agricultural and food supply chain. The question arises as to what explains and justifies the existence of sector-specific rules exempting agriculture from general antitrust rules, and that of sector-specific rules adopted only and exclusively for the agricultural sector.

The positions – in a simplified manner – can be divided into two broad categories. On the one hand, there are those who in most cases have strong reservations about the privileged position of the sector, and argue that there

[5] 15 US Code § 17.

[6] 7 US Code §§ 291–292.

[7] Consolidated version of the Treaty on the Functioning of the European Union (TFEU) [2012] OJ C326/1.

[8] Regulation (EU) No 1308/2013 of the European Parliament and of the Council on establishing a common organisation of the markets in agricultural products and repealing Council Regulations (EEC) No 922/72, (EEC) No 234/79, (EC) No 1037/2001 and (EC) No 1234/2007 [2013] OJ L 347/671.

[9] Council Regulation (EC) No 1184/2006 on applying certain rules of competition to the production of, and trade in, agricultural products [2006] OJ L 214/7.

is little justification for the privileged treatment of farmers under antitrust laws and trade regulations. They are the ones who see in these specific and exceptional norms the strength and success of the agricultural lobby, both at national and EU level, and do not connect the justification behind the adoption of these rules with the specific nature of agricultural production and the resulting anomalies experienced by farmers when selling their goods. As a German author puts it, for example, the minimum harmonisation directive on unfair trading practices in the agricultural and food supply chain[10], has pushed the principles of competition and contractual freedom in the food chain even further into the background, sacrificing them to interest-driven politics.[11] In fact, the national and EU power of the agricultural lobby is considerable and, as European integration has continued to deepen, the lobbying organisations and groups at Community (EU) level have been very effective, within the institutional framework of COPA-COGECA (union of the two largest farmer/agro organisations in Europe, that is, Comité des organisations professionnelles agricoles-Comité général de la coopération agricole de l'Union européenne), which brings together European producers. In this way, they have achieved the Europeanisation of national agricultural interests, which has enabled them to channel their needs and demands into the EU institutions and their decision-making processes.[12] The position of this group can be paralleled with the theory of regulatory capture[13] described by *Stigler* in his influential article on economic regulation theory,[14] which suggests that regulation is nothing more than the result of political battles between interest groups in order to maximise the benefits of a policy for one or another interest group.[15]

Others take a more moderate tone. In *Buhr*'s opinion, legislators and enforcers must be careful when restricting certain contractual practices in the food supply chain and preventing vertical integration or horizontal

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[10] Directive (EU) 2019/633 of the European Parliament and of the Council on unfair trading practices in business-to-business relationships in the agricultural and food supply chain (UTP Directive) [2019] OJ L 111/59.

[11] Philipp Pichler, 'Die Umsetzung der UTP-Richtlinie ins deutsche Recht – Überblick über ein ordnungspolitisches Ungetüm' (2021) 9 Neue Zeitschrift für Kartellrecht 537.

[12] Carine Germond, 'Preventing Reform: Farm Interest Groups and the Common Agricultural Policy' in Wolfram Kaiser and Jan Henrik Meyer (eds), *Societal Actors in European Integration – Polity-Building and Policy-Making 1958–1992* (Palgrave Macmillan 2013) 121–123.

[13] John Lipczynski, John O.S. Wilson and John Goddard, *Industrial Organization* (5th edn, Pearson 2017) 16.

[14] George J. Stigler, 'The Theory of Economic Regulation' (1971) 2(3) The Bell Journal of Economics and Management Science, 3–21.

[15] Herbert Hovenkamp and Fiona M. Scott Morton, 'Framing the Chicago School of Antitrust Analysis' (2020) 168 University of Pennsylvania Law Review 1843, 1854.

concentration, because they may pursue 'risk reducing overall welfare' by not taking into account the advantages of economies of scale and efficiencies created by integration.[16] That is to say, the justification behind sectoral provisions can rather be assessed on a case-by-case basis.

The other group's representatives not only take into account but also emphasise that the agricultural sector has certain specific characteristics which, compared with other sectors of the economy, justify its special treatment under antitrust law.[17] Among these sectoral characteristics, they mention: (a) the long duration of the production period and profitability; (b) the very large number of farmers; (c) the irregularity of the supply of agricultural products, that is, the difficulty of predicting and determining the quantity and quality of harvests; (d) the rigidity of demand, that is, the fact that demand is independent of price changes; (e) the fact that agricultural production costs adapt to falling prices with astonishing slowness. In addition, there are also non-economic aspects such as the strong conservatism of farmers, for whom agriculture is not only a source of income that provides them with living expenses but also a complex lifestyle.[18] The most important objective and unavoidable factor, which is the basis of many of the characteristics listed, is the dependence and vulnerability of agricultural production to weather and climatic conditions. Unusual weather conditions are clearly reflected in the year-to-year volatility of yields,[19] which is reflected in price volatility of produced goods. These factors strongly determine, influence and constrain farmers who wish to market and sell their produce to food processors, wholesalers and retailers. The effects of price volatility are increasingly being felt by producers as the globalisation of the food chain and the increasing integration of agricultural markets are having their effects felt more rapidly than ever before on domestic markets.[20]

The truth may lie on the Horatian *aurea mediocritas*: by finding the middle ground somewhere halfway between these two groups. The agricultural lobby does include strong and vocal interest groups, both at national level and in the European Union, but its representatives can bring about convincing arguments

[16] Brian L. Buhr, 'Economics of Antitrust in an Era of Global Agri-Food Supply Chains: Litigate, Legislate and/or Facilitate?' (2010) 15(1) Drake Journal of Agricultural Law 59.

[17] See, for example: K.J. Cseres, '"Acceptable" Cartels at the Crossroads of EU Competition Law and the Common Agricultural Policy: A Legal Inquiry into the Political, Economic, and Social Dimensions of (Strengthening Farmers') Bargaining Power' (2020) 65(3) The Antitrust Bulletin 406.

[18] Wilhelm Röpke, *Crises and Cycles* (William Hodge & Company 1936) 21.

[19] John B. Penson, Jr., Oral Capps, Jr., C. Parr Rosson III and Richard T. Woodward, *Introduction to Agricultural Economics* (7th edn, Pearson 2018) 24.

[20] Food and Agriculture Organization of the United Nations, Price Volatility in Agricultural Markets: Evidence, impact on food security and policy responses (2010).

to get the legislation they want. This is – of course – a clear privilegisation from the viewpoint of antitrust law. Nevertheless, as an additional remark, it is worth mentioning that the commodification of agricultural products and foodstuffs, that is treating them merely as commodities, ignores their most important feature: food is essential. Those who produce it are predominantly not only sellers of products in a given market but also representatives of the rural lifestyle, the guardians of rural communities. Moreover, the necessity of food for our existence may suggest that those who produce our foodstuffs need protection against exclusionary and exploitative business conducts so that they can appropriately perform their activity. The absence of sector-specific regulations would show precisely that this specificity is not respected during the lawmaking processes. The exceptional norms for the agricultural sector, and the specific norms adopted solely and exclusively for the agricultural sector, such as the UTP Directive in the EU, lead us towards the opposite direction, that is, towards the acknowledgement of agriculture's importance beyond commodity production. There are no illusions here, this argument is insufficient from the standpoint of antitrust; therefore, it is reasonable to search for economic justifications.

Agricultural antitrust exemptions are related to anti-competitive agreements, which make it possible for agricultural producers and their associations to combine forces and unite their economic power. This statutory possibility, both in the EU and the United States, is crucial so that farmers could have countervailing market power against their buyers. Buyer power depresses the prices producers receive for their products, which is beneficial for end consumers if these lower prices paid to suppliers by buyers are actually reflected in lower consumer prices in the retail sector.[21] Buyer power can be evidenced by an 'asymmetric' price response of retail products to farmgate price changes. This means, for example, that when there is a supply shortage that raises farmgate prices, this increase is immediately passed on to consumers, while when there is a decrease in farmgate prices, the expected decrease in retail prices appears only gradually, and results in high profits for intermediaries during the period in which prices are unusually high.'[22]

Lower farmgate prices may force less competitive agricultural producers out of business or mean that producers in their capacity as employers lower the wages of their workers. Therefore, there is a connection between the ability of competition regimes to address buyer power problems and rural

[21] On price transmissions, see: Commission of the European Communities, Analysis of price transmission along the food supply chain in the EU (2009).

[22] Executive Summary, OECD Policy Roundtable on Competition and Regulation in Agriculture: Monopsony Buying and Joint Selling (2004) 8.

employment.[23] There are scholars who even find a a causal link between buyer power abuses and violations of the right to food.[24] It goes without saying that these problems – unless linked to monopsony – are difficult to be handled by antitrust agencies strictly operating with the credo of increasing economic efficiency (mostly in the form of consumer welfare).

Buyer power has two forms: monopsony power and bargaining power. While the former is inefficient in all cases because of its withholding effect, the latter requires a much more careful analysis whether it actually has adverse effects on competition.[25] Countervailing power established with the help of the exemption offsets monopsony power,[26] but the exemption in the EU is also applicable when farmers face bargaining power which does not necessarily constitute a danger to efficiency. Therefore, it seems that the statutory exemption may create a possibility for agricultural producers to have market power versus their buyers even when this power has nothing to countervail. It may even be detrimental in that consumer prices might increase. This is called supervailing power by *Baumer, Masson and Masson*. As can be seen later, for the sake of controlling supervailing power which may arise from the antitrust exemption, US antitrust has a 'control mechanism' in the form of forbidding undue price enhancement.[27] This explicit control mechanism is missing in EU antitrust.

Based on *Carstensen*'s clustering, which distinguishes five categories for the justifications of antitrust exemptions,[28] three of them may prove to be useful regarding the agricultural sector: (1) market or institutional failures, (2) wealth transfers and protection from competition, and (3) exemptions that improve the efficiency of the enforcement of competition policy. Of these three relevant justifications, only one group seems to be acceptable for contemporary antitrust,

[23] Olivier de Schutter, 'Addressing Concentration in Food Supply Chains: The Role of Competition Law in Tackling the Abuse of Buyer Power' (2010) Briefing Note 03 – United Nations Special Rapporteur on the Right to Food.

[24] Aravind R. Ganesh, 'The Right to Food and Buyer Power' (2010) 11(11) German Law Journal 1190–1244; Tristan Feunteun, 'Cartels and the Right to Food: An Analysis of States' Duties and Options' (2015) 18(2) Journal of International Economic Law 341–382.

[25] Ignacio Herrera Anchustegui, *Buyer Power in EU Competition Law* (Concurrences 2017).

[26] David L. Baumer, Robert T. Masson and Robin Abrahamson Masson, 'Curdling the Competition: An Economic and Legal Analysis of the Antitrust Exemption for Agriculture' (1986) 31(1) Villanova Law Review 183–252.

[27] Baumer, Masson and Masson (n 26) 201.

[28] 1. Natural monopoly, 2. Market or institutional failure, 3. Wealth transfers and protection from competition, 4. Exemptions facilitating the transition of industry structure from state ownership or direct regulation to market orientation, 5. Exemptions that improve the efficiency of the enforcement of competition policy. See: Peter Carstensen, 'Economic Analysis of Antitrust Exemptions' in Roger D. Blair and D. Daniel Sokol (eds), *The Oxford Handbook of International Antitrust Economics*, vol. 1 (OUP 2015) 33–62.

that is, the group of market failures which covers the above-mentioned creation of countervailing power. Countervailing power, first coined by *Galbraith*, enabled by Section 6 of the Clayton Act and the Capper-Volstead Act in the US and secondary law provisions in the EU, is different from the market power of industrial firms in that it is *the response* 'to the power of those to whom they sold their […] products.'[29] The concept of countervailing power can be complemented with the consideration of reducing contracting costs.[30] Suppliers of agricultural products have no market power even if they negotiate terms and conditions jointly. However, joint negotiations do reduce costs, and could restrain their business partners when they engage in strategic conduct. Another theory, which is listed by *Carstensen* among the justifications to cure market or institutional failures, and which is useful for agricultural producers, is the possibility for competitors to cooperate for the sake of creating an efficient market. This is embodied by agricultural cooperatives in the US and producer organisations (hereinafter: POs) in the EU.

The considerations of the group pursuing 'wealth transfers and protection from competition' is not what antitrust tolerates and to what it wants to subscribe to at all. Simply put, it is related to competition policy but it is not the field of antitrust. As put by *Shelanski*, '[a]ntitrust is not, however, the only institution through which government addresses competition concerns and market failures.'[31] *Carstensen* mentions, as one of the underlying arguments of wealth transfers and protection from competition, the conferring of market power to achieve specific, in particular social, goals. Trade regulation provisions, such as the UTP Directive, aim to contribute to the attainment of increasing individual earnings of agricultural producers, and thus their standard of living. Besides this social goal, there are other arguments to appear within this group. The activity of agricultural producers, that is, agricultural production, is supported because, as put by *Carstensen* in general, 'the costs of protection are worth the benefit to some other socially desirable objective.'[32] As to the agricultural sector, these other socially desirable goals are perfectly described by the concept of 'multifunctional agriculture'. The protection of the environment, the preservation of landscape, as well as rural employment and food security all are important pillars of the agricultural activity, which may be deemed to be justifications for the intervention into competition in agri-food markets. If policymakers are of the opinion that small and medium-

[29] John Kenneth Galbraith, *American Capitalism – The Concept of Countervailing Power* (Routledge 1993) 139.

[30] Carstensen (n 28) 49.

[31] Howard Shelanski, 'Antitrust and Deregulation' (2018) 127(7) The Yale Law Journal 1926.

[32] Carstensen (n 28) 56.

sized agricultural enterprises better contribute to the preservation of rural landscape and environmental protection than large agribusinesses engaged in agricultural production, they may attempt to give a higher level of protection to smaller market participants so that they can not easily be squeezed out of the market despite the fact that they may be (less) efficient. To this group, we can also add the wealth transfer considerations[33] provided for agricultural producers through sector-specific regulations. Regarding agriculture, it is closely related to the specific social objective of increasing the standard of living of producers, which is pursued by agricultural policy. Highly regulated sectors, such as agriculture, may require that not only antitrust agencies but also sectoral authorities have certain powers to contribute to the efficiency of the enforcement of competition policy.[34] A good example of this is the situation after the implementation of the Unfair Trading Practices Directive (hereinafter: the UTP Directive) in Germany, and the regulation in force even before the implementation of the UTP Directive in Hungary, where agriculture-specific authorities (*Federal Agency for Agriculture and Food und Ernährung* and *National Food Chain Safety Office*) make decisions on unfair trading practices committed against the suppliers of agri-food products. Of course, addressing imbalances in the food supply chain with legal instruments beyond antitrust, may create contradictions between, on one hand, competition laws and fair trading laws,[35] and, on the other hand, competition authorities and other regulatory agencies.

All in all, it is reasonable to distinguish between, on the one hand, economic arguments suitable to justify agricultural antitrust exemptions, and, on the other hand, arguments which can be called upon when one aims to justify other competition-related regulations in agri-food markets. The one and only acceptable antitrust argument for adopting exceptional norms for the agricultural sector is related to the concept of countervailing power. Its creation by agricultural suppliers has to be made possible to offset the monopsony powers of buyers. From an efficiency-based viewpoint, it is only acceptable if buyer power appears as monopsony, rather than bargaining power. Although the bargaining power of buyers may have adverse effects on competition, as put by *Anchustegui*, it is not harmful at first sight. However, there may be other arguments to be referred to when attempting to find the justification for competition-related regulations not falling under the scope of conventional antitrust. The prohibition of unfair trading practices is easier to be explained by arguments related to wealth transfers or socially desirable objectives pursued by other policies. Although wealth transfers to

[33] Carstensen (n 28) 56.

[34] Carstensen (n 28) 58–59.

[35] Philippe Chauve, Antonia Parera, and An Renckens, 'Agriculture, Food and Competition Law: Moving the Borders' (2014) 5(5) Journal of European Competition Law & Practice 304.

agricultural producers are economic in nature, they do not play a role in antitrust enforcement, similarly to those agricultural policy objectives which aim to raise the standard of living of farmers. These latter types of arguments seem like demands of interest groups,[36] in which the power of agricultural lobby can be discovered.

In conclusion, competition-related rules in agri-food markets have two different groups of justifications. While the exemptions provided for the creation of countervailing power are accepted by antitrust policy, socially desirable objectives and wealth transfers come from the field of agricultural policy that influences competition in agri-food markets; they do not fit the legal toolbox at the disposal of conventional antitrust law.

III. Regulation in force

1. US regulations: Clayton Act's Section 6 and the Capper-Volstead Act

It is wrong to assume that antitrust laws do not apply to agricultural cooperatives at all: they are not completely immune.[37] The scope of the exemption benefiting them under antitrust laws is limited.[38] However, its exact extent is unclear.[39]

The essence of Clayton Act's Section 6 is to permit 'the operation of agricultural or horticultural mutual assistance organizations when such organizations do not have capital stock or are not conducted for profit.'[40] The reason behind this is clear: the provisions of the Sherman Act can be interpreted in such a way that they cover mutual assistance, between local farmers managing small farms, which normally violate the Act, through the joint pricing and marketing of agricultural products, resulting in the elimination of competition.[41] If no protection was afforded to farmer organisations, these

[36] R. Shyam Khemani, 'Application of Competition Law: Exemptions and Exceptions' (2003) UNCTAD Series on Issues in Competition Law and Policy.

[37] T.O., 'Agricultural Cooperatives and the Antitrust Laws: Clayton, Capper-Volstead, and Common Sense' (1958) 44(1) Virginia Law Review 63.

[38] Alice Schumacher Horneber, 'Agricultural Cooperatives: Gain of Market Power and the Antitrust Exemption' (1982) 27(3) South Dakota Law Review 476.

[39] William E. Peters, 'Agricultural Cooperatives and the Antitrust Laws' (1963) 43(1) Nebraska Law Review 103.

[40] US Department of Justice – Antitrust Division, *Antitrust Division Manual* (5th edn, 2021) II-13.

[41] Stephen D. Hawke, 'Antitrust Implications of Agricultural Cooperatives' (1984) 73(4) Kentucky Law Journal 1036–1037.

practices would mean a *per se* violation of the Sherman Act.[42] However, this was counteracted by Section 6, albeit with significant limitations where capital-stock and for-profit organisations are not covered by this provision. This limitation was overruled by the Capper-Volstead Act which extended the scope of protection.

First of all, a distinction has to be made. While the activities *below* cooperative level, such as marketing agreements between farmers and cooperatives and joint marketing contracts among affiliated cooperatives, are exempt from antitrust laws, the activities *on* cooperative level, such as the ones mentioned in the next two cases, are not.[43] In its 1939 judgment of the *United States v. Borden* case, the US Supreme Court also emphasised that agricultural cooperatives do not enjoy full exemption under antitrust laws.[44] The *Borden* judgment clearly shows that cooperatives shall not combine with non-exempt persons in restraining trade.[45] In 1960, as a continuation of this restrictive analysis[46], the *Borden* approach was clarified and expanded on in the *Maryland and Virginia Milk Producers Assn., Inc. v. United States* case.[47] With this judgment 'the Supreme Court established that the agricultural cooperative exemption does not extend to unilateral competition-stifling practices. The Court condemned a cooperative's coercive and predatory trade practices which were so far outside the legitimate objectives of agricultural cooperatives as to be clear violations of the Sherman Act.'[48] The 'predatory action' test was developed by the Supreme Court in light of the legislative history of Clayton Act's Section 6 and the Capper-Volstead Act.[49]

Capper-Volstead immunity is granted to a cooperative, if it has a legitimate objective to be attained when engaged in agricultural business activities, and no predatory trade practices are used by the cooperative to achieve this goal. It means that an ends-means analysis can be carried out consisting of four patterns: (a) legitimate goal – non-predatory action, (b) legitimate goal – predatory action, (c) illegitimate goal – non-predatory action, and (d) illegitimate goal – predatory action.[50] Obviously, only the first pattern

[42] Richard T. Rogers and Richard J. Sexton, 'Assessing the Importance of Oligopsony Power in Agricultural Markets' (1994) 76(5) American Journal of Agricultural Economics 1144.

[43] Alan M. Anderson, 'Agricultural Cooperative Antitrust Exemption-Fairdale Farms Inc. v. Yankee Milk Inc.' (1981–1982) 67(2) Cornell Law Review 401–402.

[44] US Supreme Court: United States v. Borden Co., 308 US 188 (1939).

[45] Schumacher Horneber (n 23) 480.

[46] Hawke (n 41) 1044.

[47] US Supreme Court: Maryland and Virginia Milk Producers Assn., Inc. v. United States, 362 US 458 (1960).

[48] Schumacher Horneber (n 23) 480.

[49] Hawke (n 41) 1045.

[50] Hawke (n 41) 1047–1048.

is exempt. Although it is an established element of the US Supreme Court case law that antitrust law exemptions shall be interpreted narrowly,[51] the Capper-Volstead Act's protection has even been extended to price-fixing agreements,[52] despite the fact that the Act's wording does not explicitly mention it. Some say that price-fixing is the most effective tool of achieving bargaining balance, and has to be interpreted as an aspect to be included in the term 'marketing'.[53] This also shows the likely interpretation problems emerging from Section 6 of the Clayton Act: what is meant by 'legitimate objects'? Besides collective processing, preparing for market, and handling, Section 1 of the Capper-Volstead Act declares that marketing is also a possible legitimate object to be carried out by a cooperative; however, the boundaries of these terms leave room for different interpretations.

Furthermore, we must also not forget the express requirements of the Capper-Volstead Act, which are well summarised by *Hawke* as: producing agricultural products by the cooperative's members; operating for the mutual benefit of members; the volume of non-member business not exceeding that of member business; structured so that each and every member has one vote irrespective of the capital owned, or the dividends paid per year do not exceed eight percent on stock or membership capital; voluntary membership; and performing at least one of the statute's enumerated acts before the immunity. 'Most of these requirements are inherent in an agricultural cooperative's basic structure and, therefore, should present little problem for the eligible cooperative.'[54] It was explicitly held by the Supreme Court that even one non-farmer member in a cooperative deprives that cooperative of the exemption provided by the Capper-Volstead Act.[55] This approach has also been adopted by district court judgments recently.[56] The inadvertent nature of the inclusion

[51] See the cited cases in footnote 155 of Alison Peck, 'The Cost of Cutting Agricultural Output: Interpreting the Capper-Volstead Act' (2015) 80(2) Missouri Law Review 473: 'Union Labor Life Ins. Co. v. Pireno, 458 US 119, 126 (1982); see also Bankamerica Corp. v. United States, 462 US 122, 147–48 (1983); Grp. Life & Health Ins. Co. v. Royal Drug Co., 440 US 205, 231 (1979); Abbott Labs. v. Portland Retail Druggists Ass'n, Inc., 425 US 1, 11 (1976); Fed. Mar. Comm'n v. Seatrain Lines, Inc., 411 US 726, 733 (1973); United States v. McKesson & Robbins, Inc., 351 US 305, 316 (1956); United States v. Masonite Corp., 316 US 265, 280 (1942).'

[52] Donald M. Barnes and Jay L. Levine, Farmer Cooperatives 'Take Cover': The Capper-Volstead Exemption is Under Siege (2021) 74(1) Arkansas Law Review 16.

[53] Charles Edward Black and Ronald Kent Sufrin, 'Agricultural Cooperatives: Price-Fixing and the Antitrust Exemption' (1978) 11 U.C.D. Law Review 553–554.

[54] Hawke (n 41) 1039–1040.

[55] US Supreme Court: Case-Swayne Co., Inc. v. Sunkist Growers, Inc., 389 US 384 (1967); US Supreme Court: National Broiler Marketing Association, Petitioner, v. United States, 436 US 816 (1978).

[56] John C. Monica, Jr. and Jetta C. Sandin, 'Agricultural Antitrust Pitfalls' (2017) 50(5) Maryland Bar Journal 19. See: United States District Court, E.D. Pennsylvania: In Re

is irrelevant, so is the good faith of the members in being part of a properly constituted cooperative.[57]

Today, the Capper-Volstead Act is under fire. Many criticise that cooperatives have grown to such a size that their protection under the Act is unjustified. However, it is simplistic to label all cooperatives with the same size. These voices fail to take into account that not only have cooperatives grown, but so have their buyers, particularly retail chains, and thus the imbalance in bargaining power has remained. Due to the small number of court cases interpreting the Capper-Volstead Act, there are still many unanswered questions about this law. There are conflicting views as to whether the exemption covers supply management in the form of production restriction, as well as whether vertical integration of farmers nullifies the exemption. Moreover, in many cases, even deciding who qualifies as a 'farmer' may also be a challenging question.[58] The issue of immunity for production and supply restrictions under the Act is manifold, and arguments can be raised both pro and contra.[59] A comprehensive and in-depth analysis of the question concludes that 'Congress did give agriculture certain exemptions because of inherent difficulties endemic to agricultural markets, but those exemptions extend only as far as Congress intended. Output limitations – however effective in controlling supply and fixing prices – do not appear to be among the tools that Congress intended to exempt in passing the Capper-Volstead Act.'[60]

The provision on jurisdiction set in Section 2 of the Capper-Volstead Act is also worthy of a few comments. It gives authorisation to the Secretary of Agriculture 'to obtain a cease and desist order if he finds that an association has monopolized or restrained trade to such an extent that the price of any agricultural product is unduly enhanced.'[61] The main issue is the extent and scope of this jurisdiction: is it exclusive or primary in relation to that of the Federal Trade Commission and the Department of Justice? The question was answered in the *Borden* case, whose relevant findings on this are reproduced here in full:

> 'We find no ground for saying that this limited procedure is a substitute for the provisions of the Sherman Act, or has the result of permitting the sort of

Mushroom Direct Purchaser Antitrust Litigation, 621 F. Supp. 2d 274 (2008); United States District Court, E.D. Pennsylvania: In Re Processed Egg Products Antitrust Litigation, 206 F. Supp. 3d 1033 (2016).

[57] Barnes and Levine (n 52) 10 and 13.

[58] Barnes and Levine (n 52) 16–19, 19–23, and 23–24.

[59] See the arguments summarised by Christine A. Varney, 'The Capper-Volstead Act, Agricultural Cooperatives, and Antitrust Immunity' (December 2010) The Antitrust Source 5–8.

[60] Peck (n 51) 498.

[61] Barnes and Levine (n 52) 8.

> combinations and conspiracies here charged unless or until the Secretary of Agriculture takes action. That this provision of the Capper-Volstead Act does not cover the entire field of the Sherman Act is sufficiently clear. The Sherman Act authorizes criminal prosecutions and penalties. The Capper-Volstead Act provides only for a civil proceeding. The Sherman Act hits at attempts to monopolize as well as actual monopolization. And § 2 of the Capper-Volstead Act contains no provision giving immunity from the Sherman Act in the absence of a proceeding by the Secretary. We think that the procedure under § 2 of the Capper-Volstead Act is auxiliary, and was intended merely as a qualification of the authorization given to cooperative agricultural producers by § 1, so that, if the collective action of such producers, as there permitted, results in the opinion of the Secretary in monopolization or unduly enhanced prices, he may intervene and seek to control the action thus taken under § 1. But as § 1 cannot be regarded as authorizing the sort of conspiracies between producers and others that are charged in this indictment, the qualifying procedure for which § 2 provides is not to be deemed to be designed to take the place of, or to postpone or prevent, prosecution under § 1 of the Sherman Act for the purpose of punishing such conspiracies.'[62]

It means that the Secretary of Agriculture has neither exclusive nor primary jurisdiction over antitrust offenses of agricultural cooperatives.[63] Actually, we must not forget that '[t]he Secretary of Agriculture has never been called upon to determine whether an association has restrained trade to such an extent that it has unduly enhanced prices.'[64]

Besides the Capper-Volstead Act, another piece of agricultural legislation must be noted: as an expansion to the former, the Cooperative Marketing Act of 1926 was passed to provide further protection for agricultural cooperatives. It authorises farmers to acquire, exchange, interpret, and disseminate past, present, and prospective information on crops, markets, statistics, economics, and other similar information by direct exchange between them, and/or their associations or federations, and/or by and through a common agent created or selected by them.[65] This law implies that no court action could be brought against farmers because of an anti-competitive exchange of information.

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[62] See: US Supreme Court (1939) United States v. Borden Co., 308 U. S. 206.

[63] Ralph H. Folsom, 'Antitrust Enforcement under the Secretaries of Agriculture and Commerce' (1980) 80(8) Columbia Law Review 1634.

[64] Donald A. Frederick, 'Antitrust Status of Farmer Cooperatives: The Story of the Capper-Volstead Act' (US Department of Agriculture 2002) 281.

[65] 7 US Code § 455. Dissemination of crop, market, etc., information by cooperative marketing associations. As *Mahaffie* put it: 'Elements of the exemption are also contained in the Cooperative Marketing Act of 1926 […].' See: Charles D. Mahaffie Jr., 'Cooperative Exemptions under the Antitrust Laws: A Prosecutor's View' (1970) 22(3) Administrative Law Review 436.

2. EU regulations

2.1. Primary law

When addressing the primary law of the EU on antitrust provisions applying to agriculture, we must start the analysis with the Treaty on the Functioning of the European Union.[66] The Treaty on European Union does not include any specific provision concerning the issue.

In principle, the EU defines its common agricultural and fisheries policy, which – according to *Whish* and *Bailey* – has its own philosophy.[67] The internal market shall extend to agriculture, fisheries and trade in agricultural products.[68] Therefore, the common agricultural and fisheries policy is part of the internal market. Save as otherwise provided in Articles 39 to 44 TFEU, the rules laid down for the establishment and functioning of the internal market shall also apply to agricultural products.[69] Rules on competition, being positioned in Chapter 1[70] of Title VII of the TFEU from Article 101 to 109, are a part of the internal market.[71] However, since the beginning of European integration, European agricultural markets have not been fully exposed to free competition.[72] *Schweizer* posits that the introduction of common competition rules for agricultural markets has a negative and a positive component. The negative component relates to the application to agriculture of the competition rules of Articles 101 et seq. TFEU. The positive component opens the way for the European Parliament and the Council to independently regulate competition issues in the agricultural sector.[73]

The basic system and derogation is provided by Article 42 TFEU which declares as follows:

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[66] See also the analysis: Jan Blockx and Jan Vandenberghe, 'Rebalancing Commercial Relations along the Food Supply Chain: The Agricultural Exemption from EU Competition Law After Regulation 1308/2013' (2014) 10(2) European Competition Journal 387; Cseres (n 17) 409–413.

[67] Richard Whish and David Bailey, *Competition Law* (7th edn, OUP 2012) 963.

[68] TFEU, Art. 38(1).

[69] TFEU, Art. 38(2).

[70] Section 1 of Chapter 1 (from Article 101 to 106) deals with rules applying to undertakings, while Section 2 of Chapter 1 is concerned with rules on state aids (from Article 107 to 109).

[71] TFEU, Article 3(1) b). See: Walter Frenz, 'Agrarwettbewerbsrecht' (2010) 40(7) Agrar- und Umweltrecht 193–195.

[72] Ines Härtel, '§ 7 Agrarrecht' in Mathias Ruffert (ed), *Europäisches Sektorales Wirtschaftsrecht* (1st edn, Nomos Verlag 2013) 437.

[73] Dieter Schweizer, 'Art. 42 AEUV' in Torsten Körber, Heike Schweitzer and Daniel Zimmer (eds), *Wettbewerbsrecht, Band 1: EU. Kommentar zum Europäischen Kartellrecht* (6th edn, C.H. Beck 2019).

> The provisions of the Chapter relating to rules on competition shall apply to production of and trade in agricultural products only to the extent determined by the European Parliament and the Council within the framework of Article 43(2) and in accordance with the procedure laid down therein, account being taken of the objectives set out in Article 39.[74]

This provision establishes the primacy of agricultural policy over general competition law.[75] Article 39 TFEU comprises the objectives of the Common Agricultural Policy (hereinafter: CAP), which have to be taken into consideration when deciding on the extent of the application of competition rules to the production and trade in agricultural products.[76] One – perhaps the most important – objective of the CAP runs counter to the conventional objective(s) of antitrust. The goal of ensuring a fair living standard for farmers through, in particular, increasing their individual earnings is in objective contradiction with the aim of conventional antitrust that is committed to increase economic efficiency in the form of enhancing consumer welfare. That is to say, while agricultural policy places its main emphasis on producer surplus, antitrust policy places it on consumer surplus.[77] It brings an irresolvable tension between these two public policies and draws a boundary between the above-mentioned groups based on their respective value judgments, that is, whether to prefer producers or consumers in this specific context.

Article 43(2) TFEU lays down the procedural rules which have to be followed within the framework of EU decision-making: the European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, shall establish[78] those rules which provide the possibility of derogation from general competition rules and, thus, the special treatment of agriculture.

2.2. Secondary law: Agri-Food Competition Regulation

The possibility for derogations established by the TFEU is realised in secondary legal acts, as already mentioned, in the CMO Regulation and the Agri-Food Competition Regulation. The antitrust provisions in these legal acts

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[74] TFEU, Article 42. See also Philipp Groteloh, 'Grundzüge des Agrarkartellrechts' in Matthias Dombert and Karsten Witt (eds), *Münchener Anwaltshandbuch Agrarrecht* (2nd edn, C.H. Beck 2016).

[75] Härtel (n 73) 438.

[76] TFEU, Article 39(1).

[77] Philip Watson and Jason Winfree, 'Should we use antitrust policies on big agriculture?' (2021) Applied Economic Perspectives and Policy <https://doi.org/10.1002/aepp.13173> accessed 25 June 2022.

[78] TFEU, Article 43(2).

complement each other in terms of the scope *ratione materiae*. The Agri-Food Competition Regulation covers the trade in those Annex I products, which are not covered by the CMO Regulation.

The Agri-Food Competition Regulation replaced – with minor changes – the Council Regulation No 26 of 4 April 1962.[79] The replacement took place because of clarity and rationality requirements.[80] The policy behind its adoption is derivable from the general objectives of the Common Agricultural Policy.

Although pursuant to Article 1 of the Agri-Food Competition Regulation, Articles 101 to 106 TFEU, as well as provisions adopted for their implementation, shall apply to all agreements, decisions and practices referred to in Articles 101(1) and 102 TFEU which relate to the production of, or the trade in, the products listed in Annex I to the TFEU, these conducts are also subject to Article 2 of the Agri-Food Competition Regulation.[81]

The meaning of agricultural products is clarified in CJEU case law.[82] Given that the following examples are not agricultural products listed in Annex I, special provisions do not apply to them: products obtained by further processing made from original products listed in Annex I, such as cognac brandies;[83] primary, but non-Annex I, agricultural products used as auxiliary substances for Annex I products;[84] primary, but non-Annex I, agricultural products, such as furskins.[85] Insofar as primary products have already been

[79] Although it is of little importance, Cseres [(n 17) 411] writes that Regulation No 26 of 4 April 1962 was superseded by Regulation 1234/2007, the first Single Common Market Organisation. However, this statement is not true. Council Regulation (EC) No 1184/2006, which I call Agri-Food Competition Regulation in this article, is the one that declares in its Article 4 that Regulation No 26 shall be repealed.

[80] Agri-Food Competition Regulation, Recital (1) and Art. 5.

[81] Agri-Food Competition Regulation, Art. 1.

[82] See: Dieter Schweizer, 'GWB § 28 Landwirtschaft' in Torsten Körber, Heike Schweitzer and Daniel Zimmer (eds), *Wettbewerbsrecht, Band 2: GWB. Kommentar zum Deutschen Kartellrecht* (6th edn, C.H. Beck 2020).

[83] Case 123/83 *Bureau national interprofessionnel du cognac v Guy Clair* EU:C:1985:33, para 15: '[…] potable spirits are expressly excluded from the category of agricultural products.'

[84] Case 61/80 *Coöperatieve Stremsel- en Kleurselfabriek v Commission of the European Communities* EU:C:1981:75, paras 20–21: The applicant's fifth submission was that animal rennet for cheese making is agricultural product despite of the fact that it is not included in the Annex of agricultural products (then: Annex II, now: Annex I). According to the Court, 'in order for the Regulation to be applicable to rennet, that product must therefore itself come under Annex II to the Treaty. It follows that Regulation No 26/62 can have no application in this case and that the applicant's fifth submission must be rejected.'

[85] Case T-61/89 *Dansk Pelsdyravlerforening v Commission of the European Communities* EU:T:1992:79, para 2: 'The scope of Regulation No 26 applying certain rules of competition to production of and trade in agricultural products was limited in Article 1 thereof to the production of and trade in the products listed in Annex II to the Treaty. Consequently, that

treated or processed, they are only covered by the special competition regime if the treated or processed product is listed in Annex I.[86]

Article 2 includes the exceptions to Article 101(1) TFEU. In *Whish*'s words, these exceptions are the so-called derogations.[87] Of the two pillars of EU competition law applying to undertakings regulated in the TFEU, the Agri-Food Competition Regulation only sets out derogations with regard to the prohibition of anti-competitive agreements; it does not recognise any derogation regarding the abuse of dominance.[88] That is, the Agri-Food Competition Regulation does not affect the prohibition of abuse of dominace under Article 102 TFEU; this, therefore, applies in full in the agricultural sector.[89]

The two main derogations in relation to Article 101(1) TFEU may be called upon when agreements, decisions and practices

a form an integral part of a national market organisation; or
b are necessary for the attainment of the objectives set out in Article 39 TFEU.[90]

Sentence 2 of Article 2(1) also includes an example. The wording 'in particular' reflects the indicative/illustrative nature of the provision: *in particular*, Article 101(1) TFEU shall not apply to agreements, decisions and practices of farmers, farmers' associations, or associations of such associations belonging to a single Member State, which concern the production or sale of agricultural products or the use of joint facilities for the storage, treatment or processing of agricultural products. Nevertheless, there are also negative criteria determined as regards this provision. On one hand, there is an absolute requirement that under the agreement, decision or practice of farmers, farmers' associations, or associations of such associations, there shall be no obligation to charge identical prices. On the other hand, the exemption shall not apply, if either (a) the Commission finds that competition is thereby excluded or (b) the objectives of the Common Agricultural Policy are jeopardised. This means that for an agreement, decision or practice to be exempted from Article 101(1) TFEU, the following prohibitions shall be respected cumulatively: (a) the

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regulation may not be applied to the production of or trade in products, such as furskins, which do not come under Annex II to the Treaty even if they are ancillary to the production of another product which itself comes under that annex.'

[86] Schweizer (n 74).

[87] Whish and Bailey (n 68) 964.

[88] Whish and Bailey (n 68) 964.

[89] Ines Härtel, 'AEUV Art. 42 [Eingeschränkte Anwendung der Wettbewerbs- und Beihilferegeln]' in Rudolf Streinz (ed), *EUV/AEUV – Vertrag über die Europäische Union, Vertrag über die Arbeitsweise der Europäischen Union, Charta der Grundrechte der Europäischen Union* (3rd edn, C.H. Beck 2018).

[90] Agri-Food Competition Regulation, Art. 2(1).

prohibition on charging identical prices, (b) the prohibition on the exclusion of competition, and (c) the prohibition on jeopardising CAP objectives.[91] From a reversed point of view, to return to the application of Article 101(1), it is sufficient that one of the three above-mentioned prohibitions is violated.

Paragraphs 2 and 3 of Article 2 consist of procedural rules. The European Commission has sole power, subject to review by the General Court and the Court of Justice of the European Union, to determine which agreements, decisions and practices fulfil the substantive conditions. The decision shall be made after consulting the Member States and hearing the undertakings or associations of undertakings concerned, and any other natural or legal person that the Commission considers should be heard. The decision shall be published. Determining so may take place (a) on the Commission's own-initiative; (b) at the request of a competent authority of a Member State; or (c) at the request of an interested undertaking or association of undertakings.[92] The publication of the determination shall state the names of the parties and the main content of the decision. It shall have regard to the legitimate interest of undertakings in the protection of their business secrets.[93] Nevertheless, it is important to note that 'as farmers assess the applicability of the derogation to the agreement themselves without informing the Members States or the Commission, the Commission has no data on how often farmers relied on this derogation. In competition investigations, parties rarely referred to [this derogation].'[94]

The two derogations included in Article 2 of the Agri-Food Competition Regulation have an unclear relationship. Although the wording shows that they are formulated as alternative conditions (the word '*or*' implies this finding),[95] earlier case law suggests otherwise. The term 'national market organisation' was defined in a 1974 Court judgment. On the basis of Articles 43(3) and 45(1) of the Treaty establishing the European Economic Community, the Court found at that time that the objectives of national market organisations are analogous at national level to those pursued by the common market organisations at Community level. It means that

> The national organization can thus be defined as a totality of legal devices placing the regulation of the market in the products in question under the control of the

[91] Agri-Food Competition Regulation, Art. 2(1).

[92] Agri-Food Competition Regulation, Art. 2(2).

[93] Agri-Food Competition Regulation, Art. 2(3).

[94] European Commission, Report from the Commission to the European Parliament and the Council: The application of the Union competition rules to the agricultural sector (26 October 2018) 17.

[95] See: Those agreements are exempted from the general prohibition of anti-competitive agreements which form an integral part of a national market organisation *or* are necessary for attainment of the Common Agricultural Policy objectives.

> public authority, with a view to ensuring, by means of an increase in productivity and of optimum utilization of the factors of production, in particular of manpower, a fair standard of living for producers, the stabilization of markets, the assurance of supplies and reasonable prices to consumers.[96]

Defining national market organisations based on the objectives of the CAP, thereby drawing an analogy between national and common market organisations, means that the second condition of Article 2 of the Agri-Food Competition Regulation has been merged into the first. That is, based on case law, the first derogation can only apply to an agreement, if it also fulfils the second condition. It is not sufficient for the said agreement to be an integral part of a national market organisation – it also needs to be necessary for the attainment of CAP objectives. This was reiterated in a Commission Decision, which found that the agreements and decisions of various French producer groups in the new potatoes market are exempted because they meet both criteria: not only do they constitute an integral part of a national market organisation, but they are also necessary to atain the objectives of the Common Agricultural Policy.[97] Here a further condition must be mentioned: the first derogation can only be applied, if there is no common market organisation regarding the respective product.[98] It means that the significance of the derogation provided for national market organisations in Article 2 of the Agri-Food Competition Regulation is limited, given that 'the majority of national marketing organisations have ceased to exist'[99] thanks to the system of single common market organisation.

The second derogation refers to the possibility for exempting agreements, decisions or concerted practices, if they are necessary for the attainment of Common Agricultural Policy objectives. The most significant clarification of this provision in EU case law is that the respective agreement shall contribute to the achievement of all five CAP objectives.[100] An agreement cannot be exempted from the general prohibition, if it does not satisfy each and every objective listed in Article 39 TFEU.[101]

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[96] Case 48/74 *Charmasson v Minister for Economic Affairs and Finance* EU:C:1974:137, paras 24 and 26.

[97] *New potatoes* (Case IV/31.735) Commission Decision 88/109/EEC [1987] OJ L 59/25.

[98] Whish and Bailey [(n 68) 965–966] mention the *Scottish Salmon Board* case: '[…] as there was a common organisation of the market in fishery products, the Scottish Salmon Board could not rely on the national market organisation defence.' See *Scottish Salmon Board* (Case No IV/33.494) Commission Decision 92/444/EC [1992] OJ L 246/37.

[99] Whish and Bailey (n 68) 965.

[100] See: Case 71/74 *Frubo v Commission* EU:C:1975:61, paras 24–26; Case C-399/93 *Oude Luttikhuis and others v Verenigde Coöperatieve Melkindustrie Coberco BA* EU:C:1995:434, para 25.

[101] Whish and Bailey (n 68) 965.

The Commission's careful consideration of whether an agreement realises all CAP objectives is clearly shown, for example, in one of its 2003 decisions. Therein, the enforcement authority thoroughly screened whether the five goals of the Common Agricultural Policy had all been attained respectively. The Commission found that the agreement in this case, which – in the French beef market – intended to fix a minimum price higher than the market price, did not in any way increase agricultural productivity [Article 39(1)(a)]. It was not necessary to stabilise markets [Article 39(1)(c)], given that '[t]he crisis in the beef sector was due primarily to a massive imbalance between supply and demand. Fixing a minimum purchase price does nothing to remedy such a situation. It does not affect the volume of supply, of which there was a large surplus; an increase in minimum prices might even cause demand to fall, thus widening the gap between supply and demand.' Furthermore, taking into account that there is no shortage of supply in the beef market, it was not necessary to assure the availability of supplies [Article 39(1)(d)]. The goal of supplies reaching consumers at reasonable prices was seen as also not realised [Article 39(1)(e)], where the Commisison found that '[e]specially in the case of consumption via restaurant and catering services, which are a major user of cheaper, imported meat, the suspension of imports could only have the effect of increasing prices.' All in all, the Commission found that

> the agreement is not necessary in order to achieve at least four of the five objectives of the Common Agricultural Policy. Even if the view were to be taken that it did indeed fall within the scope of the objective 'agreemen a fair standard of living for the agricultural community, in particular by increasing the individual earnings of persons engaged in agriculture', nevertheless, when that objective is weighed against the other four objectives […], which it would not help to achieve, it has to be concluded that the derogation in Regulation No 26 does not apply here.[102]

The Commission, for the sake of strengthening its findings, also declared that, if the respective agreement would have actually contributed to the attainment of all CAP objectives, the word 'necessary' in the provision means that the taken measure shall be proportionate, that is to say, there would be no less restrictive measure to be taken to realise the objectives. This requirement of proportionality was also not met.[103]

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[102] *French beef* (Case COMP/C.38.279/F3) Commission decision 2003/600/EC [2003] OJ L 209/12, para 145.

[103] *French beef* (Case COMP/C.38.279/F3) Commission decision 2003/600/EC [2003] OJ L 209/12, paras 135–149. See also the rejected appeals before the EU Courts: Case T-217/03 *FNCBV and Others v Commission* EU:T:2006:391; Case C-101/07 P *Coop de France bétail and viande v Commission* EU:C:2008:741.

Another remark must be noted. The wording of Article 2 of the Agri-Food Competition Regulation is formulated in such a way that it seems that, after the first two derogations, an example is mentioned in order to illustrate the issue. However, case law treats 'this example' as the third separate derogation from Article 101(1) TFEU. In *Oude Luttikhuis*, the doctrinal elements of this third derogation are greatly summarised:

> The third derogation is subject to three cumulative conditions. For that derogation to be applicable, it must be confirmed, firstly, that the agreements in question concern cooperative associations belonging to a single Member State, secondly that they do not cover prices but concern rather the production or sale of agricultural products or the use of joint facilities for the storage, treatment or processing of such products, and thirdly that they do not exclude competition or jeopardize the objectives of the Common Agricultural Policy.[104]

The most recent judgment of the Grand Chamber of the Court of Justice of the European Union has established a simplified benchmarks to decide whether competition rules shall apply to the activities of producer organisations and associations of producer organisations. The prohibition in Article 101 TFEU shall apply to agreements, decisions and concerted practices, if (1) they are not agreed/made *within* a producer organisation or an association of producer organisations (hereinafter: APOs), in other words, if they are not agreed/made between the members of *the same* producer organisation or *the same* association of producer organisations; or (2) any of the parties subject thereto is not *legally recognised* by the Member State; or (3) they are not *strictly necessary* for the pursuit of at least one objective assigned to the producer organisation or the association of producer organisations.[105] If any of these three criteria is not fulfilled, Article 101 TFEU shall apply to the respective agreement, decision or concerted practice.

These three requirements have been determined regarding the assessment of the following types of conducts: (1) collective fixing of minimum sale prices, (2) concertation on quantities put on the market, and (3) exchanges of strategic information. That is, the Court ruled that the collective fixing of minimum sale prices escapes the prohibition in Article 101 TFEU, if it is agreed between the members of a legally recognised producer organisation or a legally recognised association of producer organisations and strictly necessary to reach the objective pursued by the respective PO or APO. The question arises as to

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[104] Case C-399/93 *Oude Luttikhuis and others v Verenigde Coöperatieve Melkindustrie Coberco BA* EU:C:1995:434, para 27.

[105] Case C-671/15 *Président de l'Autorité de la concurrence v Association des producteurs vendeurs d'endives (APVE) and Others* EU:C:2017:860, para 67.

what the prohibition on charging identical prices in Article 2 of the Agri-Food Regulation actually means, if a legally recognised PO or APO – to the extent of pursuing one of its objectives which is strictly necessary – can decide to determine a minimum sale price. This possibly means that the respective PO or APO shall ensure for its members to be able to sell their products on their own (outside the PO or APO) below the minimum sale price determined by the PO or APO.[106]

2.3. Secondary law: CMO Regulation

The CMO Regulation has a separate part on competition rules.[107] First and foremost, it is worth mentioning that the provisions of the Agri-Food Competition Regulation and the provisions of Chapter I of Part IV of the CMO Regulation are – in most aspects – identical. In its Article 1, the Agri-Food Competition Regulation declares that it does not apply to products covered by Council Regulation (EC) No 1234/2007. Since references to Regulation (EC) No 1234/2007 shall be construed as references to the CMO Regulation,[108] the declaration of the Agri-Food Competition Regulation on its material scope still applies, and is in force in relation to the CMO Regulation. The *ratione materiae* of Agri-Food Competition does not cover those Annex I products that are covered by the CMO Regulation. However, this issue does not have too much practical significance, given that both the material scope of the Agri-Food Competition Regulation and that of the CMO Regulation are established in Annex I TFEU. Because most Annex I products are covered by the CMO Regulation, the latter leaves little room for the Agri-Food Competition Regulation to be applied.

The CMO Regulation, unlike the Agri-Food Competition Regulation, includes definitions on the relevant product and geographic market. The term 'product market' means the market comprising all products which are regarded as interchangeable or substitutable by the consumer by reason of the products' characteristics, their prices and their intended use.[109] The term 'geographic market' means the market comprising the area where the undertakings concerned are involved in the supply of the relevant products, in which the conditions of competition are sufficiently homogeneous, and which can be distinguished from neighbouring areas, particularly because the conditions

[106] Case C-671/15 *Président de l'Autorité de la concurrence v Association des producteurs vendeurs d'endives (APVE) and Others* EU:C:2017:860, para 66.

[107] See Part IV of the CMO Regulation.

[108] CMO Regulation, Art. 230(2).

[109] CMO Regulation, Art. 207(a).

of competition are appreciably different in those areas.[110] These definitions do not say anything new above what can be found in CJEU case law. The definitions are also in line with the Commission Notice on the definition of relevant market for the purposes of Community competition law.[111]

Still, one of the definitions provided by the CMO Regulation may cause slight confusion. Although there are no special rules applying to the agricultural and food sector as to Article 102 TFEU, the CMO Regulation provides for a definition of a dominant position: a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained in the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of consumers.[112] It is unclear why Article 208 of the CMO Regulation repeats word-for-word the case-law definition of a dominant position formulated in the *United Brands*[113] and *Hoffmann-La Roche* cases[114]. The definition embedded in this provision lacks reason and has no function at all, for it does not determine a sector-specific provision but repeats general case law.

Although the core meaning of the exceptions formulated in the Agri-Food Competition Regulation and in the CMO Regulation is the same, there are two small differences between their provisions. Pursuant to Article 2(1) of the Agri-Food Competition Regulation, the prohibition of anti-competitive agreements shall not apply to agreements, decisions and practices of farmers, farmers' associations, or associations of such associations *belonging to a single Member State*. In its Article 209, the CMO Regulation complements this list with producer organisations recognised under Article 152 or Article 161 of the CMO Regulation, or associations of producer organisations recognised under Article 156 of the CMO Regulation; however, as to the associations of farmers' associations, it does not mention the requirement 'belonging to a single Member State'. The latter difference may be based on the fact that associations of farmers' associations must be recognised under national law, the rules of which only apply to organisations which belong to that same Member State. The expansion of the list with producer organisations can be perceived as the concretisation of the concept of farmers' associations. Every producer organisation is a farmers' association, but not every farmers'

[110] CMO Regulation, Art. 207(b).

[111] Commission Notice on the definition of relevant market for the purposes of Community competition law (97/C 372/03), II/7–8.

[112] CMO Regulation, Art. 208.

[113] Case 27/76 *United Brands Company and United Brands Continentaal BV v Commission of the European Communities* EU:C:1978:22, para 65.

[114] Case 85/76 *Hoffmann-La Roche & Co. AG v Commission of the European Communities* EU:C:1979:36, para 38.

association is a producer organisation. The dividing line is whether the entity in question is recognised by a Member State in accordance with EU law. If it is, it is called a producer organisation; if it is not, it is called a farmers' association. It shows that 'calling up' the exemption does not necessarily require recognition in a legal sense.

Furthermore, pursuant to Article 152(1a), by way of derogation from Article 101(1) TFEU, a recognised producer organisation may plan production, optimise the production costs, place on the market and negotiate contracts for the supply of agricultural products, on behalf of its members for all or part of their total production. There are five cumulative requirements to do so: (1) one or more of the following activities is/are genuinely exercised jointly: processing; distribution; packaging, labelling or promotion; organising quality control; use of equipment or storage facilities; management of waste directly related to production. These activities contribute to the fulfilment of CAP objectives; (2) the producer organisation concentrates supply and places the products of its members on the market, whether or not a transfer takes place of ownership of the agricultural products by the producers to the producer organisation; (3) it is irrelevant whether or not the price negotiated is the same as regards the aggregate production of some or all of the members; (4) the producers concerned are not members of any other producer organisation. This can be ignored in duly justified cases where producer members hold two distinct production units located in different geographical areas; (5) the agricultural product is not covered by an obligation to deliver arising from the farmers' membership of a cooperative, which is not itself a member of the producer organisations concerned, in accordance with the conditions set out in the cooperative's statutes or the rules and decisions provided for in/derived from those statutes.[115]

There are further procedural rules in the CMO Regulation, which do not appear in the Agri-Food Competition Regulation. The listed entities, which can be subject to the exception, may request an opinion from the Commission on the compatibility of the respective agreements, decisions and concerted practices with the objectives set out in Article 39 TFEU.[116] The burden of proof is also established: the burden of proving an infringement of Article 101(1) TFEU shall rest on the party or the authority alleging the infringement; by contrast, the party claiming the benefit of the exemptions

[115] CMO Regulation, Art. 152(1a).

[116] CMO Regulation, Art. 209(2). The provision also declares that the Commission shall deal with requests for opinions promptly and shall send the applicant its opinion within four months of receipt of a complete request. The Commission may, at its own initiative or at the request of a Member State, change the content of an opinion, in particular if the applicant has provided inaccurate information or misused the opinion.

shall bear the burden of proving that its conditions are fulfilled.[117] As can be seen, the agricultural exception follows the same logic regarding the burden of proof as in the case of individual exceptions under Article 101(3) TFEU.

By contrast, when speaking of interbranch organisations, in order for them to be exempted, they shall be recognised.[118] These entities have members at different levels of the food supply chain, that is to say, the competition derogation applies to vertically integrated organisations according to the rules laid down in Article 210 of the CMO Regulation. Recognition not only has general rules[119], but also special rules for the milk and milk products sector[120], for the olive oil and table olives sector and for the tobacco sectors.[121] The exception provided for interbranch organisations is based on a notification system: the notification shall be addressed to the Commission, which shall decide, within two months from the receipt of all details, whether the respective agreements, decisions or concerted practices are compatible with Union rules.[122] The agreements, decisions or concerted practices in question may not be put into effect before the lapse of the two-month period.[123] Five conditions were determined that lead to the incompatibility of these agreements with EU law.

Three of them are quite similar to the previously mentioned exception case: (1) the respective agreement, decision or concerted practice shall not create distortions of competition which are not essential to achieving the objectives of the CAP pursued by the activity of the interbranch organisation (similar to the jeopardisation of CAP objectives); (2) they shall not entail price fixing or quota fixing (similar to charging identical prices); (3) they shall not create discrimination or eliminate competition with respect to a substantial proportion of the products in question (similar to the exclusion of competition). Additionaly, these agreements, decisions and concerted practices (4) shall not lead to the partitioning of markets within the Union in any form, and (5) shall not affect the sound operation of the market organisation.[124]

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[117] CMO Regulation, Art. 209(2).

[118] See a detailed analysis on interbranch organisations: European Commission, The interface between EU competition policy and the Common Agriculture Policy (CAP): Competition rules applicable to cooperation agreements between farmers in the dairy sector (2010) 24–27.

[119] CMO Regulation, Art. 157–158.

[120] CMO Regulation, Art. 163.

[121] CMO Regulation, Art. 162.

[122] CMO Regulation, Art. 210(2).

[123] CMO Regulation, Art. 210(3).

[124] CMO Regulation, Art. 210(4).

IV. Comparison

Both the European Union and the United States have established a legal regime that provides for derogations for the agricultural sector under general antitrust rules. In both legislations, the exemption is not unlimited, but agricultural cooperatives shall respect antitrust rules with some more ease. The US exemption can be found in Section 6 of the Clayton Act and in the Capper-Volstead Act, while the EU exemption is codified in two EU regulations. The limitations of the exemptions are ensured in part in different ways. Similarly, both jurisdictions *expressis verbis* declare which type of activities the agreement shall be related to in order for it to be exempted. The following are listed in the US: collective processing, preparing for market, handling and marketing, as well as common marketing agencies. At the same time, in the EU, the agreement shall concern the production or sale of agricultural products or the use of joint facilities for the storage, treatment or processing of agricultural products. It is immediately visible that the EU exemption also covers agreements related to production, while they are not listed in the United States. It is relevant in the case of limiting production, which the EU deems permissible within a producer organisation, but the United States does not.

The exemption provided for agricultural cooperatives is based, in part, on the doctrine of a single economic entity. An agricultural cooperative is like a parent company which has its own subsidiaries, that is, its agricultural producer members. The members are not independent undertakings from one another from an antitrust law perspective, but constitute a single economic entity – the cooperative. Neither the EU nor the US exemption mentions it explicitly, but as a consequence of the single economic entity doctrine, even price fixing is permissible to a certain extent based on case law. Indirectly, within the framework of the term 'xpli pric', which is a legitimate objective to be carried out by an agricultural cooperative, the US case law also covers price fixing. Although the EU regulation prohibits charging identical prices, recent case law in *Endives* shows that this provision only refers to a situation where a producer organisation prohibits its members from selling their own produce at a price below the minimum fixed price determined within the producer organisation.

As to the personal scope of the exemptions, there are similarities and differences. The EU and the US regulations are similar in that they do not connect the applicability of the exemption to a certain form of legal entity. It is irrelevant in both jurisdictions whether the undertaking is profit-making or non-profit making, or if it is a cooperative or a company. Both the EU and the

US employ criteria, negative or positive, to be fulfilled by an undertaking to be exempted, but the structure of these criteria and their formulation are different. The EU has derogations which can only apply to legally recognised producer organisations (see Article 152(1a) of the CMO Regulation); at the same time, there are other derogations which apply in general to farmers and farmers' associations, without giving them a correct definition (see Article 209 of the CMO Regulation and Article 2 of the Agri-Food Competition Regulation). The recognition of producer organisations is regulated in detail, on the one hand, in secondary EU law (in the CMO Regulation itself) and, on the other hand, in national law. These general rules on the recognition of producer organisations constitute a separate area of provisions in the EU. Meanwhile, the US antitrust formulates its negative criteria on associations, to which the exemption applies, directly among the provisions on the exemption. The US negative conditions – 'one member – one vote', 'dividends not excessing 8 per cent', and 'no dealing to an amount greater in value to nonmembers than to members' – do not have EU equivalents. However, the general rule of 'one member – one vote' also applies in the EU to producer organisations which are cooperatives. But again, this procedural provision derives from general rules and is not present among the rules on the agricultural antitrust exemption. In the US, negative requirements are formulated with regard to the undertaking itself, while the EU is more concerned with the economic conduct itself when formulating negative conditions. The latter declares that the agreement shall not exclude competition, require charging identical prices and jeopardise the objectives of the Common Agricultural Policy. While limiting the exemption in the US takes place primarily from the standpoint of the undertaking, and secondarily from the conduct itself with the prohibition of undue price increases. By contrast, the EU aims more to limit the exemption by regulating and ensuring that certain unwanted effects are avoided (competition exclusion, identical prices, jeopardising agricultural policy objectives).

Another important distinction can be drawn which sheds light on the diverging focus of the two jurisdictions. The European Union withdraws the protection (exemption) provided for the agreement, if the latter jeopardises common agricultural policy objectives. It means that the conduct is not only assessed in antitrust terms, but also within the framework of agricultural law. Hijacking the assessment method from antitrust law, in a direction where other policy objectives are taken into consideration, is clearly missing in the US agricultural antitrust exemption. This EU approach may seem like a folly. It is an antitrust provision, the agreement is related to agricultural products, no competition concerns arise from the collusion of agricultural producers, but the agreement endangers agricultural policy objectives, so it does not deserve privileged treatment under antitrust law.

The organisational criteria for the application of the exemptions are also similar in the EU and the United States. The EU only accepts *certain* derogations if the PO or the APO concerned is legally recognised. The US exemption also establishes the Capper-Volstead criteria to be fulfilled to get exempted. Both legal regimes only provide protection *below* cooperative level, that is to say, agreements between two separate legal entities *on* the cooperative level (between two cooperatives or between two producers organisations) are not exempt. Producers may join forces in an agricultural cooperative fulfilling the Capper-Volstead criteria in the US or in a legally recognised producer organisation in the EU. However, two separate legal entities shall not cooperate – otherwise the doctrine of a single economic entity would be violated and the prohibition should be applied. Furthermore, both legal systems require that only those agreements are exempt that are – in the EU – strictly necessary to achieve the objectives of the respective PO or APO, or that are – in the US – necessary to carry out any of the legitimate objects. The US legitimate objects and the EU objectives are analogous in that they make concentration supply possible. The specific aims to be pursued by a producer organisation, which are determined by the CMO Regulation, fit into the toolbox of means to realise the overall Common Agricultural Policy objectives in the EU. A slight and insignificant difference is that the United States does not determine the exact umbrella objectives to be pursued and realised by its agricultural policy; however, this does not change the fact that it treats agricultural cooperatives in the antitrust environment in the same way as the EU.

The most significant difference between EU and US regulations is that the former also allows supply restrictions, as can be seen from the *Endives* judgment. As to the concertation on quantities put on the market, the Court ruled that it escapes the prohibition in Article 101 TFEU, if it is agreed between the members of a legally recognised producer organisation, or a legally recognised association of producer organisations, and is strictly necessary to reach the objective pursued by the respective PO or APO. By contrast, the US is against limiting production. The CMO Regulation explicitly declares that ensuring that production is planned and adjusted to demand, particularly in terms of quality and *quantity*, is a specific aim which can be pursued by a PO. That is to say, limiting production in the EU by a producer organisation is permissible (under certain conditions) and may be exempt from the general prohibition, if it takes place within a legally recognised PO. The United States does not address price fixing and supply control as two sides of the same coin, unlike the European Union, where both economic activities are lawful from the perspective of the agricultural antitrust exemption. While the US only accepts restrictions which take place *post-production*, the EU also deems

lawful *pre-production* cooperations. The exchange of strategic information is also permissible in both jurisdictions.

The economic justification of limited agricultural exemptions lies in the concept of countervailing power. The exemptions, which make it possible for agricultural producers to combine forces, enable them to create countervailing power versus the market power of buyers. One significant difference between the EU and US regime is that the former does not include a control mechanism when an association of agricultural producers faces a buyer that does not have monopsony power. In that case, the exemption can be misused because of the fact that the 'united front' of farmers does not face a buyer whose economic power should be counterveiled to increase efficiency. That is to say, when there is no monopsony power in the hands of a buyer, which should be countervailed, the market power of sellers becomes a supervailing power, with likely adverse effects on competition. The US antitrust provision that prohibits undue price enhancement by agricultural cooperatives attempts to control the very issue. This explicit control mechanism is missing in EU antitrust. At a theoretical level, POs or APOs, if they meet the general criteria determined and bargain with buyers without market power, have at their disposal the possibility to increase sales prices to a level which is no longer competitive, and thus not efficient, given that their market power is not countervailing but supervailing in relation to their buyers. Hoever, the argument can be raised that the Common Agricultural Policy also aims to ensure that supplies reach consumers at reasonable prices and so there is a somewhat indirect control mechanism against price rises carried out by producers. Nevertheless, this is not as direct and obvious of a criterion as in the United States; instead, it is more of a balancing between CAP objectives.

Another significant difference between the EU and US regimes is that the former also provides for a derogation to interbranch organisations. This derogation is only applicable to recognised entities, unlike Article 209 of the CMO Regulation and the provisions of the Agri-Food Competition Regulation. The other difference with respect to interbranch organisations is that they shall notify the Commission that their agreement could be exempted, unlike horizontal agreements which are self-assessed by farmers, their associations, POs and APOs, as to whether they are compatible with the rules on the derogation.

From the viewpoint of functional comparison, both the EU and US regulations aim to achieve the same goal with the same legal means. The main function is to increase the bargaining power of producers against their buyers. The realisation of it takes place by excluding certain agreements of agricultural producers from the scope of the general prohibition of anti-competitive agreements. Even the most harmful of all agreements, price

cartels, which distort competition by object, are also exempted if they are concluded within a legal entity. In antitrust terms, these would be *per se* prohibited because they are drawn up with the participation of competitors to fix sale price. However, based on the doctrine of a single economic entity, these agricultural associations are treated as one undertaking, despite the fact that they unite competitors.

The structure of the regulations is also similar – the relevant provisions can be found in the legal sources of agricultural law. The US agricultural exemption, the Capper-Volstead Act, is codified in Title 7 of the US Code, which consists of laws related to agriculture. The EU also separates its derogations from general antitrust rules, and codifies them, in part, in the legal act on the single common market organisation of agricultural products, and, in part, in a completely separate legal act, the Agri-Food Competition Regulation, which does not cover any other topic aside the agricultural antitrust exemption.

It is clear from the analysis that the method for providing a higher level of protection for agricultural producers is the same in both jurisdictions. With limitations, both exempt certain agreements from the prohibition of anti-competitive agreements. The place of their emphasis is, nevertheless, different. The United States aims to remain in the area of antitrust with its own economic justification that concentrates on creating countervailing power and preventing it from becoming supervailing power. By contrast, aside from economic reasons, the European Union is *also* concerned with agricultural policy objectives to be attained through the antitrust exemption. This approach validly strengthens and gives impetus to the voices cynically echoing that the EU exemption is the consequence of agricultural lobbing. Limiting the assessment of the EU exemption to antitrust considerations could be the first step for EU legislation to quieten these voices and establish a pure efficiency-enhancing economic justification for this sectoral derogations, and thus, increase its acceptance among antitrust lawyers.

One cannot forget, however, that the European Union (and its predecessor, the European Economic Community) has committed itself long ago to the value judgment that gives precedence to agricultural policy objectives over competition rules. This is unlikely to change in the near future for two reasons. First, the tradition of treating the agricultural sector as the 'favourite child' of its economy is deeply embedded in the European continent despite the fact that in 2020 agriculture contributed only 1.3% to the EU GDP[125] but, at the

[125] European Commission, Performance of the agricultural sector <https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Performance_of_the_agricultural_sector> accessed 26 June 2022.

same time, it represented 35% of its total expenditure.[126] Second, general antitrust trends tend to point towards signs of cracks and fractures of the consumer welfare paradigm as well as the more economic approach on both sides of the Atlantic.[127]

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[126] European Commission, CAP expenditure in the total EU expenditure <https://ec.europa.eu/info/sites/default/files/food-farming-fisheries/farming/documents/cap-expenditure-graph1_en.pdf> accessed 26 June 2022.

[127] It is enough to think of Lina Khan's appointment as Chair of the Federal Trade Commission, who is one of the most renowned advocate of a paradigm shift in US antitrust, or legislative developments in the EU that put aside pure efficiency-based considerations and bring fairness back to their assessment, be it the digital sector (Digital Markets Act) or agriculture (UTP Directive).

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Table 1. The comparison of the US and EU regulation

Legal source	The United States of America		The European Union			
	Section 6 of Clayton Act	Capper-Volstead Act	Agri-Food Competition Regulation	CMO Regulation, Art. 152(1a)	CMO Regulation, Art. 209	CMO Regulation, Art. 210
Personal scope	agricultural and horticultural organizations, instituted for the purposes of mutual help, not having capital stock or conducted for profit	persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers in associations, corporate or otherwise, with or without capital stock	farmers, farmers' associations, or associations of such associations belonging to a single Member State	recognised producer organisations [general requirements for recognition shall be fulfilled]	farmers, farmers' associations, or associations of such associations; or recognised producer organisations [general requirements for recognition shall be fulfilled]	recognised interbranch organisations [general requirements for recognition shall be fulfilled]
Material scope	lawfully carrying out their legitimate objects	collectively processing, preparing for market, handling, and marketing, common marketing agencies	agreements concercing the production or sale of agricultural products or the use of joint facilities for the storage, treatment or processing of agricultural products	planning production, optimising production costs, placing on the market and negotiating contracts for the supply of agricultural products, on behalf of its members for all or part of their total production	agreements concerning the production or sale of agricultural products or the use of joint facilities for the storage, treatment or processing of agricultural products	agreements necessary in order to meet the objectives listed in certain articles

Legal source	The United States of America		The European Union			
	Section 6 of Clayton Act	Capper-Volstead Act	Agri-Food Competition Regulation	CMO Regulation, Art. 152(1a)	CMO Regulation, Art. 209	CMO Regulation, Art. 210
What types of negative criteria?	–	one member – one vote *or* dividends not exceeding 8 per cent per year, *and* no dealing to an amount greater in value to nonmembers than to members	no obligation to charge identical prices, competition is not excluded, common agricultural policy objectives are not jeopardised			no partitioning of markets, not affecting the sound operation of the market organisation, no distortions created which are not essential to achieving the objectives of the CAP, no price fixing or quotas, not creating discrimination or elimination of competition with respect to a substantial proportion of the products
Negative criteria for whom/what?	–	formulated regarding the undertaking	formulated regarding the conduct			

B O O K R E V I E W

Alexandr Svetlicinii, *Chinese State Owned Enterprises and EU Merger Control*, Routledge 2021

This book written by Alexandr Svetlicinii is perfectly in the spirit of the times. Entitled *Chinese State Owned Enterprises and EU Merger Control*, and published by Routledge in 2021, it sets itself up as an enlightenment of a reality of which the Europeans can only glimpse the shadow.

The EU merger control seems to have reached a stalemate since the *Alstom*/*Siemens* decision. Faced with the growth of the Chinese state-owned companies, the Commission's power to control their concentrations effectively is strongly contested by the political class and part of the doctrine. It is in this atmosphere that this book comes in.

This book has come to shed light on the various issues at stake in the application of variable geometry competition rules, in the face of the tendency of certain countries to disregard all competition rules when it comes to a public operator. European practitioners, academics and authorities should read this book to put a name to their new apprehensions about the reverse discrimination in competition law enforcement. This book answers the questions that we, academics and practitioners, are asking ourselves: what is the nature of this danger that threatens the internal market, what is its origin, how the competitive assessment is made, and what the proposed solutions are.

The author plunges us into the workings of Chinese institutions dominated by the party grip on decision-making, and demonstrates in particular the predominant place of the Chinese state-owned enterprises in the legislative and the economic spheres. This immersion teaches us the reasons for such a construction based on state-owned enterprises and the legal-economic model that results from it. The author traces the evolution of the Chinese economy from an industrial tissue controlled by the Chinese Communist Party to a modern system favoring SOE-to-SOE mergers, set to create national champions.

On political control, the author demonstrates the specificity of Chinese state-owned enterprises and the influence of the Chinese Communist Party on major corporate governance decisions. The title of the respective chapter "Political control: from shadows to the front stage" describes an interventionist policy that marginalizes the rules of market competition.

On the assessment of the SOE-related mergers in the EU, Alexandr Svetlicinii identifies a pattern of reasoning that the Commission follows, or should follow, in assessing these transactions. This reasoning focuses in particular on the management mode and the influence that the foreign State could have on the strategy and market conduct of SOEs in order to achieve industrial policies.

Following this overview, the author presents what he calls "novel legal issues of a general interest" in European law. The challenge is of course to define the notion of single economic unit and to demonstrate the reasoning path that is the proper one for the substantial assessment of mergers, in particular by determining the criteria allowing identifying the risks of coordination of the Chinese state-owned enterprises. From the danger of distortion of competition resulting from cross-subsidization, to the risks of post-merger coordination between the Chinese state-owned enterprises, the author clearly identifies various obstacles that this type of concentrations may generate for the merger assessment.

This book is a meticulous demonstration of a problem that is frequently raised in the current public discourse but without identifying its contours. Alexandr Svetlicinii has managed to identify and connect various factors internal to the Chinese economy with the possible risks of anti-competitive distortions the EU internal market. The author can only be congratulated on the lucidity and relevance of his analysis, whether it be on the method or the approach.

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International Conference of the Jean Monnet Network on EU Law Enforcement (EULEN) 'EU Competition Law Enforcement: Challenges to Be Overcome' 26th and 27th May 2022

On May 26th and 27th 2022, the Centre for Antitrust and Regulatory Studies (CARS) hosted an International Conference on "EU Competition Law Enforcement: Challenges to Be Overcome". The Conference was organized by Maciej Bernatt, Laura Zoboli, Federico Ghezzi, Mariateresa Maggiolino and Marta Sznajder within the frame of the Jean Monnet Network on EU Law Enforcement (EULEN) and the joint collaboration of the Bocconi University of Milan.

Maciej Bernatt and Laura Zoboli (University of Warsaw) opened Day 1 with a brief welcome address, leaving the floor to the keynote speech of Anna Gerbrandy (Utrecht University), titled *Moving towards sustainability as a case study for thinking about challenges for EU competition law*. The presentation focused on competition challenges to be faced vis-à-vis sustainability. It encompassed considerations regarding article 101 TFEU and cooperation for sustainability, with the key issue being the interpretation of "benefits" in outbalancing agreements. The presentation paved the way for a discussion about the boundaries of competition law and the hierarchy of values that are likely to form new parameters of the antitrust assessment, no longer bound by pure econometrics but purporting a wider consideration of new factors such as child-labor implications, animal welfare, environmental impact and so on.

The first panel, chaired by Federico Ghezzi (Bocconi University), focused on "ECN+ and beyond" and featured the first presentation by Kamil Dobosz (Krakow University of Economics) on "*National competition law – time to say goodbye?*". The speaker highlighted new obstacles that national competition Authorities face in applying domestic competition law in the framework of the ECN+ Directive Those obstacles can be of political nature or brought about by the effort to ensure major conformity with the scope of the Treaty and a more uniform application of competition law among the Member States.

The second panelist, Jasper Sluijs (Utrecht University) presented on A*nticompetitive Behavior by Public Entities: Experimental Evidence and Implications for Enforcement*. Sluijs introduced the economic traits underpinning Commercial Government Initiatives (CGIs) and the antitrust-related challenges, which include predation on private competitors. The speaker showed the evidence-based results of the deep-pocket

experiment and how it can inform enforcement efforts of the NCAs *vis-à-vis* CGI's anti-competitive behaviors.

The third presentation was given by Jasminka Pecotic Kaufman (University of Zagreb) on the topic *Judicial Interpretation and Competition Rules: Excessively Stringent Standard of Proof as a Threat for Effectiveness of Competition Law Enforcement*. The speaker stressed the importance of judicial review underlying the legal interpretation, for it pushes forward the development of competition law. On the contrary, a bad judicial review has the effect of stifling the effective application of competition law. Kaufman charted the main issues, such as the excessive formalism in judicial review, which assumes different forms in west and east Europe, the trans-nationalization of market values, as well as the semantic dissonance and the gap between NCAs and Courts (the latter not being able to address complex technicalities as effectively as the NCAs). Finally, the speaker summarized the sources of cautious optimism.

The second panel of Day 1, chaired by Maciej Bernatt (University of Warsaw), focused on "Procedural challenges". Kati Cseres (University of Amsterdam) presented a policy paper titled *Priority Setting in EU Competition Law Enforcement* co-authored with Or Brook (University of Leeds,). The presentation featured the significance of setting priority for competition authorities and deciding which case to pursue and which one to disregard. The priority setting project consists in framing the theoretical outlook and in understanding it throughout three stages (i.e., pre-decision, decision and post-decision). Such a project also emphasizes what are the principles that mark the success of priority setting and points out the empirical findings underpinning policy recommendations. This presentation was commented on by Mariateresa Maggiolino (Bocconi University), who stressed the reasons why an understanding of priority setting is very much needed in the first place and laid out the concerning points; secondly, the commentator suggested additional points that can be furthered by the project.

The second presentation *Enforcement of competition law in times of crisis: is guided self-assessment the answer?* was given by Bruce Wardhaugh (Durham University), who outlined the risks of answering the call to relax competition rules in times of crisis. The reasons supporting the preservation of competition enforcement rules include the prevention of market failures and the fact that the crisis is used as a tipping cause for concentration. On the other hand, Wardhaugh emphasized the importance of self-assessment because not all collaborations are anticompetitive and sometimes the sole idea of infringing competition law virtually refrains undertakings from carrying out fair collaborations, especially in the sustainability space. The speaker presented concrete cases and provided guidance on the way forward, entailing setting up a concrete dialogue between firms and NCAs, and major use of comfort letters. While commenting on this presentation, Federico Ghezzi (Bocconi University) stressed that concerns about the *ex-post* enforcement of competition rules *vis-à-vis* these kinds of agreements may be overrated because too burdensome and of uncertain outcomes; on the contrary, an *ex-ante* authorization would be better approach.

And comfort letters were the subject of Selçukhan Ünekbaş's presentation (European University Institute): *The resurrection of the comfort letter: Back to the Future?*

The speaker began by outlining the use comfort letters have served in recent years and how such instrument has been revived during the pandemic. Ünekbaş suggested that such a tool, resurrected in time of emergency, may be fated to endure as part of the European Commission's post-pandemic praxis. However, numerous questions have been raised on whether comfort letters possess external and internal binding effects, thus posing problems of legal uncertainty. In his final remarks, the speaker recommended the adoption of article 10 of Regulation 1/2003 as a more suitable solution.

The last presentation of the day was given by Lena Hornkohl (Max Planck Institute Luxembourg), titled *European and Regulatory Procedural Law, Leave it to the professionals: a call for expert judges in private enforcement of competition law*. The speaker gave an introductory overview of cartel damages calculation and why expert lay judges can foster the understanding and assessment of such a mechanism. Subsequently, Hornkohl brought some examples of expert lay judges employed to a different extent across various jurisdictions, such as in Austria and Belgium for disputes concerning labor law and commercial law, in Sweden for disputes related to intellectual property law, as well as in France and Germany for agricultural land disputes. The speaker then outlined what are the advantages and disadvantages of employing expert lay judges, but also the way risks can be mitigated. Commenting on the presentation, Jasper Sluijs (Utrecht University) endorsed the need for competition economists as lay judges in private enforcement. In contributing to the development of the paper, Sluijs pointed out that expert opinions are already employed consistently in damage estimation for non-contractual liability and therefore there might be room to further such practice in antitrust damage litigation. The audience also reacted to the presentation by sharing comparative perspectives and inputs to expand the research.

Day 2 of the conference opened with a brief introductory remark from Maciej Bernatt (University of Warsaw), who also moderated the first roundtable, which featured a debate among five competition experts about the rule of law and the enforcement of competition. Speakers of this session were Adam Bodnar (SWPS University in Warsaw), Małgorzata Kozak (Utrecht University), Giorgio Monti (Tilburg University), Kati Cseres (University of Amsterdam), Dawid Miąsik (Polish Supreme Court and Polish Academy of Sciences).

The third panel, chaired by Adam Jasser (University of Warsaw), and focused on "frontiers of competition law enforcement", began with Isabella Lorenzoni (University of Luxembourg), who introduced her research titled *Why do competition authorities need artificial intelligence?*

Lorenzoni started from the assertion that, with the fourth industrial revolution, undertakings may deploy more sophisticated means to circumvent antitrust rules and therefore NCAs may need to adapt their enforcement tools to the point of developing AI-powered software or establishing *ad hoc* units to investigate digital markets. Some examples are the Forensic Investigation Detection Unit in Greece, the economic intelligence unit in Spain and the DaTA unit in the UK. In Italy, instead, the competition authority has been testing a solution based on a combination of data analysis, AI and ML. The speaker stressed the importance of developing AI tools to

offset the decline in leniency applications, enhance efficiency and reverse-engineer companies' algorithms which can undermine competition through self-preferencing and cartel implementation. In the final remarks, the speaker also stated the importance of legal adaptation.

Marta Sznajder (University of Warsaw) presented *The role of competition law enforcement in preserving media pluralism*. After a brief introduction on the role media pluralism and competition play in strengthening democratic processes, Sznajder argued that competition can either directly or indirectly foster pluralism, for it is designed to fight monopolistic structures. In supporting this argument, the speaker discussed three case studies of mergers in the media industry, namely PKN Orlen/Polska Press, Agora/Eurozet and KESMA, exemplifying how the concentration of ownership threatens pluralism and indicating merger review as a way to prevent such outcome.

Marek Martyniszyn (Queen's University Belfast) introduced his research titled *Extraterritoriality in EU Competition Law: Shifting the Paradigm?*, which touched on the importance of addressing cross-border violations spotlighted by the recent development of extraterritorial enforcement – see, for example, the cases Intel (2017), iiyama (2018), Air Cargo (2022) – and the application of "the effects test". According to the effects doctrine, it is possible to ground the EU jurisdiction on the competitive harm caused by entities operating abroad. In the light of the recent case law, Martyniszyn emphasized that the application of the effects doctrine is likely to be expanded and therefore additional attention should be paid by competition scholars and specialists on such topic.

The fourth panel, chaired by Laura Zoboli (University of Warsaw), focused on "Antitrust enforcement and EU regulation of digital markets" and featured the first presentation by Nataliia Mazaraki and Anzhelika Gerasymenko (Kyiv National Trade and Economics University) on *Competition law enforcement in Ukraine: challenges from the Big Four and national online giants*. The speakers provided an overview of competition law enforcement in Ukraine, focusing on the impact of digitalization across sectors and the approach adopted by the Antimonopoly Committee of Ukraine (AMCU). Contrary to other NCAs and jurisdictions, the AMCU has not engaged in any case pertaining to digital markets or even questioned the need to rethink the current legal framework to adapt enforcement tools to new challenges brought about by tech giants. However, this scenario may change shortly thanks to opening opportunities for the "Europeanization" of the national legal framework, which may lead to strengthening and adapting investigative and enforcement tools and engaging with other public bodies to address issues resulting from digital markets.

Christophe Carugati (Paris Centre for Law and Economics) presented his research about *the role of national authorities in the Digital Markets Act* considering how the Commission will likely enforce the DMA and whether the NCAs can apply a similar Regulation within national borders. After a thorough overview of the current national enforcement praxis in digital markets, Carugati pointed out the opportunities of replicating the EUMR (Merger Regulation) allocation mechanism with the DMA and of setting up *ad hoc* legal frameworks to allow NCAs to enforce DMA-like cases when one of the following conditions is met: the NCA has strong know-how in

a certain area; the NCA has the expertise of local platform and conditions; the NCA has developed or develops technological tools. In the final remarks, Carugati issued two recommendations. With the first, the speaker encouraged the adoption of the EUMR-like allocation mechanism; with the second, he put forward that the DMA and DMA-like competition cases should be enforced in cooperation with non-competition enforcers and the support of the high-level group. Commenting on this research, Giuseppe Colangelo (University of Basilicata) questioned whether the DMA would be the ultimate solution to the problems brought about by the digitalization of markets and the gatekeepers' power, as well as whether the EUMR is the proper legal basis to achieve decentralization. In this regard, Article 114 TFUE appears to be the right legal basis but it would not untangle the main problem, being that the involvement of NCAs would generate risks of overlapping and conflicting decisions.

The last panelist, Tabea Bauermeister (University of Hamburg) presented her paper titled *The German "Lex GAFA" – lighthouse project or superfluous national solo run?*, discussing the newly-established Section 19a of the German Competition Act. Bauermeister first summarized section 19a, which defines norm addressees and forbidden conduct; then, she underlined what are the criticalities of this provision and the consequences that may hamper its implementation: excessive vagueness, legal uncertainty and limited geographical scope. On the other hand, Section 19a has the merit of serving as an interim norm, by bridging the time gap with the application of the DMA.

The fifth panel, chaired by Mariateresa Maggiolino (Bocconi University), dedicated to "The challenges and perils of the digital economy", hosted the presentation of Pauline Phoa (Utrecht University) under the title *Conceptualizing the power of big tech companies and its implications for competition enforcement*. Phoa first delved into the foundation of market power and how data fuels that power in digital markets. She introduced the concepts of "dimension of power", meaning a power that is instrumental, structural (i.e., able to influence the agenda setting) and discursive across four "domains of power": political, social, economic and personal. When combined, such power funnels into a "modern bigness" with the potential to channel data and digital capacity on an ongoing basis. The result is that such modern bigness ultimately vests the corporation with the ability to shape the existing framework of norms and market, and consequently, to influence discussions about competition law and policy.

Jeanne Mouton (Université Côte d'Azur) presented her research: *The digital economy as a threat to the private enforcement of competition law*, which explores the reasons behind the existing gap between the growing number of public enforcement cases in the digital market and a few follow-on cases of damage claims. Mouton argued that such discrepancy may be due to diversity in objective, procedural/investigative means and methods. The complexities arising from the structure of digital markets also exacerbate the shortcoming of Directive 2014/104/EU when it comes to proving harm and quantifying damages. In the final remarks, Mouton identified potential development and put forward possible solutions to the cited issues.

The last presentation featured Giuseppe Colangelo (University of Basilicata) discussing the paper *Amazon Buy Box case: the dawn of self-preferencing case law?*,

co-authored with Laura Zoboli (University of Warsaw). Colangelo gave a comprehensive introduction about self-preference and the relevant case law, including an overview of the case *'Google Shopping'* (EC 2017, CoJ 2021), thus exploring whether the case *'Amazon Logistics'* (AGCM 2021) dovetails with this context and how this case furthers the debate about unilateral anti-competitive conducts. Commenting on this paper, Giorgio Monti (Tilburg University) questioned that the case *'Amazon Buy Box'* is really about self-preferencing and that major attention should be paid to how the implementation of the DMA can shift the assessment of self-preferencing under article 102 TFUE.

Lastly, Maciej Bernatt's and Laura Zoboli's remarks closed this outstanding two-day international Conference which gathered together participants from various countries in a hybrid format after almost two years of full online events. More details on the conference are available at: https://cars.wz.uw.edu.pl/en/events/conferences-and-seminars/1200-conference-eu-competition-law-enforcement-challenges-to-be-overcome.html, while the working papers discussed during the conference can be found here: https://jmn-eulen.nl/papers/.

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International Colloquium of the University of Naples Federico II Faculty of Law 'How the EU Rules the World: Insights from Four Continents' 4 October 2021

On 4 October 2021, the University of Naples Federico II Faculty of Law hosted an International Colloquium entitled "How the EU rules the world: Insights from Four Continents". This event was one of the activities carried out by Federico II Faculty of Law in the framework of its cooperation agreement with Denver University Sturm College of Law.

The conference focused on *The Brussels Effect*, a monograph published in 2020 by Professor Anu Bradford, Henry L. Moses Distinguished Professor of Law and International Organization at Columbia Law School, describing the process whereby non-EU countries adopt, on a voluntary basis, rules and standards that are similar to or inspired by those set by the EU.

The conference participants were welcomed by the Dean of Federico II Faculty of Law, Professor Sandro Staiano, and by Professor Fabio Ferraro, Director of the Postgraduate Program in EU law at the University of Naples Federico II, who made some preliminary observations as to how EU law has been a global trend-setter in certain areas, such as data protection, consumer safety, environmental protection, competition law and the regulation of online hate speech, but not in others, such as the enforcement of the rule of law, immigration policy, as well as foreign and security policy.

The conference convenor, Amedeo Arena, Professor of EU Law at the University of Naples Federico II Faculty of Law, observed that the Brussels Effect stands in stark contrast to a nearly constant public commentary about the EU's imminent demise and inability to address global challenges. He added that in order to understand this complex and fascinating phenomenon, it was necessary to analyze its "antecedents", namely the California and Delaware effects. He thus introduced the keynote speaker, Professor Celia Taylor, Nanda Chair at Denver University Sturm College of Law and Visiting Scholar at the University of Naples Federico II Faculty of Law.

Professor Taylor explained that the "Delaware effect" stems from the circumstance that the majority of publicly traded companies in the US are incorporated in the State of Delaware, thus making Delaware corporate law a reference point throughout the US. Several theories have been put forward to account for Delaware's prominence in the corporate law area. According to the "race to the bottom" theory, corporations

have an incentive to incorporate in Delaware because its laws tend to be pro-management. However, the reason underlying that incorporation trend may also be that Delaware's Court of Chancery is well-versed in corporate law matters and that Delaware's General Corporation Law is one of the most advanced and comprehensive corporation statutes in the US.

Professor Taylor then turned to the California effect, explaining that California is one of the most progressive States in the US and that it has prompted a "race to the top" in many policy areas, including Data Privacy, Health Care Regulation, Car Emission Standards. Professor Taylor focused on one of them: California's initiative to promote gender diversity in corporate governance. She mentioned that, on 30 September 2018, the State of California passed Senate Bill 826, requiring every corporation whose principal executive office is located in California to have at least one female director on its board by the end of 2019, or face fines up to $300.000.

Professor Taylor explained that, even though many corporations despised this kind of Governmental interference in their governance structure, they complied with its requirements. In 2018, nearly 30% of California company boards were all male, but after the enactment of the bill that percentage dropped to 3%. Moreover, in 2018 only 766 California public company board seats were held by women, but that number increased to 1,275 in 2020, an increase of 66.5%.

After that, Professor Taylor provided an overview of the impact of Senate Bill 826 in other States. She mentioned that the State of Washington passed the "Women on Corporate Boards Act" that became effective on 11 June 2020 and required corporations in the State to have a "gender-diverse board" or provide shareholders a "board diversity discussion and analysis". She also added that other US States adopted similar strong recommendations for their corporations to act in this same way, thus suggesting that California's approach to gender diversity in corporate boards is spreading throughout the US.

Professor Taylor added that some individuals and special interest groups have challenged the legality Senate Bill 826, claiming it infringes the Equal Protection Clause of the California Constitution, because it facially discriminates on the basis of sex and serves no important government interest. She added that even if these challenges are eventually successful and Senate Bill 826 is struck down, it has already made a significant impact and it is unlikely that corporations will exclude women from their boards again.

After the keynote, an online roundtable took place, featuring antitrust experts from four different countries: Tadashi Shiraishi, Professor at the Graduate School for Law and Politics of the University of Tokyo; Arianna Andreangeli, Senior Lecturer at the Edinburgh School of Law and Joint Coordinator of the Jean Monnet Centre of excellence at the Edinburgh Europa Institute; Vicente Bagnoli, Professor at Mackenzie Presbyterian University and antitrust practitioner in Sao Paulo; and Spencer Waller, John Paul Stevens Chair of Competition law and Director of the Institute for Consumer Antitrust Studies at Loyola University of Chicago.

The roundtable focused on the impact that EU antitrust law has in those four countries. On this subject, most panelists agreed that, as far as the general public is

concerned, the interest in EU law is not particularly significant, except for the UK. Yet, panelists shared the idea that, taking into account a more specific group, such as law graduates and scholars, the awareness of EU law is much higher.

The discussion then turned to the influence of EU antitrust law in the four countries at issue. On this matter, the majority of the panelists agreed that EU competition law has had and continues to have a significant impact on competition law in their respective countries. Professor Shiraishi mentioned exploitative abuse regulation as an example of the influence of EU Competition Law on Japanese Competition Law. He explained that, while equivalent regulations exist in the EU, they are absent in the US, whose antitrust statutes inspired Japan's Anti-monopoly Act of 1947.

Moreover, Professor Shiraishi noted that the EU regulation of global big techs has been a game changer for Japan. Indeed, the Japan Fair Trade Commission (JFTC) changed its 65-year approach to exploitative abuse just six months after the German Competition Authority, following the enactment of the GDPR in the EU, launched an investigation on the alleged abuses by Facebook relating to the exploitation of the personal data of its users. Before that, he noted, the JFTC had never investigated exploitative abuses against end consumers, as it believed that the goal of Japan's exploitative abuse regime was the protection of Small and Medium Sized Enterprises (SMEs). However, the JFTC's probe on Facebook data policy seems part of a global rethinking of the Japanese competition law enforcement priorities, as it appears from the JFTC's recent guidelines on the exploitative abuse by big digital platforms of the personal data of their users.

As far as the UK is concerned, Professor Andreangeli explained that, despite leaving the EU, competition law is an area where the Brussels effect endures on a systemic level in the British legal order. She provided two examples supporting this statement. First, even after leaving the EU and being no longer subject to the EU prohibition on State aids, the UK granted the Competition and Market Authority (CMA) the power to monitor subsidies, so as to ensure that the competition is not distorted within the UK. Another example Professor Andreangeli provided is Section 60A of the UK Competition Act, which, even after Brexit, limits the possibility for UK courts and the UK competition authorities to depart from the EU's *acquis*. She thus concluded that the competition law in the UK is a textbook example of the Brussels Effect.

As far as Brazil is concerned, Professor Vicente Bagnoli referred to the *SKF* case of 2013: the Brazilian Competition Authority (CADE) fined the company SKF for resale price maintenance in the ball bearings market adopting an EU-style 'illegality by object' approach. Instead, in previous cases CADE had interpreted the relevant Brazilian antitrust law provision following a US-style 'rule of reason' approach, thus balancing efficiencies against anticompetitive effects.

Turning to the US, Professor Spencer Waller noted that there is low but increasing attention to EU antitrust law in the US; for a recent example, he referred to the *Cicilline report* by Congressman David N. Cicilline, Chairman of the US House of Representatives, Subcommittee on Antitrust. In his report, Congressman Cicilline focused on the regulation of tech platforms in the US and he examined how different it is from the EU, as well as from the rest the world, because of the Brussels Effect.

The panelists then turned to the reasons that could account for the relevance of EU competition law in their respective jurisdictions. According to Professor Tadashi Shiraishi, as far as Japan is concerned, the reason underlying the influence of EU competition law is its robust public enforcement system, but also the style of its regulations and guidelines, which are more organized and accessible than their US counterparts.

As far as the UK is concerned, Professor Andreangeli claimed that the reason underlying the relevance of EU competition law in the UK is that the UK has been an EU Member State for a very long time. She also pointed to the fact that the EU is the main destination for UK trade, so British traders will always have a strong incentive to align with the EU regulations.

According to Professor Bagnoli, the reason underlying the influence of EU antitrust law in Brazil lies in the congruencies between the values and the purposes of Brazilian competition law and the core values of the EU.

As to the US, according to Professor Waller, the low attention to EU competition law in the US is part of a broader trend of isolation in the field of antitrust, particularly in the area of unilateral conduct. Still, he suggested that over time there will be more internal and external pressures to harmonize portions of US law in accordance with the growing consensus, particularly in areas of regulation of dominant firms.

The last part of the conference was devoted to the remarks and comments of Professor Anu Bradford, Henry L. Moses Distinguished Professor of Law and International Organization at Columbia Law School and the author of "The Brussels effect" monograph.

Professor Anu Bradford expressed her deep appreciation for this conversation on the Brussels Effect among scholars across different countries, which she claimed was one of the goals of her book. She highlighted that, despite the waves of Euro-skepticism, EU law continues to shape the legal, economic, and personal life of people all around the world.

She suggested that the awareness of the Brussels effect should lead to a higher confidence in EU law, but it should also prompt a greater sense of responsibility, because, as she aptly put it, "if the EU gets it right, it can potentially get it globally right, but if the EU gets it wrong, it can potentially get it globally wrong". This is why, in her opinion, it is essential that scholars around the world spell out what EU regulations mean in their jurisdictions, so that the EU can be aware of the global impact of its regulatory endeavors. The impact of the Brussels Effect is often positive, but sometimes it is not, thus calling for more collaboration by the EU with its regulatory counterparts around the world.

Furthermore, Professor Bradford focused on how the world has evolved since her monograph was published. She explained that, while there was a growing fear that the Covid-19 pandemic would bring globalization to an end, this outcome did not materialize, because the main driving force of the Brussels Effect – i.e. multinationals' desire to market their products and services across the world – has not changed.

To conclude, Professor Bradford focused on the possible future instances of the Brussels Effect. She mentioned that the EU is pushing for regulations as part of the

Green Deal to fight climate change with a broad and ambitious regulatory agenda, which may set a trend in many other countries. Moreover, she referred to the Digital Markets Act and the Digital Services Act, which she believes have the potential to transform the regulation of digital economy not just in the EU, but all around the world.

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