YEARBOOK OF ANTITRUST AND REGULATORY STUDIES
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ARTICLES
ARIANNA ANDREANGELI, EU Competition Law Put to the Brexit Test: What Impact Might the Exit of the UK from the Union Have on the Enforcement of the Competition Rules?
VIKTORIA H.S.E. ROBERTSON, Consumer Welfare in Financial Services: A View from EU Competition Law
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CLAUDIA MASSA, Private Antitrust Enforcement Without Punitive Damages: A Half-Baked Reform?

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Editorial foreword

The Editorial Board is pleased to present the 17th volume of the Yearbook of Antitrust and Regulatory Studies (YARS 2018, 11(17)). Among others, it contains several articles the drafts of which were presented at the First ‘Gaetano Filangieri’ Conference on the Freedom of Commerce ‘Recent developments in EU Competition Law’. The Conference was held at the University of Naples ‘Federico II’ School of Law on 8-9 May 2018 and featured speakers from eight different European universities.

Gaetano Filangieri, a late 18th Century philosopher of the so-called Neapolitan Enlightenment, is the author of the *The Science of Legislation (1780–1791)*, a monumental yet unfinished treatise on good government and on the principles of sound legislation. In his work, Filangieri developed some pioneering ideas on monopolies, regulated professions, and competition on the merits: ‘the first object of the laws on manufactures and industry’, he argued, ‘should be the promotion of competition and the suppression of the causes that restrict it’; ‘the best laws in the world’, he further averred, ‘would not be able to improve manufacturing without competition. The greater the competition, the more the manufacturer will endeavour to improve his products, as he knows that the customer will prefer them to those of his competitor.’ (*The Science of Legislation*, 2, XVI).

We are honoured to begin this volume with a guest article written by Arianna Andreangeli (University of Edinburgh), a contribution which examines one of the big issues of our times – EU competition law put to the Brexit test. The author offers her most up-to-date analysis of what impact the exit of the UK from the Union might have on the enforcement of competition rules. Presented next is a paper written by Viktoria H.S.E. Robertson (University of Graz), which analyses to what extent financial consumer protection forms part of the competition law objective of consumer welfare that EU competition law nowadays adheres to. The third article, written by Erzsébet Csatlós (University of Szeged), explores and examines the legal nature of the European Competition Network (ECN) as one of the most advanced examples of cooperation forms of competent authorities that aim to, among others, overcome diversity of non-harmonised legal areas and on which the EU relies. Further on, Magdalena Knapp (University of Białystok) discusses the concept of third party liability for anticompetitive conduct under EU competition law (vs the principle of personal responsibility) and the notion of a test for the attribution of anti-competitive conduct of a service provider as well as the
grounds for exemption from liability for actions of a genuinely independent contractor. Finally, Claudia Massa (University of Naples ‘Federico II’) provides an assessment of Directive 2014/104/EU, criticizing the choice taken by European legislature to exclude punitive damages from the category of recoverable damages following a violation of antitrust law.

Aside from the aforementioned research papers, the current volume of YARS contains also three legislation & case law reviews. First, Gabriella Perotto (University of Turin) examines the elusive notion of ‘selectivity’ in the context of fiscal aids, having regard to the CJEU case-law and most recent Commission decisions in this area. Second, Andrea Pezza (University of Naples ‘Federico II’) provides his contribution to the on-going debate on the optimal institutional design of competition authorities by examining the French system of antitrust enforcement, as structured following the reform approved in 2008. Third, Anna Piszcz (University of Białystok) takes a comprehensive view on the EU 2018 draft Directive on UTPs in B2b Food Supply Chains and the Polish 2016 Act on Combating the Unfair Use of Superior Bargaining Power in the Trade in Agricultural and Food Products.

In its next section, the current YARS volume contains reviews of two books published in 2017 in Warsaw by the University of Warsaw, Faculty of Management Press. First, it contains Agata Jurkowska-Gomulka’s review of a book written by Maciej Gac regarding group litigation as an instrument of competition law enforcement, analysed on the basis of European, French and Polish experiences. Second, the volume contains a review by Raimundas Moisejevas of a book edited by Anna Piszcz and related to the implementation of the EU damages directive in Central and Eastern European countries.

Finally, included in the current YARS volume are also conference reports. They cover: (i) ‘First “Gaetano Filangieri” Conference on Freedom of Commerce “Recent developments in EU Competition Law”’ (Naples, 8–9 May 2018), and (ii) ‘7th International PhD Students’ Conference on Competition Law’ (Białystok, 10 October 2017).

We end this brief editorial note with expressions of deep gratitude. We wish to thank the authors and various anonymous reviewers who willingly gave their time and expertise to contribute to the current volume.

Białystok – Berkeley, 2nd October 2018

Anna Piszcz
University of Białystok

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University of Naples ‘Federico II’

– YARS Volume Editors
EU Competition Law Put to the Brexit Test: What Impact Might the Exit of the UK from the Union Have on the Enforcement of the Competition Rules?

by

Arianna Andreangeli*

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Abstract

This contribution examines some of the consequences of the UK’s exit from the European Union for the enforcement of the competition rules. It reflects on the impact that Brexit is going to have on future transnational antitrust litigation in

* Senior lecturer in Competition law, Edinburgh Law School, University of Edinburgh. Heartfelt thanks are owed to Aiste Slezeviciute, PhD candidate at Edinburgh Law School, for the many discussions on these issues. An earlier version of this contribution was presented at the First Gaetano Filangieri Conference on Freedom of Commerce ‘Recent developments in EU Competition Law’, held at the University of Naples ‘Federico II’ on 8–9 May 2018. The author is grateful to all participants for their comments. The usual disclaimer applies. Article received: 4 May 2018; accepted: 31 May 2018.
Britain and Europe. Thereafter it analyses the challenges that Brexit is likely to present for cooperation in public competition enforcement and suggests solutions for future development.

Résumé

Cet article examine les certaines conséquences de la sortie du Royaume-Uni de l’Union européenne sur l’application des règles de concurrence. Il se penche sur l’impact que Brexit va avoir sur les futurs litiges transnationaux en matière d’antitrust en Grande-Bretagne et en Europe. Puis, il analyse les défis que Brexit est susceptible de présenter pour la coopération dans l’application de la coopération publique et suggère des solutions pour le futur développement.

Key words: competition; litigation; Brussels Regulation; Brexit; cooperation

JEL: K21, K41

I. Introduction

Brexit represents an epochal change for both the United Kingdom and the European Union: the challenges that it brings to the UK are well known. How will the competences hitherto exercised by the Union be repatriated to London and, it is hoped, to the other nations of the UK, such as Scotland and Wales? How easy will it be for the British state to respond to the demands arising from the exercise of these powers? What will be the destiny of those areas of UK law that have so far developed in sync with EU law, such as competition law? In this particular area a number of further issues are going to arise both for the UK’s competition authority and for the UK courts: as the Competition and Markets Authority (hereinafter; CMA) exits from the European Competition Network (hereinafter: ECN), and regains full competence to deal with mergers having an impact on UK markets, strains on its operational capacities will be inevitable. Furthermore, with the commitment expressed numerous times by many ministers to develop a new national industrial strategy, the perspective that the EU Commission will lose its state aid powers vis-à-vis UK financial measures raises concerns of new protectionism and of the emergence of national champions.

The UK courts will also be at the forefront of the need to respond to the challenges brought by Brexit in the exercise of their jurisdictional powers: so far Section 60 of the UK Competition Act 1998 has guaranteed that British antitrust rules will be applied in a way that mirrors the Court of Justice of the EU’s interpretation of Articles 101 and 102 TFEU. It is true that the
EU Withdrawal Bill, which is currently being scrutinised by the House of Lords, has indicated that the UK courts will have to take into account future EU case law. However, especially with the passage of years after the exit of the UK from the Union, it may become increasingly difficult to maintain ‘synchronicity’ between Luxembourg and the judiciary sitting in a former member of the EU. No longer will the UK courts be able to access the Court of Justice of the EU via the preliminary reference procedure. In addition, the decisions of the same Court will no longer be binding on British judges, or indeed the UK authorities generally – one of the ‘red lines’ enumerated by the UK Prime Minister in many of her speeches.¹

But how is this sea change going to work in reality? It is in fact admittedly difficult to imagine that well-established case law, which has so far been grounded in the EU acquis, will be reversed so neatly at the end of the transition period. It is therefore suggested that the UK courts are unlikely, come the exit of the UK from the EU, to depart from their established acquis without a very compelling reason (e.g. Fletcher, 2017). It may therefore be expected that, as they seek to reconcile the demands of their new ‘independence’ from Luxembourg, the British courts will remain subject to the Court of Justice’s ‘soft power’, for the benefit of legal certainty. And last, but by no means least, as the Brussels Regulation² ceases to apply vis-à-vis the courts sitting in Britain and Northern Ireland, litigants in transnational disputes, as competition law cases often are, are going to face significant uncertainty as to the applicable law and to the identification of the court having jurisdiction to hear their claims.

Brexit, however, is not just going to have a massive impact on competition law and policy in the UK. Its effects are inevitably going to be felt in the Union and in the development of the interpretation and enforcement of the competition rules by the EU Commission, its ECN partners and ultimately the Court of Justice of the EU. The aim of this paper is to offer some reflections on some of these issues by taking a deliberately EU focused standpoint. Having regard to the private enforcement of the competition rules, it will explore the challenges arising from the future inapplicability of the Brussels regime for EU-wide rules on jurisdiction and parallel proceedings. Could Brexit de facto reverse the allegedly unstoppable path that had led to the Brussels acquis by ‘reviving’ earlier conventions and international agreements to which the UK had subscribed before 1972? Moreover, what consequences may the inapplicability

of the Brussels Regulation *vis-à-vis* UK courts have in the field of competition law, where these courts had become a destination of choice for litigants?

Equally significant issues can arise in the area of public enforcement. With a ‘hard’ exit from the EU looming on the horizon, it is almost certain that the UK’s CMA will no longer be part to the ECN, according to the EU’s draft exit agreement with the UK. Yet, at the same time, the UK will be obliged to abide by the same principles of competition law that it subscribes to now, not only in the transitional period but also beyond March 2019. It is expected that the UK and the Union will negotiate cooperation arrangements akin to those in force between the EU and non-member states such as Switzerland, South Korea and Japan.

However, it is clear that they will be far less effective in terms of the depth of cooperation *vis-à-vis* the current ECN arrangements, thus potentially hindering the fact-finding and detection powers exercised by the Commission and the other ECN members in cases involving UK-based companies. So far, it looks as though the EU favours ‘off the shelf’ solutions to respond to the challenges presented by Brexit in a number of areas, and competition policy may make no exception to this approach. Yet, it is questionable whether the forms of cooperation that have so far characterised the relations of the EU with other jurisdictions may be appropriate, or indeed sufficient, to ensure the continuing detection of cartels that, despite political changes, are going to remain EU-wide. Could the UK’s exit from the EU therefore warrant a rethink of this approach? And what consequences could this have on the status quo as regards the forms of cooperation within and outside the Union? Could we envisage a situation whereby the UK competition authority, as a former member, can cooperate more closely with the remaining ECN members than other non-member states?

II. Leaving the safe harbours of the Brussels Regulation: private enforcement in a post-Brexit world – is reviving old instruments a feasible option for multi-party, transnational competition claims?

We all know that one of the features of competition law disputes is to be multi-party and, in the EU context, to be also multi-national – impacting transnational trade, either actually or potentially, means that inevitably practices engaging the application of the EU antitrust rules are liable to fall within two or more different jurisdictions. Against this background it is beyond doubt that the availability of assured and reliable rules concerning the identification of a competent court is of capital importance for potential claimants. The Brussels Regulation has served precisely this purpose, namely to afford would-be
plaintiffs the possibility to assess and identify the forum within which to sue in accordance with a set of clear criteria which tend to be non-exclusive. Thus, in a competition damages action, a plaintiff may decide to rely on the ‘place of the domicile of the defendant’ rule; however, if she happens to be a consumer and considers that evidence may be available in the jurisdiction in which she is based, she may decide instead to rely on the rule that affords jurisdiction over the same dispute to the court where she herself has her place of residence.

Leaving aside the debate on the desirability of competition among different fora, which the Regulation engenders, it is beyond doubt that its rules have ensured legal certainty for claimants and defendants as well as, thanks to the interpretation of its rules prevailing in England, allowing English courts to become courts of choice for many plaintiffs (see generally Danov, Becker and Beaumont, 2013). Brexit, however, stands to change all of this; no longer will plaintiffs seeking to launch a claim before the much trusted and efficient UK courts be able to rely on the safe harbours of the binding rules enshrined in Articles 4 and 7 of the Brussels Regulation. Nor will the judgments handed down by these courts be binding across the whole of the Union. Claimants lodging actions in other Member States are unlikely to rest easy as parallel actions in UK courts will not be ruled out; in addition, those victorious in other Member States will no longer be able to enforce their judgments quickly and easily in UK courts and vice versa (see Dickinson, 2016; Andreangeli, 2018, Ndolo and Liu, 2017).

It is acknowledged that these issues are encompassed in the agenda of the EU/UK negotiations and will therefore be given a resolution in that context. However, it is clear that the UK’s exit from the Union will herald uncertainty as to the identification of the competent judge and the risk of parallel actions. In particular, it is worth reflecting on whether, once the UK leaves the ‘safe space’ of the Brussels regime, old international instruments of which the British state had been a signatory before its EU accession will ‘revive’ – could this ‘resurrection’ be compatible with current EU law principles? In addition, to what extent can the UK courts rely on domestic legal principles to decline jurisdiction before them that had been claimed in light of the Brussels Regulation? Although these courts will no longer be subjected to the principle of the supremacy of EU law, this question could be of capital importance for multi-party, multi-jurisdictional disputes where it may be more convenient for the parties, especially for the purpose of access to evidence and to justice, to petition British judges.

Before we examine the above issues, however, it is necessary to pause and consider why they are of particular importance not just for UK judges and lawyers, but also for EU competition law as a whole. As was anticipated, competition law disputes, especially those arising from the alleged infringement of Article
101 TFEU, are in nature multi-party and multi-jurisdictional: unsurprisingly therefore, they are also subject to the application of the Union’s conflicts of laws rules. Furthermore, it is well known that UK judges, and especially the English courts, have become a destination of choice for many litigants – they are perceived as competent, relatively quick (albeit not cheap by any means) and accessible, both in terms of standing and as regards the rules on evidence (see Lianos, Davies and Nebbia, 2015; Wurmnest, 2016; Danov, 2016).

The regime enshrined in the Brussels Regulation has been critical to the attainment of these outcomes, especially since the UK courts have been adopting a relatively extensive view of the jurisdictional rules. Cases like *Provimi* and *Cooper Tyre* have allowed non-UK plaintiffs to establish jurisdiction in the English courts on the sole ground that a member of the corporate group of one of the defendant companies had its domicile in England, and quite regardless of its direct involvement in the infringement. Although later case law, especially that handed down by the Competition Appeals Tribunal, aimed to lay down some boundaries to this rather sweeping reading of the standing rules, it is beyond doubt that the ‘plaintiff-friendly approach’ championed by these courts has promoted the standing of the UK as a good place to litigate competition claims. Where to, though, after Brexit?

It is sure that the UK’s exit from the Union will lead to it ‘regaining control’ on yet another area of policy, albeit, it is forecast, at a significant cost to the legal services industry. However, it is unlikely to change the nature of competition cases, the resulting likelihood of multi-jurisdictional claims that may impact the UK jurisdiction and the preference for UK courts, at least for a time. This is why it is argued that whatever solution is agreed, it must not depart from the current EU *acquis* and, in particular, must continue to ensure clarity as to the competent court and avoid unnecessary burdens when it comes to executing judgments obtained elsewhere in Europe.

However, it is unclear whether these issues are going to be a priority in the current negotiations, hence the question of how can the gap left open by the intervening inapplicability of the Brussels regime be filled. As was anticipated above, it has been mooted whether international agreements which the UK and the EU had been parties to before 1972 can become applicable again. And what about those Conventions that had been signed by the Member States, but have now been subsumed into the current EU private international law framework? Moreover, could the parties to a competition case seek to resolve these problems themselves by agreeing *ad hoc* arbitration clauses, designed to overcome the uncertainty arising from the intervening inapplicability of the Brussels Regulation? Or is all this just a lot of ‘scaremongering’ since courts

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3 Provimi Ltd v Aventis Animal Nutrition SA, [2003] EWHC 961 (Comm), para. 29, 30–34; also Cooper Tyre, [2009] EWHC (Comm) 269, para. 50; see also para. 55–56, 64.
throughout Europe will continue to ‘trust’ each other, both in respect of the allocation of jurisdiction and the mutual recognition of judgments?

Coming to the first of these options, it may seem surprising but this has emerged in the debate as a feasible avenue to overcome the difficulties of a post-Brussels world. Among others, Dickinson argued in a recent article that come the exit from the Union, the UK would likely ‘revert’ to being bound, as a ‘stand-alone’ contracting state, to observe conventions such as, among others, the Lugano Convention concluded in 2007 that concerns jurisdiction, recognition and enforcement of judgments, as well as the 1980 Rome Convention or even the 1968 Brussels Convention (Dickinson, 2016).

It was suggested, in particular, that the 1980 Rome Convention could be a ‘good candidate’ for testing this possibility, since it had been ‘open for signature by parties who (at that time) were members of the EEC’, as was the UK (Dickinson, 2016). Moreover, it was emphasised that the Convention remains in force to the extent that it binds also, inter alia, ‘overseas territories to which the EU’ would not extend. Perhaps more importantly, its application to a non-EU member state would not be affected by the fact that it was ‘replaced by the Rome I Regulation’ for EU member states (Dickinson, 2016). On a similar vein, it has also been suggested that the 1968 Brussels Convention might again become applicable, since accession to it on the part of the UK was contingent upon EEC membership. It was also highlighted that the Convention itself has remained applicable to ‘relations with the territories of the member states to which (…) the EU Treaties’ do not apply (Dickinson, 2016).

There are, however, a number of objections to this scenario. It could be doubted in fact that the Court of Justice would allow these instruments to ‘revive’ their effects vis-à-vis the United Kingdom. On this point, it should be remembered that the Court identified in the West Tankers case ‘the unification of the rules of conflict of jurisdiction in civil and commercial matters and the free movement of decisions in those matters’ as the overriding objectives of the Brussels Regulation.\(^4\) Thus, the position of the Court could be interpreted as suggesting that the process leading to the enactment of the Regulation, which is aimed at ensuring the good functioning of the single market through establishing common, clear jurisdiction rules and allowing the ‘free movement of judgments’, is irreversible in nature (Andreangeli, 2017). On this basis, it would accordingly be difficult to conclude that these ‘old’ international instruments could be in any way ‘revived’ vis-à-vis the UK. To hold otherwise would, in fact, run counter to the principle of effectiveness of EU law, and therefore create tension between, on the one hand, reasons of practicality in the resolution of multi-party and multi-jurisdictional cases,

\(^4\) Case C-185/07, Allianz and another v West Tankers, EU: C: 2009: 69, para. 24.
such as competition claims, and, on the other hand, one of the central tenets of Union law (Dickinson, 2016; Andreangeli, 2017).

Could the parties to an agreement, then, seek to minimise this uncertainty by signing ‘choice of court’ clauses designed to bring competition claims arising from, for instance, cross-jurisdiction joint venture agreements or distribution arrangements? It is well-known that these clauses have long been regarded by the Court of Justice as inimical to the key principles and objectives of the Brussels Regulation. In the aforementioned West Tankers preliminary ruling, the Court expressed the view that a court could not be prevented from ruling on its own jurisdiction, in accordance with the Brussels Regulation, by means of either an arbitration agreement or an injunction issued by another court on the basis of such an agreement.\(^5\) The Court was very clear that no court could determine the scope of the jurisdiction of another court because to hold otherwise would have undermined both the full effect of the Regulation and the ‘trust (…) that the Member States accord to one another’s legal systems and judicial institutions (…)’.\(^6\)

Come Brexit, however, West Tankers will no longer be applicable to UK courts, which could therefore be able, at least in principle, to issue anti-suit injunctions in competition claims. However, it is not at all clear whether these injunctions will be upheld by a court of an EU member state for the latter would still be bound to follow the West Tankers dictum (Ndolo and Liu, 2017). To overcome this difficulty, it has therefore been suggested for, after exit, the UK to join the 2005 Hague Convention on choice of court, which itself allows the enforcement of choice-of-court agreements and to which any state can accede (Ruhl, 2018). It is acknowledged that this approach, to the extent that it relies on the will of the parties to remedy the uncertainty arising from a ‘hard Brexit’, and from an at least momentary lack of an ad hoc agreement, could go some way toward protecting the jurisdiction of a UK court in a competition case. Nonetheless, it is well known that the Hague Convention presents a number of structural limits, such as its strictly defined scope and the fact that so far it has not attracted the support that the EU had hoped for at the time of its negotiation. (Ruhl, 2018).

Can the mutual trust that the courts of the EU member states have developed over the years come to the aid of competition litigants wishing to lodge their claim ‘safely’ in the English courts or the Competition Appeals Tribunal? It has been argued that national courts are likely to recognise the jurisdiction of UK courts on the basis of the rules on ‘international lis pendens’, enshrined in Part 4 of the Brussels Regulation (Nyombi and Dickson, 2017). Admittedly, this approach would address the risks of uncertainty for litigants

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\(^5\) West Tankers, cit. (fn. 4), para. 29.
\(^6\) Id., para. 30.
as well as remain consistent with the EU *acquis*. However, what remains unclear is whether domestic law in force in the UK, and in particular the English rule of *forum non conveniens*, may become applicable once again, thus leading to outcomes that are once again difficult to reconcile with the Brussels regime. (Nyombi and Dickson, 2017; also Allen and Overy, brief, 2016). It was mentioned earlier that Brexit is likely to allow the UK to ‘regain control’ over the jurisdiction of these courts in an area, such as antitrust law, where the latter had been interpreted in a generous and rather plaintiff-friendly manner. It could thus be argued, not without merit, that the doctrine of *forum non conveniens*, which has been so far outlawed in cases falling within the scope of the Brussels Regulation, could be consistent with this objective, since it would allow English courts to decline the power to adjudicate on cases that can be justly tried elsewhere and quite regardless of the will of the parties (inter alia Andreangeli, 2018). Against this background, it may legitimately be doubted whether the mutual trust among national courts, that has so far accompanied EU membership, could be taken for granted in any way in a post-Brexit world without going as far as questioning, if not as putting under clear strain, those principles that have guided the allocation of jurisdiction in multi-party and multi-national competition claims (Merret, 2018).

In light of the above analysis, it may be concluded that the adjudication of multi-jurisdictional, multi-party disputes, such as competition cases, in a post-Brexit era is likely to create significant tension in the framework of principles that have so far guided the allocation of jurisdiction and the mutual recognition of judgments in the EU. It is acknowledged that many of these questions are likely to be subjected to negotiations, and will hopefully be settled as part of the exit deal between the UK and the EU. However, it is argued that until such time as this deal takes shape, litigants will be faced with great uncertainty and, more generally, a lot of the ‘established wisdom’ surrounding this area will be put to the test.

### III. Brexit and public competition enforcement: leaving the safe harbour of the ECN and sailing into uncertainty?

#### 1. Out of the European Competition Network – the new reality of cooperation without EU membership

The previous section highlighted some of the consequences of Brexit and argued that the exit from the Union will have significant consequence not

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7 See e.g. case C-68/93, Shevill, EU: C: 1995: 61, para. 35–37.
only for the UK; it is also going to have an as yet unknown impact on key 
EU law principles, that have so far been fundamental for the effective private 
enforcement of the competition rules, namely those key tenets of EU conflicts 
of laws that have allowed antitrust litigation to flourish in Britain. The public 
enforcement of the competition rules is equally going to be no stranger to 
similar tensions. So far Section 60 of the Competition Act 1998, in accordance 
with principles of effectiveness and supremacy of EU law, has ensured that the 
rules governing the investigating powers enjoyed by the CMA are extended 
to give effect in the UK to decisions adopted by the EU Commission in the 
detection of infringements which have prima facie occurred within the UK 
jurisdiction, thus being critical to British competition agency’s fulfilment of its 
duties of cooperation within the European Competition Network.

Brexit is going to have a significant impact on this status quo. No longer 
will the infringement decisions adopted by the EU Commission be legally 
bounding within the UK jurisdiction. In addition, and perhaps more critically, 
the CMA will no longer be subjected to its obligations and endowed with its 
powers as a member of the European Competition Network (see Cengiz, 
2012). In this specific respect, it is clear that the deep cooperation existing 
among the National Competition Authorities (hereinafter; NCAs) in the EU 
and between the NCAs and the Commission have allowed each member of 
the ECN to investigate far more efficiently prima facie infringements having 
an impact on interstate trade. The CMA itself recognises the importance of 
the Network and of the duties and powers of cooperation bestowed upon it 
by Council Regulation No 1/2003 for the fulfilment of its statutory duties.8

This all, however, stands to change dramatically since, according to the 
Draft Withdrawal agreement formulated by the EU, the British competition 
agency will no longer be a member of the ECN, thereby losing a host of 
investigative powers such as: the power of exchange and use in evidence 
documents gathered in the course of competition investigations and the power 
to ask other authorities to carry out inspections on its behalf. It is expected that 
this, among other issues, will be settled in the course of the exit negotiations. 
However, it is legitimate to doubt that whatever cooperation the UK secures 
vis-à-vis its erstwhile ECN partners, this cooperation will be as deep as the one 
that is available now to the CMA as a member of the Network. Additionally, 
addressing this issue as part of the exit negotiations is likely to be even more 
urgent since the EU aims to move to even greater cooperation among the 
NCAs and to reinforcing the authorities’ investigating and sanctioning powers

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8 See e.g. speech given by the CMA’s Chief Executive, Dr Andrea Coscelli, on 4 February 
2017, available at: https://www.gov.uk/government/speeches/andrea-coscelli-on-the-cmas-role-
as-the-uk-exits-the-european-union (last accessed on 31 July 2018).
through the EU Commission’s ‘ECN+’ Directive proposal. Arguably, this is not going to be just a problem for the UK: it is in fact submitted that Brexit is unlikely to change the integrated nature of the EU’s economy, within which the UK is a very significant player. Nor is it going to mean that transnational cartels involving UK based firms will be less likely in the future.

Against this background, it is argued that the circumstance that EU competition law may be applicable in an extra-territorial manner is indeed a tangible possibility. As is well known, the Court of Justice has accepted that Articles 101 and 102 TFEU and the EU Merger Regulation can apply to practices involving companies based outside the Union. Just to name one notorious judgment – in the Dyestuffs appeal decision the Court held that even though the appellant company had at the time no seat within the common market, the Commission could still impose a fine on it with respect to an infringement committed by a subsidiary company, which the appellant – a company having its seat outside the EEC at the time – controlled totally on the ground that the breach had produced its effects within the Common Market. In other words, it is the place in which an agreement or other anti-competitive practice is implemented that matters for the purpose of triggering the jurisdiction of EU law, as well as the attending power of the EU Commission or of any other member of the ECN to investigate and sanction the infringers.

In light of the above, it may be concluded that addressing the ‘vacuum’ arising from the CMA no longer being a member of the ECN is a key imperative for the EU just as much as for the UK. But how could this objective be achieved? Could proposing solutions that are ‘off-the-shelf’ be the only way of doing so? Or should the negotiating parties instead prefer a more creative approach to these issues, one that perhaps takes into account the fact that up to the moment of exit the UK has been compliant with the Union *acquis*? These questions will be addressed in the next subsection.

### 2. From partners to... what exactly? Forging a new relation between the CMA and the (rest of the) ECN

The previous subsection highlighted some of the immediate consequences of Brexit for the position of the CMA *vis-à-vis* the European Competition

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10 Case 45/69, ICI v Commission, EU: C: 1970: 73, para. 128; see also paras. 130–136 and 141.

11 See also, inter alia, case C-89/85, Re: Wood Pulp, EU:C:1998:447, para. 16–18.
Network. It was argued that, as the UK’s exit from the EU is not going to affect the possibility for competition infringements to be cross-border, securing strong cooperation links between the UK and the rest of the Union is a priority not only for Britain but also for the EU as a whole.

The purpose of this subsection will be to consider the alternatives to the current model that may be deployed in a post-Brexit world to ensure the continued, seamless and Europe-wide application of the competition rules on the part of the CMA and ECN’s member agencies. It is well-known that in order to investigate and detect *prima facie* competition infringements, whose impact spans jurisdictions within and outside the EU, the Union has negotiated and concluded a number of cooperation arrangements with key partners. Such arrangements can, however, have different characteristics and focus on different elements of the investigating and sanctioning procedures; cooperation may be agreed to take place at the early stages of a case by, for instance, imposing on the parties an obligation to communicate to each other the start of a new investigation. Or it may entail the power and the corresponding duty to exchange information and evidence (e.g. Demedst, 2012). In this specific context, this form of cooperation can once again be more or less extensive.

Having regard especially to antitrust cooperation in which the EU engages, existing instruments can be categorised in different ways. In the so-called ‘first generation agreements’, the EU and its major trading partners, such as the US (1991), Canada (1993) and South Korea (2009), have undertaken to have a shared framework for the exchange of basic information concerning ongoing investigations. Within these frameworks, however, it is not possible to exchange information and documents gathered in the course of an individual investigation unless the parties to the investigation agree to such exchange (Demedst, 2012). In practice, therefore, only non-confidential information can be transmitted to another jurisdiction; the parties to first generation agreements are under no obligation to disregard their own domestic law, for instance by exchanging information that would have to remain confidential according to national rules (Demedst, 2012).

Upon perceiving these limitations, the EU Commission, taking stock also of the commitments made in 1998 by OECD members in a Recommendation concerning effective action against hardcore cartels12, took steps toward the negotiation of agreements entailing greater cooperation. ‘Second generation agreements’, therefore, allow the parties to cooperate more deeply among each other, by not only undertaking to communicate to each other information about new or ongoing cases, but also by being able to exchange evidence

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gathered in the course of investigations, albeit within certain limits (Demedst, 2012). So far, however, the EU has concluded only one second generation agreement with Switzerland.\(^1\) Incidentally, while in 1994 the US had put in place internal legislation aimed at allowing for similar instruments to be negotiated and concluded, no such agreement has been forthcoming (e.g. Newman and Delgado Echevarria, 2004). The EU/Swiss cooperation framework enables the parties to reciprocally exchange information gathered as evidence in competition investigations, albeit within strict limitations aimed at the protection of confidentiality; perhaps most importantly, the information exchanged under the agreement cannot be used in order to impose sanctions on individuals (Demedst, 2012).

Antitrust cooperation has also been possible thanks to other instruments; comprehensive mutual legal assistance treaties, for instance, have provided competition authorities with a tool to obtain assistance in competition cases, for instance for the purpose of obtaining evidence located in a different jurisdiction (Martinszyin, 2015; Joshua, 2008). Their use in antitrust investigations is however limited: unlike in many domestic jurisdictions, there is no EU-wide criminal offence for cartel behaviours, thus precluding the application of treaties aimed at ensuring cooperation with respect of criminal matters (Joshua, 2008). In addition, the forms through which this cooperation takes place are often cumbersome, since they usually involve the use of diplomatic channels or the involvement of judicial authorities (Joshua, 2008).

Competition provisions have also been included in free trade agreements (hereinafter; FTAs): thus, in the EU/South Korea free trade agreement, concluded in 2010, the parties reiterated their commitment to the existing competition cooperation agreement, concluded in 2009 and aimed at ensuring mutual cooperation, coordination and consultation as well as the exchange of non-confidential information. The FTA provided for an additional commitment of reciprocal consultation in matters of competition policy and to the exchange of non-confidential documents in those circumstances that were not covered by the 2009 agreement (Demedst, 2012). Similarly, the 2011 Agreement between the EU and Columbia and Peru contains a number of provisions designed to facilitate cooperation and coordination in competition cases, the making of representations in cases of mutual concern and a limited exchange of information between jurisdictions (subject to the limits enshrined in domestic law as regards confidentiality) (Demedst, 2012).

It is added that the recent Canada-EU Trade Agreement (hereinafter; CETA), currently subject to ratification by national parliaments, reiterates

the importance of inter-agency cooperation and for that purpose confirms that such cooperation will continue to take place in the forms established by the 1999 Canada/EU Competition Cooperation agreement;¹⁴ this agreement¹⁵ requires each party to notify the other party of the initiation of new cartel and abuse of dominance cases that may affect their interests.¹⁶ The Agreement also provides for a framework for exchange of information and legal assistance as well as for the mutual consultation as regards matters of mutual interest. These powers are, however, subject to significant limits: in accordance with the principle of comity, information can only be exchanged if it is in the interest of both parties and allowed by the respective domestic laws.¹⁷ Moreover, Article X(2) commits both parties to maintaining the confidentiality of any such information and imposes on each party the duty to oppose disclosure sought by a third party.

‘Soft’ forms of cooperation have also had a place in the EU’s policy aimed at securing greater coordination and assistance from competition agencies outside its jurisdiction. Memoranda of understanding, for instance, have been negotiated with several countries: unlike treaties, these are merely administrative arrangements that, in accordance with principles of negative and positive comity, deal with issues of ‘cooperation and coordination, assistance (…) and avoidance of conflict (…)’; they also lay out a basic mechanism for communication and rules on the confidentiality of the information reciprocally transmitted in the course of their application (Demestd, 2012). They are, however, entirely voluntary: thus, despite constituting flexible tools for the management of inter-agency cooperation, they do not create any obligations under international law, or indeed set aside any obligation enshrined in domestic law, most importantly those obligations concerning the confidentiality of information (Demesdt, 2012).

In light of the forgoing summary, it must be acknowledged that the ECN is not the only framework within which the Commission cooperates with competition agencies in other jurisdictions for the purpose of an effective detection and sanctioning of antitrust infringements. However, it certainly allows for very effective, almost seamless cooperation, as well as ensures that multiple proceedings concerning the same prima facie breach can be avoided (Cengiz, 2012). At its heart is the timely notification of new cases, avoidance of parallel actions and, at the same time, preference for joint actions should

¹⁶ Article II.
¹⁷ Article VII.
more than one authority be best placed to deal with a particular investigation; perhaps its most important feature is the possibility to both exchange and use in evidence material gathered in another jurisdiction and to carry out fact-finding measures on behalf of another authority.\textsuperscript{18} This is to take place in an informal, relatively flexible forum, where, on the one hand, there is no ‘clearing house’ as regards case allocation but, on the other hand, extensive cooperation takes place, including the exchange and use as evidence of information gathered by other NCAs and the ability to request a partner agency to act as an investigating authority on behalf of the requesting party (e.g. Hjemtvedt, 2017).

Can other ‘off-the-shelf’ instruments be as effective as mechanisms for coordination and cooperation as the ECN? It is doubtful that ‘first generation agreements’ or competition cooperation provisions contained in FTAs may prove as effective; it is in fact submitted that under these arrangements the CMA and the EU Commission, for instance, would not be able to reciprocally exchange confidential information or indeed to carry out investigative measures on their reciprocal behalf with the same seamlessness as is the case under the current ECN structure (Demedst, 2012). As highlighted above when briefly discussing the Competition Chapter of the CETA, any cooperation between the EU Commission and a third country competition agency is very likely to be limited by the application of the principles of positive and negative comity, as well as by the continuing commitment to respect the confidentiality of the investigated parties.

It is equally difficult to imagine that mutual legal assistance treaties (MLATs) may replace the existing Network, not least because cartel behaviour is not criminalised in all of the Member States as well as in the EU, with the consequence that, the ‘double criminality’ requirement not being met, these treaties would not be applicable (Burnside and Crossley, 2005; Joshua, Camesasca and Jung, 2008). As for memoranda of understanding (MoUs), once again, limits concerning the protection of the confidentiality of information and the entirely voluntary nature of these arrangements are not going to be a suitable replacement as a means of regulating the future UK/EU relationship in the context of competition enforcement (Slot, 2015).

But what about second generation agreements? As was discussed earlier, the EU has so far negotiated one such agreement with Switzerland. This type of arrangement provides for deeper cooperation, for example by allowing the parties to reciprocally exchange information that can be used as evidence in circumstances equivalent to those listed in Article 12 of Council Regulation No 1/2003; the existing agreement also allows for reciprocal cooperation in the

\textsuperscript{18} See EU Commission, Notice on cooperation within the network of competition authorities (‘the Network Notice’), (2004) OJ C101/43, especially para. 1 and 3.
taking of evidence, again within the limits enshrined in the applicable national law (Slot, 2015). It could be suggested, not without merit, that an arrangement akin to the EU/Swiss agreement could replicate the key features of the ECN, by encompassing comparable cooperation and coordination prerogatives and, therefore, to ensure both the exchange of evidence and the carrying out of investigative measures by proxy.

On a closer look, however, this is not so straightforward. A new agreement of this kind is going to require time to negotiate and conclude: by way of example, it took the EU and the Swiss authorities nearly 3 years to negotiate the current arrangement, between 2011 and 2013, and the latter entered into force in 2014. Thus, even taking into account the transition period, time seems to be at least tight for the UK and the EU Commission to engage in talks aimed at undertaking similar cooperation rights and obligations (Wagner von Papp, 2017). It is also not entirely clear whether a second-generation agreement could, in practice, secure all the benefits of the ECN: having regard, for instance, to the exchange of information and, in this context, to the protection of lawyer-client confidentiality, it bears reminding that UK lawyers will no longer benefit from the current EU safeguards, which are linked to the legal adviser being authorised to practice in one of the Union’s member states.19 Thus, it could be argued that even under a second generation agreement, a UK-regulated lawyer would not be able to claim privilege against a request to disclose documents issued by the NCA of one of the EU member states. In addition, the consent of the parties to the case in question to the exchange of information may still be necessary: for instance, the EU/Swiss agreement requires such consent when evidence originating from a lawyer is required for transmission from Switzerland. The same applies vis-à-vis evidence provided as part of a leniency application or settlement process.20

Against this background, it is argued that in practice jeopardising cooperation in competition enforcement with one of the key NCAs in Europe will be an almost inevitable consequence of a hard Brexit. Is the negotiation of a new agreement, either as stand-alone or as part of the main treaty setting out the new trading relations between the EU and the UK the only way of creating a new framework for cooperation in this field? On a first look, a resounding ‘yes’ may seem the only answer. The UK will be just like any other third state and will be treated as such. On reflection, however, the reply to this question is not so simple: it should be remembered that come its exit, the UK will not just be ‘another third state’. It will be a former member state, and as such its

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20 See Agreement between the European Union and the Swiss Confederation, cit. (fn. 12), especially Article 7(5) and (6).
internal laws will be compliant with the EU acquis. In addition, bearing in mind the text of the EU Withdrawal Bill\textsuperscript{21} and the stipulations made by the EU in its Draft agreement\textsuperscript{22}, it is legitimate to expect that such consistency will remain for some time to come for a number of reasons. First of all, the UK courts will endeavour to take into account the judgments of the Court of Justice of the EU in cases where the application of ‘repatriated’ EU law is at stake.\textsuperscript{23} Secondly, the UK will continue to be a party to international cooperation and consultation frameworks such as the International Competition Network and the OECD. Although it is acknowledged that these fora only provide space for ‘soft’ forms of collaboration, it is likely that, to the extent that they provide space for discussion of issues of mutual concern and for the exchange of best practices, they will help maintain convergence between the CMA and its erstwhile ECN patterns.

On this basis, would it perhaps be too bold to suggest that the negotiating parties could go beyond the ‘off-the-shelf’ solution of a ‘second generation’ cooperation agreement and undertake to maintain the status quo as regards the position and the relations existing between the CMA and the rest of the ECN? It is suggested that this is not a moot question, nor just a flippant proposal. It should be recalled that at the root of the tight relationship existing among the members of the ECN are a number of tenets, one of which is the recognition that the rights of defence enjoyed by the parties affected by competition investigation in each member state must be considered ‘sufficiently equivalent’.\textsuperscript{24} It is further argued that Brexit will not mean the abrogation of the UK Competition Act 1998, or indeed of the UK’s domestic legislation safeguarding fundamental rights: if anything, the whole purpose of the UK Parliament enacting legislation designed to incorporate EU law into national law is to avoid the ‘cliff-edge’, namely the creation of any normative vacuum in areas where the EU retains competence until the UK exits the Union.\textsuperscript{25}

\textsuperscript{21} See e.g. Article 6(2), Draft EU (Withdrawal) Bill, available at: https://publications.parliament.uk/pa/bills/lbill/2017-2019/0079/18079.pdf, especially para. 2 and 19 ff.
\textsuperscript{23} Ibid.
Against this background, it would be difficult to conclude that come the exit of Britain from the EU this equivalence will no longer exist. Accordingly, it is submitted that the CMA could still be considered a ‘trusted member’ of the ECN and, consequently, could be entitled to enjoy similar prerogatives as it is entitled to under Council Regulation No 1/2003 as the latter stands at the time in which the UK’s exit takes its full effect – namely, at the end of the transition period. The continuation of the existing relationship could be enshrined, perhaps, into a chapter of the future Withdrawal agreement and further complemented by a Memorandum of Understanding designing new practical arrangements underscoring the future CMA/ECN cooperation.

It is recognised that this is a very bold suggestion; it is also acknowledged that just as there are a number of normative justifications in support of it, so there are equally meritorious objections to it. As a result of Brexit, the UK will no longer be bound to the principle of supremacy of EU law and, perhaps more importantly, the Court of Justice of the EU will no longer have jurisdiction in the UK, especially via the preliminary reference procedure. In addition, it is unclear whether, should the proposed Directive aimed at enhancing the powers currently enjoyed by the ECN members be adopted and later transposed, the CMA may come to enjoy more extensive prerogatives than those enjoyed by the ECN members beyond the point of exit. Nonetheless, it is argued that, if the concern for both the British authorities and the EU negotiators is to avoid a ‘cliff-edge’ in the area of antitrust cooperation and to maintain the existing status quo, a modicum of pragmatism and trust, the latter supported by an expectation of continuing mutual consistency when it comes to, inter alia, the protection of the rights of defence of investigated parties, may be on order.

In conclusion, it cannot be denied that Brexit is going to be a challenging transition not just for the UK but also for the EU. While at first glance adopting ‘off-the-shelf’ options seems to be inevitable, such as second-generation cooperation agreements, a closer look at the practical consequence of Britain’s exit from the Union could provide support for a tailor-made response to the question of how the relationship of the CMA with its erstwhile ECN partners should be fashioned and, in that context, for adopting arrangements that are as close as possible to existing forms and depth of cooperation. It is acknowledged that venturing down this road may put into question key principles of EU law, including the integrity of the jurisdiction of the Court of Justice. However, it is at least worth considering this option seriously, if the EU’s commitment to fighting transnational cartels is to remain a real one in a post-Brexit Europe.

26 See Explanatory Notes, cit. (fn. 24), para. 2, 53.
IV. Conclusions: Brexit and competition enforcement in Europe – straining at the seams of EU law principles?

The exit of the UK from the EU has marked a seismic moment for the Union, first and foremost politically: even one of the drafters of the Treaty of Lisbon, Lord Kerr of Kinlochard, admitted some time ago that Article 50 had been designed while taking the view that no member state, not least the UK, would have wanted to leave the EU (Gray, 2017). Competition enforcement, whether public or private, is not going to be immune to the aftershocks of this change. As illustrated so far, avoiding the ‘cliff-edge’ is not just an imperative for Britain but also for the EU. At the same time, however, it has been shown that attaining this objective does not come without a cost. If on the one hand it may seem appealing to ‘resurrect’ old conventions, so that some degree of continuity with existing EU conflicts of laws rules can be maintained, on the other hand, going down this route may be very difficult to reconcile with the integrity and inner coherence of the Brussels Regulation regime.

Furthermore, it remains partly unclear how the UK courts will be able to balance the demands and opportunities of their newly acquired ‘independence from Luxembourg’ against the need to maintain legal certainty, an objective likely to be best served by abiding by the ‘soft power’ of the Court of Justice of the EU (see e.g., Boffey, 2017). While it may be expected that the British judiciary will continue to adhere to EU precedent for some time to come (e.g. Lock, 2017), it is undeniable that this outcome presents significant institutional and legitimacy challenges, such as those stemming from the absence of a British ‘voice’ on the EU bench.

Having regard to public enforcement and to the position of the CMA vis-à-vis the ECN, mutual trust and the expectation that the rights of defence will be protected to a standard that is equivalent in the UK to that of the EU could support adopting a solution to how to refashion the relationship between EU competition agencies, including the Commission, and their UK counterpart – a solution that is not ‘off-the-shelf’ and can more or less replicate existing arrangements. However, it is doubtful whether effectiveness in enforcement may be privileged at the expense, at least to a degree, of other key principles, including the integrity of the jurisdiction of the Court of Justice of the EU.

Two years from the Brexit referendum and no clarity exists on the future relationship of the UK and the Union. It is hoped that in the fog of uncertainty the negotiating sides do not lose sight of the importance of effective competition enforcement across Europe and, at the same time, of the need to avoid straining at the seams of a legal system where the commitment to well-functioning markets is so important.
Literature


Consumer Welfare in Financial Services: A View from EU Competition Law

by

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Abstract

The paper analyses to what extent financial consumer protection forms part of the competition law objective of consumer welfare that EU competition law nowadays adheres to. It argues that while EU consumer law more generally aims at protecting
the final consumer, EU financial consumer protection instruments often protect a broader spectrum of customers. This wider notion of the consumer can also be found in EU competition law, where the consumer is usually likened to any customer. A notable difference between EU financial consumer protection and EU competition law, however, is that they place a different emphasis on structural goals and inherently individual components. In EU competition law, the structural protection of competition is thought to eventually protect consumers. By uniting individual and structural aspects of consumer welfare, as well as by combining reactive and proactive consumer protection, EU competition law and EU financial consumer protection law can together achieve a financial protection of consumers that naturally goes beyond what each area of the law could achieve alone. A stringent approach, however, would require the development of a comprehensive EU financial consumer law which includes both dimensions.

Résumé

L'article analyse dans quelle mesure la protection financière des consommateurs fait partie de l'objectif du bien-être des consommateurs en matière de droit de la concurrence, auquel le droit européen de la concurrence adhère actuellement. Il soutient que le droit de la consommation de l'UE vise généralement à protéger le consommateur final, mais les instruments de protection financière des consommateurs de l'UE protègent souvent un plus large éventail de clients. Cette notion plus large du consommateur se retrouve également dans le droit européen de la concurrence, où le consommateur est généralement assimilé à un client. Une différence notable entre la protection financière des consommateurs de l'UE et le droit de la concurrence de l'UE est l'accord d'une importance différente aux objectifs structurels et aux composantes intrinsèquement individuelles. Dans le droit de la concurrence de l'UE, la protection structurelle de la concurrence est considérée de protéger éventuellement des consommateurs. En unissant les aspects individuels et structurels du bien-être des consommateurs et en combinant une protection réactive et proactive des consommateurs, le droit de la concurrence de l'UE et le droit de la protection financière des consommateurs de l'UE peuvent ensemble assurer le niveau de la protection financière des consommateurs allant au-delà de ce que chaque domaine juridique pourrait atteindre toute seule. Une approche stricte nécessiterait toutefois l’élaboration de droit européen de la consommation dans le secteur financier complète, qui engloberait les deux dimensions.

Key words: banking markets; capital markets; consumer protection; consumer welfare; EU competition law; financial markets; financial services; insurance markets; welfare standard.

JEL: D18, G20, I31, K21, L40
I. Introduction

The financial services sector, consisting of banking markets, capital markets and insurance markets, is ‘the lifeblood of the real economy’ (European Commission, 2016). Sector-specific regulation subjects financial services to close scrutiny in the European Union (EU), and consumers in Europe enjoy particular protection in financial services because of the significance of financial services for everyday life – one merely needs to think of bank accounts, credit card payments, mortgages and loans. Financial services regulation pertains to the single market project of the European Union, and the application of EU competition law in this sector needs to be seen as an integral part of this (similarly, see Banasevic, Ryan and Wezenbeek, 2014, § 11.220). As today’s EU competition law strongly relies on a consumer welfare standard, it might be able to contribute to protecting consumers in the area of financial services. This particular aspect of EU competition law is explored in this paper. It asks to what extent financial consumer protection as understood by financial consumer protection law is congruent with consumer welfare as pursued by the EU competition laws. It starts from the hypothesis that financial consumer protection has an inherently individual component to it, while the competition laws take a more general and structural approach to competition that is then thought to eventually translate into consumer welfare. Thereby, the role that considerations of financial consumer protection have when analysing consumer welfare under the competition rules is distinct from other areas of the law.

By exploring recent EU case law in the financial services sector, the paper analyses possible points of convergence and divergence between financial consumer protection in a more traditional sense and consumer welfare in financial services markets as an expression of consumer welfare as it is pursued by the EU competition laws. It scrutinizes how consumer welfare aspects were considered in selected cases, and to what extent consumer welfare led to the resolution of the case. This will then allow for a comparison of consumer welfare as understood by financial consumer protection law, and consumer welfare under the EU competition rules.

The paper concludes with some suggestions on how financial consumer protection could be further developed in the European Union, in particular by submitting that a more comprehensive approach to EU competition law and EU financial consumer protection law could achieve greater and perhaps also more coherent consumer protection. This would allow policy makers to

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1 It needs to be acknowledged, however, that financial consumer protection laws also have structural components, such as when regulating financial market places.
combine the proactive and reactive components of these areas of the law, as well as their individual and structural approaches, in the interest of the European consumer.

II. Consumer welfare in financial services markets: the role of EU competition law

1. General thoughts

In the US, it has been held that antitrust and consumer protection law are ‘the two component parts of an overarching unity’ (Averitt and Lande, 1997, p. 713), namely consumer sovereignty. Both US antitrust and US consumer protection law are seen as having the task to increase consumer welfare (Wright, 2012, p. 2216, 2218). While the antitrust laws should keep the markets competitive by focusing on factors that are external to consumers, the consumer protection laws should enable consumers to choose well amongst the market options available by focusing on factors that are internal to consumers (Averitt and Lande, 1997, p. 713, 716 f, 718, 729 f). The recent setting-up of the Consumer Financial Protection Bureau (CFPB) in the US has led to some controversy, as it saw a shift in competences over financial consumer protection from the Federal Trade Commission (FTC) to the CFPB – and thus a separation of the two strands of consumer law in financial services that some considered unwarranted (Wright, 2012, p. 2219). In the EU, several Directorates General of the European Commission share the competences for consumer law understood in this bifurcated way. Of particular relevance are the Directorate General for Financial Stability, Financial Services and Capital Markets Union (DG FISMA) on the one hand, and the Directorate General for Competition (DG COMP) on the other hand. While DG COMP both develops EU competition policy and acts as the prime enforcer of the EU competition laws, DG FISMA is focused on developing the EU policy on banking and finance – with implementation and enforcement largely delegated to the Member States.3

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2 Arguing that consumer choice rather than overcome price and efficiency models should guide antitrust, see Averitt and Lande, 2007.
An ongoing UNCTAD project on financial consumer protection in the banking sector is investigating ways for financial consumer protection to promote growth, enhance financial stability and increase consumer welfare. The project names five central aspects of financial consumer protection, namely inclusion, transparency, knowledge, sustainability and redress (UNCTAD, n.d.). These aspects point to the internal factors that were mentioned above. The G20 High-Level Principles on Financial Consumer Protection, developed by the OECD in 2011, also call for financial consumer protection to lead to an equitable and fair treatment of consumers, to disclosure and transparency, financial education and awareness. They equally mention the importance of competitive markets for consumer welfare (OECD, 2011). In many of these documents, individuals and SMEs are regarded as those worthy of financial consumer protection (for instance, see OECD, 2014, p. 2).

2. Consumer welfare in EU financial consumer protection law

The understanding that EU financial consumer protection law has of consumer welfare is the necessary starting point for the present inquiry. In general, EU consumer protection laws apply to consumers, whereby consumers are understood to be natural persons that are acting for purposes which are outside their trade, business, craft or profession.4 EU financial consumer protection, however, is a special case in this respect, as it sometimes relies on this narrow conception of the consumer while at other times offering much broader protection to buyers of financial services. Two aspects of EU financial consumer protection are of particular interest for the present inquiry: the nature of the protection offered, and the nature of the customers to whom that protection is afforded. A short overview on some important instruments of EU financial consumer protection shall give some insight into this.

First, in the area of investment services, the Prospectus Regulation of 2017 sets out rules for disclosing information when offering securities to the public, or when admitting securities to trading on regulated markets. It does so with the explicit aim of protecting investors, and mentions both consumer and investor protection more generally as an aim within capital markets.5

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5 Regulation (EU) No 2017/1129 of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, OJ L 168, 30.06.2017, p. 12, art. 1(1), recitals 3, 4 & 7 (‘The aim of this Regulation is to ensure investor protection and market efficiency.’).
The prospectus obligation has the aim of informing consumers, namely retail investors, of investment services and their risks (Colaert and van Dyck, 2010, p. 396). However, the prospectus obligation can be limited where only qualified investors are affected. In a similar vein, the Directive on Collective Investment in Transferable Securities (UCITS Directive) foresees information obligations to protect investors. The Directive on Financial Instruments Markets distinguishes between retail and professional clients, laying down different rules for these two groups of customers. The same distinction can be found in the Regulation on packaged retail investment products. In order to fully protect private investors, EU law also regulates financial institutions through which private investors acquire securities. The regulation of these institutions goes far beyond the mere provision of information, and can be seen as one of the structural components in EU financial consumer protection law (Colaert and van Dyck, 2010, p. 397–398, 409). The EU also foresees rules on credit rating agencies that are aimed at protecting investors and restoring market confidence (European Commission, n.d.).

Secondly, in the area of credit services the EU adopted a Consumer Credit Directive in 2008 which, in the words of the European Commission, ‘aims at fostering the integration of the consumer credit market in the EU and ensuring a high level of consumer protection by focusing on transparency and

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6 Ibid., art. 1(4)(a).
10 In this respect, see Directive 2014/65/EU of 15 May 2014 on markets in financial instruments (MiFID II), OJ L 173, 12.06.2014, p. 349; Regulation (EU) No 600/2014 of 15 May 2014 on markets in financial instruments (MiFIR), OJ L 173, 12.06.2014, p. 84. These two legal frameworks started to apply from 3 January 2018. MiFID II distinguishes between retail and professional clients, affording more protection to the former; see MiFID II, art. 4(1)(10) & (11).
consumer rights.' This Directive only benefits the consumer, ie ‘a natural person who, in transactions covered by this Directive, is acting for purposes which are outside his trade, business or profession.’ In credit services, there is thus a distinction between natural persons acting outside their professional remit, and professionals. Amongst others, the Directive aims at protecting consumers by guaranteeing consumer confidence. It has been questioned, however, whether that Directive should not also extend to small businesses which have a bargaining power that is comparable to consumers as understood by the Directive (Colaert and van Dyck, 2010, p. 381).

Another area in which the EU has adopted consumer protection rules is that of banking and payment services. Here, there is generally no distinction between final consumers and other customers (traders). Instead, the rules frequently foresee protection based on specific interests, such as the interest of an account holder, or the interest of an online banking user (Colaert and van Dyck, 2010, p. 430). The Payment Services Directive, for instance, mentions that safe electronic payments should benefit consumers, merchants and companies, but it also recognizes that ‘consumers and enterprises are not in the same position, they do not need the same level of protection.’ Accordingly, while some of the provisions apply across the board, there is sometimes an opt-out if the payment service user is not a consumer. However, while the Payment Services Directive notes that it focuses on final consumers, it at the same time allows Member States to extend protection under the Directive to micro-enterprises – thus acknowledging their inferior bargaining power.

To sum up, financial consumer protection instruments in the EU have a strong individual component and often follow the information paradigm, but there is also a structural element present which aims at boosting confidence in the financial markets. Contrary to most other consumer laws, it is not

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14 Ibid., recital 8.
16 This is the case for the transparency provisions of title III and some rights and obligations as provided for in title IV; see Directive (EU) 2015/2366, arts 38(1), 61(1) and (2).
17 Directive (EU) 2015/2366 of 25 November 2015 on payment services in the internal market, OJ L 337, 23.12.2015, p. 35, art. 38(2): ‘Member States may apply the provisions in this Title to micro-enterprises in the same way as to consumers.’
only individuals in their private capacity that are protected, but also small businesses or the users of financial services more generally.

3. Consumer welfare in EU competition law

It is generally acknowledged that EU competition law as it stands today pursues two main policy goals: market integration and consumer welfare.\(^{18}\) The goal of market integration goes back to the very beginning of EU competition law in the 1950s and is well-reflect in the Treaty provisions and continues to be re-affirmed by the European courts (similarly, see Whish and Bailey, 2018, p. 23, 52; calling this the ‘paramount goal’ of EU competition law, see Buttigieg, 2009, p. 47).\(^{19}\) The Treaty provides for an internal market to be established among the currently 28 Member States\(^{20}\) of the European Union with a combined population of over 500 million.\(^{21}\) An inherent feature of this internal market is the protection of competition.\(^{22}\)

Concerning the second main goal of EU competition law, consumer welfare, the European Commission only started introducing this standard in the 1990s

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\(^{18}\) It has also been claimed that, at the outset, the aim of Articles 101 and 102 TFEU was to safeguard individual economic freedom (see Cseres, 2005, p. 248). While US antitrust has purely economic goals, EU competition law has added purely political goals (such as market integration) to its policy objectives (see Blair and Sokol, 2013, p. 2497, 2510, 2541). The first US case to acknowledge that consumer welfare represents the goal of antitrust law dates from 1979, whereas EU competition law first mentioned consumer welfare in a soft law instrument from 1997 (see Daskalova, 2015, p. 133, 134 n 2, 142 n 33; European Commission, Green Paper on Vertical Restraints in EU Competition Policy (22 January 1997) COM(96) 721 final; US Supreme Court, *Reiter v Sonotone* (1979) 442 US 330, 343 with reference to: Bork, 1978, p. 66). The reliance of US antitrust law on consumer welfare as its only goal, however, has been critically questioned as it does not provide an unequivocal standard (see Orbach, 2011, 133; First, 2009, p. 199, 204).

\(^{19}\) This goal of EU competition law was recently re-confirmed by the CJEU in Joined Cases C-468/06 to C-478/06, *Sot. Lelos kai Sia v GlaxoSmithKline* EU:C:2008:504, para 65 (containing references to earlier cases); Joined Cases C-501/06 P, C-513/06 P, C-515/06 P & C-519/06 P, *GlaxoSmithKline v Commission* EU:C:2009:610, para 61; Joined Cases C-403/08 & C-429/08, *Football Association Premier League & Karen Murphy* EU:C:2011:631, para 139.

\(^{20}\) Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Italy, Ireland, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Spain, Slovakia, Slovenia, Sweden and the United Kingdom. The United Kingdom invoked Article 50 TEU on 29 March 2017 and is the first Member State in the history of the EU set to withdraw from the Union (‘Brexit’); see European Commission, *Brexit Negotiations*, https://ec.europa.eu/commission/brexit-negotiations_en (accessed 1 June 2018).


\(^{22}\) Protocol (No 27) on the internal market and competition, OJ C 202, 7.06.2016, p. 308.
based on the teachings of the Chicago School, and ‘without any intervention by the legislator’ (Weitbrecht, 2008, p. 81, 85, calling this a fundamental change). It has been the stance of the European Commission for more than a decade now that consumer welfare is ‘well established as the standard the Commission applies when assessing mergers and infringements of the Treaty rules on cartels and monopolies. Our aim is simple: to protect competition in the market as a means of enhancing consumer welfare and ensuring an efficient allocation of resources’ (Kroes, 2005).23 This continues to be the case to this day (see, for instance, Vestager, 2017). The General Court soon followed suit (for a more elaborate discussion, see Daskalova, 2015, p. 151). In two judgments from 2006, the General Court alluded to consumer welfare as the aim of EU competition law. In ÖSTERREICHISCHE POSTSPARKASSE, it stated that ‘the ultimate purpose of the rules that seek to ensure that competition is not distorted in the internal market is to increase the well-being of consumers.’24 In its GLAXOSMITHKLINE judgment, the General Court held that the goal of Article 101(1) TFEU was ‘to prevent undertakings … from reducing the welfare of the final consumer of the products in question.’25 The General Court also emphasized that the Commission had, in this particular case, conducted its legal analysis under this consumer welfare standard.26 Upon appeal, however, the Court of Justice found that the General Court’s conclusion on consumer welfare was supported ‘neither [by] the wording of Article [101(1) TFEU] nor the case-law.’27 Instead, it held that the finding of an anti-competitive object did not require proof that final consumers were harmed, and that Article 101 TFEU protected ‘not only the interests of competitors or of consumers, but also the structure of the market and, in so doing, competition as such.’28 This, one could say, was an important blow to those advocating consumer welfare as the necessary standard of the EU competition rules – amongst others the

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23 In 1993, then-Commissioner Van Miert had still asserted that EU competition policy was concerned with economic, political and social goals: the promotion of efficient production, market integration, and safeguarding a pluralistic democracy (see Van Miert, 1993); in the literature, it has also been argued that the European Commission may be relying on consumer welfare as a rhetorical device more than as an actual standard of assessment (see Akman, 2009a, p. 71)).

24 Cases T-213/01 & T-214/01, ÖSTERREICHISCHE POSTSPARKASSE V COMMISSION EU:T:2006:151, para 115. The General Court deduced this interpretation from the wording of Article 101(3) TFEU.


Commission. As will be seen below, this initially hard stance by the Court has softened over time.

Although based on the US understanding of consumer welfare, the concept of consumer welfare takes on a meaning particular to the EU under EU competition law (Weitbrecht, 2008, p. 85 f, underlining that this specific European approach can be seen in the fact that identical merger cases were decided differently in the EU and the US). While consumer welfare in economics is understood to be the sum of consumer surplus, in EU competition law consumer welfare is not necessarily understood on such an individual basis. Contrary to the consumer protection laws, competition law is often understood to pursue a particular aspect of consumer welfare, namely that of economic wellbeing – or interest – of consumers broadly construed (Ioannidou, 2015, p. 24). In a number of early and more recent cases (see on these Whish and Bailey, 2018, p. 19 f), the European Court of Justice has underlined that consumer harm can also stem from harm to the competitive structure of the market. This can be called a structural approach to consumer welfare that is peculiar to competition law. As the Court has held, the ‘competition rules of the Treaty [are] designed to protect not only the immediate interests of individual competitors or consumers but also to protect the structure of the market and thus competition as such.’ This points to a very broad understanding of what consumer welfare entails, likening it more to a general framework than to a readily applicable standard of assessment. By relying on this framework, competition law implicitly assumes that fostering competition will result in more consumer welfare (Decker, 2017, p. 151, 156). Consumer welfare – together with competition as such – was mentioned in the Court’s 2012 case of Post Danmark I, where the Court held that a company must show that its efficiency gains from an abusive conduct outweigh negative effects on consumer welfare. In its 2014 Intel judgment, the General Court argued that under Article 102 TFEU it is not only practices that directly harm consumers that are caught, but also practices that may affect consumers ‘through their impact on an effective competition structure.’ This is also supported by the Treaty, which in its Protocol on the internal market and competition sets out that the internal market referred to in Article 3 TEU shall include ‘a system

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30 Case C-08/08, T-Mobile Netherlands EU:C:2009:343, para 38.
31 Case C-209/10, Post Danmark v Konkurrencerådet (Post Danmark I) EU:C:2012:172, para 42.
ensuring that competition is not distorted.\textsuperscript{33} Consumer welfare is therefore understood in a rather broad sense by the European courts, and consumer harm can arise both directly from the conduct in question, or indirectly, through the conduct’s impact on the competitive market structure.

With EU competition law’s roots usually traced back to ordoliberalism (on this, see Gerber, 1994, p. 25; Gerber, 2001, p. 232 ff; contesting this finding, see Akman, 2009b, p. 267), it has been questioned to what extent the consumer welfare standard advocated today coincides with an ordoliberal approach. In this respect, many tenets of ordoliberalism may find themselves challenged in the face of the generally accepted consumer welfare approach (Ahlborn and Grave, 2006, p. 197, 217). The focus on the utilitarian goal of consumer welfare can be seen as a shift from the Freiburg School’s deontological understanding of competition – which wants to protect competition for its own sake, regardless of the final outcome – to a more utilitarian view of competition as adopted by the Chicago School, which is based on welfare considerations (on the difference between the utilitarian and the deontological approach to competition, see Andriychuk, 2015, p. 575, 578). Apart from this very fundamental question, there are many more unsettled questions concerning the intricacies of the consumer welfare approach under EU competition law.

While consumer welfare is a concept that competition law has borrowed from economics, these two disciplines do not understand the concept to have the same meaning (Orbach, 2011, p. 133 f). In this sense, it is a shared concept with different conceptions (for a similar conclusion on the nature of the market definition concept in competition law, see Robertson, forthcoming). In a similar vein, it is an unsettled question whether consumer welfare as pursued under EU competition law should maximise overall consumer welfare or consumer surplus in an economic sense, or whether it should (also, or perhaps primarily) target competitive wrongdoing aimed at individual consumers (welfare, it has been argued, is highly subjective and as such cannot be easily generalized; see Daskalova, 2015, p. 136). Some have argued that consumer surplus\textsuperscript{34} might be a first indicative benchmark for assessing consumer welfare, but that other aspects of consumer welfare, which go beyond this price-based criterion, should also form part of the competition law analysis – even if it is not quite clear how, economically speaking, this can be done (Daskalova, 2015, p. 136 f). Others have cautioned that through its narrow focus on a particular relevant market, antitrust is in any case not well-placed to promote consumer welfare in an economic sense (Orbach, 2011, p. 140 f). Another open question concerning consumer welfare relates to the time horizon that is applied. Should short-term

\textsuperscript{33} Protocol (No 27) on the internal market and competition, OJ C 202, 7.06.2016, p. 308.

\textsuperscript{34} The opposite of consumer surplus is, of course, consumer detriment; see on this concept Evans, 2007, p. 26.
consumer welfare be the primary objective, or long-term consumer welfare – or something in-between? (Whish and Bailey, 2018, p. 20, with reference to Bork, 1978). The time horizon is essential because it may completely alter the analysis and its outcome. Long-term benefits may require us to tolerate short-term consumer loss, or vice versa. Overall, it is perhaps the case that competition law pursues an idealized, standardized or generalized version of consumer welfare which does not quite coincide with the mathematical adding up of individual consumer surplus in an economic sense. One issue that needs to be highlighted under the EU consumer welfare standard is that EU competition law does not understand the ‘consumer’ in consumer welfare to only be a final consumer in the form of an individual, natural person – as consumer protection laws generally would. Instead, the term consumer is seen as interchangeable with the term customer, thus also including corporate customers within the competition law understanding of consumers (Akman, 2010, p. 315). For instance, in its 2004 Notice on the application of Article 101(3) TFEU, the European Commission underlines that ‘consumers within the meaning of Article [101(3) TFEU] are the customers of the parties to the agreement and subsequent purchasers.’ Indeed, including only final consumers in the competition law understanding of consumer welfare would mean that any breach of the competition laws would need to be traced in order to ascertain whether final consumers are eventually harmed by the conduct in question – a time-consuming, cumbersome and frequently impossible exercise that would severely limit the administrability of competition law enforcement (see also Daskalova, 2015, p. 140). Instead, the Commission presumes harm to final consumers from competitive harm to intermediate customers. As competition law’s focus on consumers is case-dependent, it has been argued that EU competition law entertains a ‘chameleonic’ concept of the consumer (Albors-Llorens and Jones, 2016, p. 91). This, one can argue, is a fundamental difference between what general consumer protection laws try to achieve, and what competition law intends to achieve – but it leads to similar consumer welfare approaches under EU financial consumer protection laws and EU competition law.

35 In a recent comparison of the concept of the consumer in competition, regulatory and consumer protection policies, Decker ignores this aspect of EU competition law and instead only focuses on the final consumer (Decker, 2017, p. 151 n 1).
4. Consumer welfare as applied to financial services markets by EU competition law: selected cases

Having made these general observations on the approach to consumer welfare under EU competition law, it is now time to explore some recent EU case law in the financial services sector (for a more comprehensive overview on financial services cases under EU competition law – albeit not focusing on consumer protection issues – see Lista, 2013; Banasevic, Ryan and Wezenbeek, 2014). This analysis has the objective to discern (1) which particular kind of consumer the Commission or Court has in mind in that particular case, (2) how the theory of harm in the case at hand is linked to consumer harm, and (3) how consumer welfare is understood in a case. It strives to find possible points of convergence and divergence between financial consumer protection in a more traditional sense and consumer welfare in financial services markets as an expression of consumer welfare as it is pursued by the EU competition laws. Cases will be drawn from antitrust (Articles 101 and 102 TFEU) as well as from merger control (Regulation 139/2004).

4.1. Antitrust cases (anti-competitive agreements and abuse of dominance)

Article 101 TFEU is one of the few legal provisions which directly mentions consumers. Where an agreement restricts competition in contravention of Article 101(1) TFEU, it may be redeemable under Article 101(3) TFEU under four cumulative conditions. One of these conditions – and a central one – is the need for the agreement to pass on some of the benefit arising from the anti-competitive agreement to consumers. The term consumer as understood by this provision, however, is much broader than the final consumer (on this see also Faull and others, 2014, § 3.495).

A cartel procedure which was brought to the attention of the European Commission through a leniency application led to a settlement decision in late 2013. The case became known as the Euro Interest Rate Derivatives case. It also led to a fining decision against three banks which did not participate

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38 Although it has been argued that financial services should not be subject to the competition rules, this argument was very early on rejected by the Court of Justice; see Case 172/80, Züchner v Bayerische Vereinsbank EU:C:1981:178, paras 6–9.

39 There is also abundant case law from state aid law (Article 106 TFEU) in the financial services sector, particularly following the nationalization of banks in the course of the financial crisis in the 2000s (see European Commission, 2012a). State aid cases, however, will not be considered in the following.
in the settlement, and were thus jointly fined €485 million in late 2016. The settlement decision of 2013 makes clear that the parties in question entered into agreements and concerted practices that distorted competition in the sector of Euro interest rate derivatives. In particular, they manipulated the EURIBOR, a benchmark interest rate depicting the cost of interbank lending for various maturities. The EURIBOR is calculated based on submissions of 44 panel banks every trading day, and all of the undertakings concerned were panel banks at some point during the time in which the anti-competitive practices were implemented. The manipulation was contingent on the preferences of the participating undertakings, which depended on their particular trading positions or exposures. The conduct at issue included communication through several channels, information sharing, alignment of submissions and similar activities. The Commission concluded that such conduct has the object of restricting competition under Article 101(1) TFEU. It underlined that this provision ‘is designed to protect not only the immediate interests of individual competitors or consumers but also to protect the structure of the market and thus competition as such.’ It saw no scope for applying an individual exemption under Article 101(3) TFEU.

**CDS Information Market** (2016) was another proceeding under Article 101 TFEU concerning financial services, namely unfunded credit derivatives. This case was resolved through two commitment decisions, one relating to The International Swaps and Derivatives Association (ISDA) and one relating to Markit. ISDA as an association of undertakings was investigated for its decisions on the licensing of its ‘Final Price’ for trading credit default swaps on exchanges. The Commission was concerned that this decision foreclosed exchanges from the market for exchange-traded unfunded credit derivatives over a period of three years, thereby preventing or delaying the emergence of this new market. Markit, a company offering financial information and services, was also held to be an association of undertakings which had refused

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40 European Commission, Case AT.39914 – *Euro Interest Rate Derivatives* (7 December 2016). There is no public version of this decision available yet; but see Vestager, 2016.

41 European Commission, Case AT.39914 – *Euro Interest Rate Derivatives* (4 December 2013) paras 1, 5 f.

42 Ibid., paras 32–40.

43 Ibid., para 58. Here, the Commission cited to Case C-08/08, *T-Mobile Netherlands EU:C:2009:343*, para 38.

44 European Commission, Case AT.39745 – *CDS Information Market (ISDA)* C(2016) 4583 final, paras 2, 31 (European Commission); European Commission, Case AT.39745 – *CDS Information Market (Markit)* C(2016) 4585 final, para 2.

45 European Commission, Case AT.39745 – *CDS Information Market (ISDA)* C(2016) 4583 final, paras 3, 32 f, 36.
to license certain indices for trading credit default swaps on exchanges. The Commission underlined that this would harm investors and, indirectly, their customers. ISDA and Markit both offered commitments to address the Commission’s concerns. The Commission found that these commitments would have ‘positive effects on the market structure and consumers in the Union.’

In its MasterCard (2014) judgment, the Court of Justice had to decide whether to uphold a General Court judgment which had confirmed a European Commission decision finding that MasterCard had restricted competition through the setting of multilateral interchange fees (MIFs) in its payment system, as this restricted competition amongst participating banks providing merchants with services enabling them to accept MasterCard or Maestro cards. The Commission had held that the MIFs ultimately harmed merchants and their customers, and that MasterCard had not shown that any efficiencies created through the MIFs were passed on to these two groups of customers. The Court underlined that even in a two-sided market, efficiency effects must be passed on to all consumers in the relevant markets. The two types of consumers at issue were cardholders on the one hand and merchants on the other. The General Court’s judgment was ultimately upheld.

In another case on MIFs, this time relating to the VISA network, the Commission also underlined that MIFs may artificially partition acquiring markets and hamper the objective of an internal payments market, thus harming consumers. As in the CDS Information Market case, the Commission underlined the ‘positive effects on the market structure and European consumers’ that the commitments undertaken by VISA would have.

Article 102 TFEU prohibits the abuse of market power. It has been the subject of debate whether this provision incorporates a consumer welfare standard at all (see Akman, 2009a), as the provision itself does not allude

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46 European Commission, Case AT.39745 – CDS Information Market (Markit) C(2016) 4585 final, paras 2, 8, 31 f.
47 Ibid., para 33.
49 For this summary, see Case C-382/12 P, MasterCard v Commission EU:C:2014:2201, para 3.
50 Ibid., para 11.
51 Ibid., paras 236 f.
52 On this, see eg Case C-382/12 P, MasterCard v Commission EU:C:2014:2201, para 238.
53 Ibid., para 259.
to consumer harm. In a Guidance Paper on Article 102 TFEU published in 2009, the European Commission pointed out that it would henceforth focus on abuses of market power which were most detrimental to consumers.\textsuperscript{56} Aspects of consumer welfare that it wanted to take into account included price levels, quality, and consumer choice.\textsuperscript{57} As in previous documents, the Commission clarified that it included direct and indirect buyers in its conception of the consumer.\textsuperscript{58} Taking up an analytical step which can already be found in the Guidance Paper, the Court of Justice in its 2017 \textit{Intel} judgment alluded to the possibility of objectively justifying an abuse of market power through efficiencies as long as they also benefit consumers.\textsuperscript{59}

The \textit{Clearstream} case (2009) concerned the refusal by Clearstream to provide cross-border securities clearing and settlement services, and the fact that it charged discriminatory prices. These abuses were directed at Clearstream’s only competitor on the clearing services market, Euroclear Bank (EB).\textsuperscript{60} The Commission considered these practices to harm innovation and competition, and concluded that this would result in consumer harm.\textsuperscript{61} The General Court, in deciding the case, underlined that Article 102(c) TFEU prohibited the charging of discriminatory prices to the disadvantage of customers.\textsuperscript{62} It is clear that these customers are not final consumers.

In 2007, the European Commission published its sector inquiry into retail banking, in which it covered banking services provided to consumers and small and medium businesses.\textsuperscript{63} This sector inquiry was intended to highlight which market failures in this sector could be remedied through the application of EU competition law.\textsuperscript{64} It concluded that four areas needed the continued attention from the Commission and national competition authorities, amongst others the design and operation of payment systems, credit registers, cooperation between banks and prices set by the latter.\textsuperscript{65} It is easy to see how these issues are intricately linked to financial consumer welfare.

\textsuperscript{56} European Commission, Guidance on the Commission’s enforcement priorities in applying Article 82 of the Treaty to abusive exclusionary conduct by dominant undertakings (2009), para 5.

\textsuperscript{57} Ibid., para 19.

\textsuperscript{58} Ibid., para 19 n 2.

\textsuperscript{59} Ibid., paras 28 ff; Case C-413/14 P, \textit{Intel v Commission} EU:C:2017:632, para 140. This is akin to an ‘Article 102(3) TFEU.’


\textsuperscript{61} Ibid., paras 23, 149.


\textsuperscript{64} Ibid., para 4.

\textsuperscript{65} Ibid., para 53.
4.2. Merger cases

Under the European Merger Regulation 139/2004, the European Commission assesses whether a merger is compatible with the internal market. Article 2(1)(b) of that Regulation lists a number of factors which the Commission needs to take into account in its appraisal, amongst them ‘the interests of the intermediate and ultimate consumers’ and ‘technical and economic progress provided that it is to consumers’ advantage.’ This quote again highlights that the concept of the consumer under EU competition law is not limited to the final consumer and might better be portrayed as encompassing any customer. Recital 29 of that same Regulation provides that even where a concentration is thought to be anti-competitive, the efficiencies that it creates can compensate for the potential harm to consumers that it may bring about.

Two recent merger decisions in the area of capital markets involved the Deutsche Börse and highlight how the Commission applies these considerations in actual cases. The first was the proposed merger between Deutsche Börse and the New York Stock Exchange (NYSE) Euronext (2012). This was one of the very rare occasions when the European Commission actually declared a merger to be incompatible with the internal market. In fact, out of 6,918 merger notifications that the Commission has received since 1990, it has only declared these concentrations incompatible with the internal market in 27 instances (for these statistics, see European Commission, 2018). This alone goes to show that this particular merger raised serious competition concerns to warrant such a decision – and that the Commission takes financial consumer protection very seriously. NYSE Euronext is a US holding company which operates a number of exchanges both in Europe and in the US, and it is mainly active on the markets for cash listing services, cash trading services, derivatives trading and clearing services, as well as information services and technology solutions. Deutsche Börse, on the other hand, is a listed company based in Germany and is mainly active on a similar set of markets, including cash listing, trading and clearing, derivatives trading and clearing, and cash post-trade services. The companies notified a proposed concentration to the European Commission which would have seen the creation of a new holding company incorporated under Dutch law. This would have led

68 Ibid., para 10.
69 Ibid., para 11.
70 Ibid., paras 12–14.
to the creation of the biggest stock exchange worldwide.\textsuperscript{71} In its analysis, the Commission looked at five groups of markets separately, namely cash instruments, market data and index licensing, information technology products and services, collateral management and derivatives.\textsuperscript{72} It is only in the latter that the Commission saw a significant impediment to effective competition through the concentration.\textsuperscript{73} The Commission went on to consider efficiencies that the concentration might bring about, and reached its conclusion of anti-competitiveness despite its emphasis on product innovation that might provide a significant benefit to consumers.\textsuperscript{74} In particular, the Commission referred to its Horizontal Merger Guidelines (2004) which contain a section setting out in which way efficiencies must benefit consumers in order to be taken into account.\textsuperscript{75} As clarified by a footnote in the Guidelines, the Commission understands consumers to denote both intermediate and final consumers.\textsuperscript{76} The notifying parties claimed a number of efficiencies that would benefit intermediate and final consumers, in particular relating to a reduced cost of capital, greater employment, innovation and economic growth. They submitted five economic reports to sustain their claims in this regard.\textsuperscript{77} For instance, the notifying parties claimed that their customers would benefit from lower IT and user access costs.\textsuperscript{78} However, the Commission was not able to verify these cost savings.\textsuperscript{79} The notifying parties also claimed collateral savings for their common members which would directly accrue to users,\textsuperscript{80} but the Commission concluded that as competitive pressure would diminish following the merger, price effects stemming from increased market power would outweigh any such efficiency.\textsuperscript{81} Furthermore, the notifying parties submitted that liquidity

\begin{thebibliography}{9}
\bibitem{71} Ibid., para 19.
\bibitem{72} Ibid., para 22.
\bibitem{73} Finding a significant impediment to effective competition, see ibid., paras 1131 f. No significant impediment to effective competition was found regarding licensing of equity indices, exchange co-location and network connectivity services as well as collateral management services; ibid., paras 52, 98, 113, 167, 197, 216.
\bibitem{74} For this, the Commission relied on its Horizontal Merger Guidelines; see European Commission, Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (2004) para 8; European Commission, Case COMP/M.6166, Deutsche Börse/NYSE Euronext (2012) para 530.
\bibitem{75} Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (2004) paras 79–84.
\bibitem{76} Ibid., para 79 n 105.
\bibitem{77} European Commission, Case COMP/M.6166, Deutsche Börse/NYSE Euronext (2012) paras 1145 f.
\bibitem{78} Ibid., para 1161.
\bibitem{79} Ibid., paras 1166 ff, 1187.
\bibitem{80} Ibid., paras 1188, 1234.
\bibitem{81} Ibid., para 1235.
\end{thebibliography}
would increase as a direct result of a reduction in the implicit costs of trading, and that this efficiency would directly benefit customers.\textsuperscript{82} However, as the Commission was not able to verify these efficiencies, it could not judge whether they would be passed on to consumers.\textsuperscript{83} Concluding that the notifying parties had not provided sufficient evidence that the merger would lead to efficiencies that would be passed on to consumers,\textsuperscript{84} the Commission drew attention to the fact that the merger would lead to a near monopoly and any efficiencies – even if likely to be passed on to customers – ‘would have to be particularly substantial.’\textsuperscript{85} This threshold was not met, and the merger was prohibited.

In another attempt at a merger, Deutsche Börse and the London Stock Exchange notified their proposed merger to the Commission (2017).\textsuperscript{86} This was another of the only 27 mergers that the Commission has prohibited since 1990. While consumer welfare featured prominently in the Commission’s assessment in \textit{Deutsche Börse/NYSE}, consumers were only mentioned in two instances in the 2017 \textit{Deutsche Börse/London Stock Exchange} decision. Instead, the Commission preferred to speak of customers. For instance, the prohibition decision provided some background to the assessment of mergers in the financial infrastructure markets, which also highlighted the two main customer groups at stake: the sell-side and the buy-side. Both customer groups identified were made up of some large corporate entities, including dealer banks, intermediaries, various kinds of funds and large corporations.\textsuperscript{87} This demonstrates that consumer welfare in this case was limited to the welfare of corporate customers. However, particularly in the case of pension funds and the like, it is easy to see how the economic wellbeing of these customers will indirectly impact a specific group of final consumers as well.

A number of insights on consumer financial welfare can be gained from these two merger cases involving stock exchanges. In \textit{Deutsche Börse/NYSE} (2012), it appears that consumer welfare was strongly linked to the structure of the market. Any efficiencies claimed by the notifying parties were countered by an argument based on the near monopoly position of the proposed concentration, and there was little prospect of success in the notifying parties’ arguments. This, one could say, shows how strongly the Commission links the competitive structure of the market to consumer welfare in a broad sense. From \textit{Deutsche Börse/London Stock Exchange} (2017), one can deduce that the

\textsuperscript{82} Ibid., paras 1244, 1300.
\textsuperscript{83} Ibid., paras 1301 f. Similarly, see the arguments in paras 1304, 1326 f.
\textsuperscript{84} Ibid., para 1335.
\textsuperscript{85} Ibid., para 1337.
\textsuperscript{87} Ibid., paras 66–68.
welfare of final consumers was regarded as a necessary consequence of the welfare of corporate customers.

III. Reflections on financial consumer protection under EU competition law

The European Commission relies on EU competition law in order to promote competition in financial services markets – through antitrust cases, merger control and state aid scrutiny. In addition, it also carries out sector inquiries in order to obtain a comprehensive picture of the competitive situation on those markets (see, eg, the 2007 sector inquiries into the business insurance market and the retail banking market; European Commission, 2012b), and to ascertain whether competition enforcement might be warranted. The standard by which the Commission evaluates and assesses possibly anti-competitive occurrences in these markets is that of consumer welfare, which constitutes one of the two main objectives of EU competition law – the other being the realisation of a single market amongst all EU Member States, an objective which is unique and inherent to EU competition law (questioning whether consumer welfare is indeed the standard to be applied when considering the European Court of Justice’s case law, see Akman, 2009a).

The UNCTAD factors of a regulatory approach to consumer protection in financial services mentioned above (section II.1.), and the principles of consumer welfare that could be seen in the overview on EU financial consumer protection laws (section II.2.), are certainly quite distinct from the approach that EU competition law takes when assessing consumer welfare in financial services markets. There is a clear distinction between the internal and the external factors affecting consumers in financial services. While EU financial consumer protection extends to both of these dimensions, EU competition law only relates to external factors, and particularly to the structure of competition on financial services markets. From the case law scrutinized above, it could be seen that the European Commission, as well as the General Court and the Court of Justice, regularly allude to consumer welfare in a general sense when deciding cases in financial services markets. However, they usually presume harm to consumers – which they understand to be any type of customer – from competitive harm to the market structure, or from harm to intermediaries. Consumer harm is deduced from and equalled to structural harm without analysing it in any detail. More often than not, the cases discussed were resolved based on harm to competition or also to competitors – and the result was then seen as being beneficial to the internal market and to its consumers.
Competition law’s conception of the consumer as a buyer – be it a final consumer or a corporate buyer – differs drastically from the understanding that consumer protection laws generally have of that term (Akman, 2010, p. 317). This important difference in the conception of the consumer has been referred to as the ‘Chicago trap,’ (Cseres, 2005, p. 331) cautioning that competition laws have a different understanding of consumer welfare than consumer protection laws. The use of the terms ‘consumer’ and ‘consumer welfare’ disguises this important difference between competition laws and consumer protection laws, thereby masking the fact that customer welfare in a broad sense, and the welfare of final consumers in a narrow sense, are not always congruent and, thus, competition law may not always have the intention to benefit final consumers in the sense of consumer protection laws (Cseres, 2005, p. 332; Akman, 2010, p. 319, 324). Phil Evans suggests that when faced with the reality that final consumers are often ‘one step removed from the competitive process,’ competition law can respond in either of two ways: liken the customer with the consumer, or derive consumer impact from anti-competitive harm to other customers (Evans, 2007, p. 26). It appears that EU competition law has decided to do both (see also Akman, 2010, p. 323).

The ‘Chicago trap’ arguably does not apply in financial services markets. The consumer acquis of the European Union maintains a narrow definition of the concept of the consumer, extending only to natural persons that are not acting in a professional capacity (Loos, 2008, p. 10). As could be seen, this narrow concept of the consumer is considerably broadened in many financial consumer protection laws – such as payment, insurance and investment law – so that the concept of the consumer also encompasses clients, policyholders and investors (Reich and Micklitz, 2014, § 1.37). This brings us full circle in acknowledging that both in EU financial consumer protection law and in EU competition law, the customer is regarded as a consumer – and as worthy of protection. It appears that in this respect EU competition law and EU financial consumer protection law are closer than the latter and EU consumer law more generally.

One important difference between EU competition law and EU financial consumer protection law, however, is that the former is reactive, in the sense that it only interferes in the market when anti-competitive behaviour is suspected, or an anti-competitive merger is being considered. This contrasts with consumer protection laws, where individual consumers in individual situations are targeted and the law is proactive in that it aspires to improve financial services markets in ways that will benefit consumers (Decker, 2017, p. 156). This has been said to reflect ‘a general division of labor between policies’ (Decker, 2017, p. 152). For this reason, it is possible to view these two areas of the law as complementary (see Decker, 2017, p. 159 with reference
to Averitt and Lande, 1997; OECD, 2008), with consumer protection law focusing on factors that are internal to the consumer and competition law focusing on factors that are external to the consumer (on this see Averitt and Lande, 1997, p. 729; Decker, 2017, p. 159).

It has been remarked that sectors where the protection of the final consumer is (also) at stake – such as in financial services – are often already ‘subject to specific regulation with the purpose of safeguarding consumer interest’ (Daskalova, 2015, p. 140). However, this does not mean that the competition laws and financial consumer protection laws should not work hand in hand in order to further promote consumer welfare. To the contrary, the very fact that EU competition law and EU financial consumer protection law conceptually rely on the same or a similar notion of the consumer gives these two areas of consumer law a good basis from which to start a close cooperation in the interest of consumer welfare. Together, these two areas of the law unite individual and structural aspects of consumer welfare and also combine reactive and proactive financial consumer protection. This means that, if working together, EU competition law and EU financial consumer protection law can achieve a level of financial protection of consumers that naturally goes beyond what each area of the law could achieve alone. In order to harness these synergies, however, a more comprehensive understanding of EU financial consumer law needs to develop which includes both dimensions. The present contribution set out to be a first tentative step in this direction.

**Literature**


The European Competition Network in the European Administrative System: Theoretical Concerns

by

Erzsébet Csatlós*

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Abstract

The public administration of the European Union (EU) is a *sui generis* multi-level structure under constant development. After five decades of successful functioning, the European Union still lacks a coherent and comprehensive set of codified rules of administrative procedure at all levels. The existing *acquis* related to European administration and administrative procedures is fragmented, sector specific and although it is based on the constitutional principles of the democratic traditions of its Member States, such coincidence is often insufficient for the present requirements

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of good administration. The EU basically relies on indirect administration, while a growing number of cooperation forms exists of the competent authorities that aims to ensure efficacy of execution and to overcome diversity of non-harmonised legal areas. The aim of this paper is to place the European Competition Network (ECN) in this structure, explore and examine its legal nature as it is probably the most advanced example for such cooperation.

The ECN incorporates and reveals the major procedural law questions of European administration; it is a rather successful form of cooperation, and although its core issues fail to correspond to the fundamental requirements of European administrative procedures, there seem to be positive changes in the evaluation of soft law and the functioning of the system.

Résumé

L’administration publique de l’Union européenne (UE) est une structure sui generis aux plusieurs niveaux de l’évolution constante. Après cinq décennies de bon fonctionnement, l’Union européenne (UE) ne dispose toujours pas de l’ensemble cohérent et complexe de règles codifiées de procédures administratives à tous les niveaux. L’acquis existant relatif à l’administration européenne et aux procédures administratives est fragmenté et spécifique au secteur. Même si l’acquis est fondé sur les principes constitutionnels des traditions démocratiques des États membres, une telle coïncidence est souvent insuffisante par rapport aux exigences actuelles d’une bonne administration. L’UE s’appuie essentiellement sur l’administration indirecte alors qu’il existe un nombre croissant de type de coopération entre les autorités compétents afin d’assurer l’efficacité de l’exécution et de surmonter la diversité entre des domaines du droit non-harmonisés. L’objectif de cet article est de placer le Réseau européen de la concurrence (ECN) dans cette structure, d’explorer et d’examiner sa nature juridique, car il s’agit probablement de l’exemple le plus avancé de ce type de coopération. Le REC intègre et révèle les principales questions de droit procédural de l’administration européenne. Il est une forme de coopération plutôt fructueuse, et bien que ses enjeux essentiels ne correspondent pas aux exigences fondamentales des procédures administratives européennes, il semble y avoir des changements positifs dans l’évaluation du soft law et du fonctionnement du système.

Key words: European administration; cooperation; public authority; ECN; soft law.

JEL: K1

I. The nature of the European administrative system

After five decades of successful functioning, the European Union still lacks a coherent and comprehensive set of codified rules of administrative
procedures at all levels (Schwarze, 2011, p. 7). The existing *acquis* related to European administration and administrative procedures is fragmented, sector specific and although it is based on constitutional principles of the democratic traditions of its Member States, the reciprocal influence between national law and European administrative achievements is a well-known and widely accepted phenomenon. However, the EU basically relies on indirect administration while, at the same time, the number of network structures that connects direct and indirect administration of the multi-level European administrative space is increasing.

The EU’s own executive capacity (direct administration) is relatively small (Chiti, 2011, p. 21). The execution is therefore left to the administrative capacity of Member States (indirect administration) (Ficzere, 2011, pp. 383–384). The correlation of the different levels makes it possible to describe the EU as a multi-level administrative system known as the European administrative space (EAS) (Dezső–Vincze, 2012, p. 490; Heidbreder, 2009, p. 5; Torma, 2011, p. 197; Koprić, Musa and Novak, 2011, pp. 1545–1546; Curtin and Egeberg, 2013, pp. 30–32). The concept of the EAS comes from the intergovernmental history of the integration, when administration was a sphere for domestic affairs and only uniform implementation was under the supervision of EU level institutions. Meanwhile, the key for successful execution of the *acquis* has always been properly functioning public administration, which is based on the common constitutional principles of democratic Member States (Drechsler, 2009, p. 7, 10). Moreover, the direct level of EU administration shall also be based on them; however, the reciprocal influence between

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1 As the guardian of the Treaties, the European Commission is responsible for the proper execution of EU law; in fact, each Commissioner is responsible for specific policy areas to defend the interests of the EU while they are in charge with drafting and monitoring proper execution by the Member States. The Commission is entitled to establish agencies with a technical, scientific, or administrative function to help EU institutions in policy formation, law-making and execution. Consolidated version of the Treaty on the Functioning of the European Union (hereinafter, TFEU). OJ C 326, 26.10.2012. pp. 47–390. Article 352. Sometimes they are called decentralized agencies as their seats are in different Member States although they are considered central supra-national organs, rather than local ones placed on the territory of all the Member States. European Agencies – The Way forward. Brussels, Communication from the Commission to the European Parliament and the Council, 11.3.2008, COM(2008) 135 final, p. 4.


3 As Klucka highlighted, the European Court of Justice had already indicated in 1963 that Community administration must follow rules related to the requirements of sound justice and good administration. Since then, the ECJ has developed an extensive set of administrative law principles that have been, to a large extent, derived from the administrative provisions of the
national law and European administrative law is a well-known and widely accepted phenomenon of today (Klucka, 2007, p. 1048).

The principle of autonomy of the EU along with the principle of sovereignty of its Member States form the axis that basically dominates the functioning and organisation of the execution of EU policies. The powers transferred from Member States enable the EU institutions to legislate. In certain policies, the EU has exclusive competences, while in others the competences are shared between the EU and the Member States and the latter can act only if the EU has chosen not to. The EU has the weakest powers when it has competence to support, coordinate or supplement the actions of the Member States. There is no general competence in the entire policy area but only with regard to matters specified by TEU-TFEU provisions. However, the executive organisation is not expressis verbis regulated by EU legal acts: Member States are required to have administrative systems and public administration institutions capable of transposing, implementing and enforcing the acquis according to the principle of ‘obligatory results’ (obligation de résultat).

However, over the last decades, the European Union has developed a series of ad hoc administrative procedures for the direct implementation of its rules in a number of areas, such as competition policy, trade policy, state aids, access to EU documents, or the EU civil service, which resulted in a fragmented body of rules which do not share common normative background (Panizza, 2015, p. 1). It was only the Lisbon Treaty that introduced a legislative competence for administrative cooperation, which is now described in Article 197 TFEU, although there have been an increasing number of policies, in fact, that requires intensive cooperation and intermediate networking of competent authorities at national and supra-national level. The nature and depth of such co-work depends on the level of the Europeanisation of a given policy. The various forms of trans-national interaction define the concept of composite administration, which is often performed in a networking structure of the competent authorities. The existence of such a relationship between the executive apparatus requires a re-think of the concept on a simple European administrative space moving it closer towards a multilevel European administrative space.

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4 Article 3 TFEU.
5 Article 4 TFEU.
6 Article 6 TFEU.
8 European Principles for Public Administration, SIGMA Papers: No. 27, CCNM/SIGMA/PUMA(99)44/REV1, 1999 (hereinafter, SIGMA 27), p. 6.
The European Competition Network (Hofmann, 2009b, p. 45) where the cooperation of authorities is, therefore, a significant feature.

II. Placing the European Competition Network in the European administrative organisation

The EU basically relies on indirect administration and the number of policies which require the systematic cooperation of competent authorities at the direct and indirect level is increasing. The European Competition Network (ECN) is probably the most advanced example of this form of cooperation due to several specificities to be presented below.

The establishing of competition rules necessary for the functioning of the internal market is an exclusive competence of the European Union (Article 3(1)(b) TFEU). In the European administrative system, competition policy is executed by the Commission (DG COMP) and the national competition authorities of the Member States (NCAs) forming together a network of public authorities applying the EU competition rules in close cooperation.\(^9\) Within the ECN, the Commission serves as a strong central authority with a significant degree of control,\(^10\) but NCAs are the primary enforcers of competition rules. The ECN is the forum for discussion of competition policy issues and particular cases between NCAs and the Commission as well as to exchange information and re-allocate cases by preventing parallel enforcement by multiple authorities, since either the Commission or any NCA can investigate an alleged breach of EU competition rules.\(^11\)

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\(^10\) In a formal perspective, for example, NCAs do not have the same rights as the Commission to obtain information, evidence or administrative assistance from other ECN members (Brammer, 2008, p. 352) It needs also to be noted that there are no previously settled rules on the division of jurisdiction or policy competences, and the Commission has extended influence on it (Mataija, 2010, pp. 76–77).

\(^11\) Commission Notice on cooperation within the Network of Competition Authorities (Text with EEA relevance), OJ C 101, 27.04.2004, pp. 43–53 (hereinafter, Network Notice), points 5, 13. The system is based on parallel competences in which all competition authorities have the power to apply Article 101 and 102 TFEU and are responsible for an efficient division of work. Each national authority enjoys full discretion in deciding whether or not to investigate a case, or to designate one of them as a lead authority and to delegate tasks to the lead authority such as, for example, the coordination of investigative measures, while each authority remains responsible for conducting its own proceedings.
Here lies the unique administrative law feature of competition matters: the supra-national level of administration (DG COMP) is entitled to act with authority power, that is, it can formulate legal situations and impose obligations or give rights by unilateral decisions in individual cases. It is rare, as the enforcement of EU law is basically in the hands of the authorities of the Member States, and the aim of the EU has never been either the duplication of an executive system, or the substitution of this task of Member States’ administration. The fact that authority power is placed on both levels of European administration gives specificity to this cooperation, while its other aspects are typical and natural features of composite administrative procedures.

III. Cooperation within the European administrative organisation

Cooperation is the process of entering into a relationship with another institution or organ to achieve a system derived goal. Under its classical meaning, mutual assistance stands for a supplementary activity to a procedure of another authority upon a prior request, which can be rejected for various reasons even if the request is based on a valid agreement by the parties. Networks\(^{12}\) in the EU are established to ensure a constant channel for systematic cooperation and data flow where these activities shall be done in an automatic way, without the possibility of rejecting collaboration or retaining information. Therefore, within the context of European administration, in many policy areas the development of the integration of EU and national administrative proceedings has led to ‘administrative procedures which – although finally terminated by a decision at either European or national level – are undertaken with input from various jurisdictions’ (Hofmann, 2015, p. 304).

However, the legal nature of the establishing document as well as applicable procedural rules vary from network to network. Mastenbroek and Martinsen highlighted that academic literature uses the term ‘network’ with different attributives to describe a sort of systematic teamwork. Moreover, in the EU, the form of collaboration may also take various forms: ‘both in the vertical

\(^{12}\) Networks often appear in international relations under different titles. International institutions and trans-national networks involving both governmental and non-governmental actors to pool expertise and to produce a suitable solution for common challenges. They often lack governmental powers and de iure empowerment while they contribute to the creation of de facto obligations. The obligatory nature of the soft law they create has roots in the economic or political inter-dependence of States, while the legitimacy and administrative control is missing from this system. So, domestic public administrative law, as, in fact, most elements of public law, seems to be put aside while foreign elements infiltrates domestic public administration (Bianchi, 2016, p. 61; Kinsbury, Kirsch, Stewart and Wiener, 2005, p. 3).
relation between the European Commission and agencies on one hand and the Member States’ agencies on the other, as well as the ‘horizontal’ cooperation directly between different national agencies’ (Hofmann and Türk, 2006, p. 90). They share the same feature of having no uniform normative background and are the result of the development of integration.

Based on the categorisation of Hofmann and Türk, administrative authority networks basically appear at two phases of the European administrative system: in the preparation for the conditions of implementation of EU policies and in the decision-making process in individual cases. **Planning networks** are based on the pooling of expertise, like in comitology procedures. In the executive phase, different networks are identified ranging from the simplest form of **information networks** (which are established to channel and to co-ordinate the generation and editing of data relevant to administrative activity), to **trans-territorial networks**, which are the channels for administrative acts by administrations which have effect outside of their own jurisdiction due to the obligation of their mutual recognition (Hofmann and Türk, 2006, pp. 90–91). The most commonly used network of composite administration includes individually binding decisions made on the Member State or European level. The number and relevance of such **enforcement networks** has increased in recent years with both vertical and horizontal relations, and its most publicised example is the enforcement regime for EU competition law under Articles 101 and 102 TFEU. (Hofmann, 2009a, pp. 201–202). Enforcement networks establish a channel for cooperation with the aim of producing one single decision of one of them, so it is like a systematic discussion and mutual assistance forum, if this latter is needed. Enforcement ensures effectiveness involving the exercise of public power with the objective of preventing or responding to a violation of the issued norm via an enforcement mechanism (Roben, 2008, pp. 1965–1967). Although in competition matters the Commission is entitled to proceed and has authority power, it is very rare that a supra-national organ disposes of public authority so far as to be able to produce **binding individual acts** in a procedure. It is also rare within the EU that **regulatory networks** (Kingsbury, Krisch and Stewart, 2005, pp. 16–17) are formed even if practical concerns support self-regulation, which tends to compensate for the insufficiencies of legal acts with **soft law** norms, which they issue for the sake of a uniform application of the law.

Relying on Bogdandy’s concept, authority means the legal capacity to determine the situation of others and to reduce their freedom, i.e. to unilaterally shape their legal or factual situation without their consent. It may be manifested in individual acts and in a broader sense; it can also mean the capacity to produce such effect through a non-binding act which only conditions another legal subject. Non-binding standards are often a manifestation of this kind of exercise of public authority and they ‘are followed, inter alia, because the
benefits of observing them outweighs the disadvantages of ignoring or because they are equipped with implementing mechanisms imposing positive and negative sanction’ (Bogdandy, 2017, pp. 11–12). Under that concept, regulatory networks seem to be an advanced form of enforcement networks taking into account that the regulatory network supposes the existence of public authority.

At present, no general piece of legislation exists which provides a clear procedure for cross-border or multi-level mutual assistance (Galetta, Hofmann, Schneider and Tünsmeyer, 2014, p. 203). Often, the normative background for network cooperation also lies in soft law. However, soft law has pitfalls not only in terms of material law but also concerning procedural law aspects as it weakens legitimacy, effectiveness, and transparency of actions within (Smyrnova, 2013, p. 125). At the same time, the existence and proper functioning of a procedural framework is a precondition for the effective implementation of EU law (Kristjánsdóttir, 2013, p. 238). Meanwhile, effectiveness shall not dominate over legitimacy; legality of acts shall result in effectiveness.13

IV. Networks of European administration and the role of ECN among them

Networks generally emerge naturally between actors due to their inter-dependence towards a common goal. Meanwhile, legislation has not yet followed the development of networking structures. Concrete executive instructions to help uniform legal practice at Member States’ level often appear in non-legislative acts of the Commission. They may take the form of delegated acts (Hardacre and Kaeding, 2011, pp. 16–19; Türk, 2012, pp. 77–78),14 implementing acts15 and sometimes in different kinds of soft law

13 Although both legitimacy and effectiveness are important principles of public administration, they presuppose different perspectives: legitimacy is a legal one, while effectiveness is a management concept (Metcalfe, 2001, p. 6); ReNEUAL Book VI-3 (15) (Galetta, Hofmann, Lottini, Marsch, Schneider and Tidghi, 2014, p. 271).

14 Article 290 TFEU allows the EU legislator to delegate to the Commission the power to adopt non-legislative acts of general application that supplement or amend certain non-essential elements of a legislative act. Delegated acts may add new but non-essential rules or involve a subsequent amendment to certain, often highly technical, aspects of a legislative act. The delegation of power to adopt delegated acts is nevertheless subject to strict limits; the objectives, content, scope, and duration of the delegation of power must be defined in the legislative acts. The power can be withdrawn anytime.

15 It is primarily the duty of Member States to implement legally binding EU acts unless such acts require uniform conditions for their implementation. In these cases, based on the authorization of Article 291 TFEU, the Commission or, in duly justified specific cases and in cases provided in the Articles 24 and 26 TEU, the Council is empowered to adopt implementing
documents of agencies (Chiti, 2015, pp. 315–316)\textsuperscript{16} and other bodies. It can also happen that the document in question remains quiet on the legal nature of such kind of provisions.\textsuperscript{17} Beside implementation orders in the different kinds of norms, the cooperation between the executors is a necessary basis for the uniform implementation and execution of EU law. Different sort of networks of competent organs of both levels of European administration are formed ‘to fill the gap between the EU’s policy ambitions and its limited administrative capacities’ (Mastenbroek and Sindbjerg, 2018, pp. 423–424).\textsuperscript{18} In \textit{stricto sensu}, all administrative cooperation forms are manifestations of mutual assistance between the actors, however, the classical meaning of this expression shall be distinguished from network cooperation.\textsuperscript{19}

Networks generally emerge naturally between actors due to their inter-dependence towards a common goal. Although there are argumentations that a non-formal version of the ECN existed even under the regime of Regulation 17/62 (Cengiz, 2010, pp. 663, 665), formally, the ECN was established later. The normative background to regulate the basic features of the relationship among NCAs, and between NCAs and the European Commission is found in Chapter IV of Regulation 1/2003, and the Commission’s Network Notice of 2004\textsuperscript{20} (Mataija, 2010, p. 79; Cengiz, 2010, p. 664; de Visser, 2009, p. 217).

\begin{footnotesize}
\begin{enumerate}
\item However, they can also be executive in nature, literature primarily focuses on regulatory networks and several terms are used to cover more or less the same phenomenon: networks, trans-national regulatory networks; trans-national administrative networks; administrative networks; and trans-governmental networks. Cf. Slaughter, 2003, pp. 1041–1075.
\item Cf. ReNEUAL Book V (Galetta, Hofmann, Schneider, and Tümsmeyer, 2014) and VI (Galetta, Hofmann, Lottini, Marsch, Schneider, and Tidghi, 2014).
\item Regulation 1/2003, (15)–(18); Network Notice.
\end{enumerate}
\end{footnotesize}
EU competition policy requires uniform execution. Therefore, there are different sets of enforcement methods and tools at the disposal of Member State authorities, as well as different sets of guarantees (Israel, Lang and Hübener, 2010, p. 23). To eliminate differences, the ECN’s competition authorities express their common views in the form of ‘recommendations on several topics in particular key investigative and decision-making powers, which are intended as “advocacy tools vis-à-vis policy makers”’. Meanwhile, even if the aim of the cooperation mechanism of the ECN is intended to ensure coherent application of EU competition rules in the Member State, the ECN itself is not empowered to adopt legally binding rules. The Commission may adopt notices and guidelines as flexible tools are useful for explaining and announcing Commission policy, and for explaining its interpretation of the competition rules, even if these are not legal acts.

V. Legal regulation of network structures

Network structures are an essential administrative phenomenon in executing EU acquis; they establish a stable and constant channel of authorities; they are the catalysts of composite administration and a multi-level administrative system.

However, very few policy-specific legal provisions exist in EU law to regulate in detail the procedural phases of composite administration and the number of common rules is even fewer. Networks began as informal regimes, but have developed into recognizable forms of international administration over the last decades (Zaring, 2005, p. 548). So far, legislation have not yet followed the development of the networks, thus there is no general normative background in a form of a legal act to cover all phases of the process of a composite administrative procedure. Usually, a legal act on the policy calls for the cooperation mechanism, and the details and rules that govern the activity of the actors and their collaboration varies from policy to policy, and often take the form of soft law under different sorts of title: notes, guidance,

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23 DHL case 32, 35.
24 Network Notice, point 64.
guideline, instruction, etc. (Galetta, Hofmann, Puigpelat and Ziller, 2015, pp. 6, 8) Their distinctive nature is also indicated by the way in which they are published, if they are published in the Official Journal of the EU.\textsuperscript{25}

Soft law has roots and two meanings in international law: (a) an informal regulation of behaviour that is not a source of international law, although it is followed as such; or it is (b) acknowledged as a source of international law but without normative content: it cannot be the source of neither rights nor obligations. As the successful application of EU law requires the enforceability by authorities and judicial organs,\textsuperscript{26} this latter meaning shall dominate in legal practice (Kovács, Tóth and Forgács, 2016, pp. 2–3).

Due to its nature, there is a general objection against using soft law as it is ‘based on common practice, is ambiguous and pernicious and should not be used’\textsuperscript{27} (Fegus, 2014, p. 146.) Critical comments on the use of soft law name democratic deficit and transparency concerns, as soft law is produced outside the frameworks of the commonly accepted decision-making system (Vogiatzis, 2018, p. 225; Cengiz, 2010, p. 673). Moreover, soft law is outside the scope of classical judicial review and does not provide full judicial protection.\textsuperscript{28} At the same time, these documents are significant sources of interpretation, and so they are relevant normative provisions to achieve the proper execution of EU norms with helping administrative cooperation. They are important fillers of legal gaps, although they can never substitute formal legislation and legal acts.\textsuperscript{29} Networks with a regulatory nature incorporate, therefore, challenges to the legal order when they aim to synthesize legal practice by way of sharing best practice or interpreting Treaty-based provisions.

\textsuperscript{25} Even if it contains significant information, the Notice on Cooperation and the Leniency Notice adopted by the ECN was published in the ‘C’ series of the Official Journal of the European Union, which, by contrast with its ‘L’ series, is not intended for the publication of legally binding measures, but only of information, recommendations and opinions concerning the European Union. See: C-410/09 Polska Telefonia Cyfrowa sp. z o.o. v Prezes Urzędu Komunikacji Elektronicznej, EU:C: 2011:294, para. 35; C-226/11 Expedia Inc. v Autorité de la concurrence and Others, EU:C:2012:795, para. 30. Cf. Opinion of AG Kokott of 6 September 2012 in Expedia, C-226/11, ECLI:EU:C:2012:544, para. 37; Practitioner’s view, p. 20.

\textsuperscript{26} Cf. Article 263 TFEU excluding recommendations and opinions, i.e. non-binding legal acts under Article 288 from the scope of the CJEU’s competences (Kovács, Tóth and Forgács, 2016, pp. 2–3).


\textsuperscript{28} EP Soft Law Resolution, A, D, E, 2–4.

\textsuperscript{29} See C-57/95 French Republic v Commission of the European Communities, ECLI:EU:C:1997:164, para. 23. If a communication of the Commission is binding or aims to create an obligation on third parties that did not existing in EU hard law, it should be the subject of an annulment procedure (Kovács, Tóth and Forgács, 2016, p. 6).
In the last two decades, the number of soft law documents in the EU has been increasing and the Court of Justice of the EU (CJEU) practice is ‘not merely acknowledging the existence of EU soft acts but is also prepared to take these acts into account when deriving its decisions’ (Fegus, 2014, p. 150; see also: Ştefan, 2013, p. 197).\(^{30}\) Originally, ‘[e]ach institution shall act within the limits of the powers conferred upon it by these Treaties and in conformity with the procedures, conditions and objectives set out in them’\(^{31}\) (Senden, 2005, p. 84) thus soft law has, in fact, been used historically to mitigate the lack of formal law-making capacity and/or means of enforcement.\(^{32}\) Where the EU has competence to legislate, this precludes the use of ‘[r]ules of conduct that are laid down in instruments which have not been attributed legally binding force as such’. Nevertheless, in certain cases they may produce legal and practical effects as they are usually produced to that end,\(^{33}\) although there is a clear division between their **legal effects** and **legally binding force** in practice, meaning that they are accepted to confer rights and obligations only under very exceptional circumstances\(^{34}\) (Ştefan, 2013, pp. 197–200). Therefore, according to Kovács, Tóth and Forgács, the legal effect of soft law could be described as a **vertical indirect effect**, ‘the same as is attributable to directly effective rules in an unimplemented directive’; that third parties can rely on soft law rules against EU authorities, but not in horizontal disputes against private parties (Kovács, Tóth and Forgács, 2015, pp. 5–6). Besides substantive law, soft law has become a crucial point in the era of individual rights and fundamental requirements vis-à-vis public administrative procedures applying EU law (Klucka, 2007, p. 1047). If a procedure that includes sharing of information, including personal and business data (Muheme, Neyrinck and Petit, 2016, pp. 152–153),\(^{35}\) followed by case allocation and the final decision-making forum, but the procedural phase to that end is based on uncertain, unpredictable advisory provisions of soft law,

\(^{30}\) Even in the field of foreign relations, soft law has been gaining significance. See C-399/12 Federal Republic of Germany v Council of the European Union, ECLI:EU:C:2014:2258, para. 50; C-45/07 Commission v Greece, EU:C:2009:81, para. 30 and 31; Opinion 2/91, Opinion delivered pursuant to the second subparagraph of Article 228 (1) of the EEC Treaty, ECR 1993 I-01061106, para. 5. See also: Ortino, 2017, p. 925–926.


\(^{32}\) EP Soft Law Resolution, K.

\(^{33}\) EP Soft Law Resolution, L.

\(^{34}\) Even though soft law might not introduce new legal obligations, it might promote a very radical interpretation of an obligation provided in hard law; this is how it leads to significant effects on the legal situation of individuals or Member States. In fact, without soft law guidance on interpretation, national or European authorities might interpret a specific hard law obligation in a diverse way; Ştefan, 2013, p. 182.

\(^{35}\) See the importance of personal data protection and the allocation of responsibility in: C-145/83 Adams v Commission, ECLI:EU:C:1985:448, para. 34.
such practice is against the principle of reliable and transparent administration (Bauer and Trondal, 2015, p. 10), where the evaluation of procedural rights and guarantees is also uncertain. It also reveals the question of direct effect from the perspective of EU citizens since their other procedural rights, embodied in the Charter of Fundamental Rights of the European Union (EU Charter) including the right to good administration, in general also become an open question (Csatlós, 2016, pp. 47–48).

The emergence of composite procedures with forms of vertical and horizontal administrative cooperation gives, therefore, rise to legal problems. It involves especially the protection of individual rights and supervision of administrative actions, including the allocation of responsibility of the actors and the application of law for those phases of the procedure which are transnational. Difficulties in allocating responsibility leads to problems in finding adequate remedies for maladministration within the network (Hofmann, 2009a, pp. 210–212, 220; Hofmann, 2015, p. 305). The importance the latter in a multiple-step procedure was also highlighted by the Tillack case (Hofmann, 2009a, p. 201). However, even legal remedy issues are traced

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36 The European Administrative Space is built upon common constitutional principles rooted in democratic traditions of EU Member States. Particularly important principles set forth in the jurisprudence of the European Court of Justice, which all Member States must apply domestically when applying EU law, include: the principle of administration through law; the principles of proportionality, legal certainty, protection of legitimate expectations, non-discrimination, the right to a hearing in administrative decision-making procedures, interim relief, fair conditions for access of individuals to administrative courts, non-contractual liability of public administration. Basically, the main administrative law principles which are set as standard are: reliability and predictability (legal certainty); openness and transparency; accountability; and efficiency and effectiveness; SIGMA 27, p. 8.


38 EU Charter, Article 41: 1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union.
2. This right includes:
   – the right of every person to be heard, before any individual measure which would affect him or her adversely is taken;
   – the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy;
   – the obligation of the administration to give reasons for its decisions.
3. Every person has the right to have the Community make good any damage caused by its institutions or by its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States.
4. Every person may write to the institutions of the Union in one of the languages of the Treaties and must have an answer in the same language.

back to the regulatory deficiencies on the construction and functioning of multi-level governance networks. As such, non-conformity with organisational principles of accountability and transparency (Hofmann, 2009a, 225) may lead to a threat to fundamental rights protection.

Even if an adequate ad hoc solution might serve effectiveness, it might not serve legitimacy and legality. The major dilemma is whether to put aside democratic notions, and rely on managerial concerns like efficiency and control, and accept and conclude that problem-solving capacity shall take precedence over democratic input.40

Given the fact that the rule of law is set out to be one of the major values of the EU,41 its requirement shall not be ignored. As a solution, Metcalf pointed out the nature of coordination and the need for a different approach to it in case of networks. He would step over the classical strict administrative control to the exercise of directed influence as generally, networks in EU law lack the hierarchical, central top-down steering. Instead of a monocentric model of coordination, he puts emphasis on a legal framework that will enable external judicial review to networks ‘to respond to errors and deviations that arise from network management’ (Metcalf, 2001, p. 7). This point of view was supported by academics who carried out extensive work on the codification of public administrative procedural rules of the EU. Networks involve information exchange between distinct public authorities from various jurisdictions. Therefore, ‘[u]nder such circumstances a clear and stable legal basis for the interaction between those authorities provides not only for a clear allocation of responsibilities but also for administrative effectiveness and efficiency’.42

It is clear from the case-law of the CJEU that the duty of Member States, under the principle of sincere cooperation, to take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising from EU law and to abstain from any measure which could jeopardise the attainment of the objectives of the Treaty.43 The obligation of sincere cooperation (Klamert, 2014, p. 141; Amerasinghe, 2005, pp. 176–187)44 and respecting the principle of the rule of law (Marsden, 2009, p. 24; Raitio, 2003, pp. 125–146) along with equality, which delimits the Commission’s discretion as it is ‘required to treat persons and undertakings equally if they

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41 TEU preamble; Article 2.
42 ReNEUAL Book VI-3 (Galetta, Hofmann, Lottini, Marsch, Schneider and Tidghi, 2014, pp. 270-271).
44 TEU Article 4(3). Cf. Article 3.
are in the same situation’ (Voss, 2013, p. 156-157), may positively influence the interpretation of different kinds of rules, but it is not enough to deduce concrete obligations and it cannot substitute hard law from the point of view of **legal certainty** (Galetta, Hofmann, Lottini, Marsch, Schneider and Tidghi, 2014, p. 239 para. 11) in composite procedures that involve a supra-national body or authority with a coordinating role and/or empowerment that makes it different in competences than all of the 28 actors. As Jimenez concludes, ‘[l]egal certainty is thus, the basis for an effective internal market and thus, economic efficiency’ (Jimenez, 2016, p. 192) and the road towards this lies, among others, in a comprehensive procedural framework.

VI. The European Competition Network in view of legal challenges concerning networks

Regulation 1/2003 was adopted by the Council and EU law is exclusively interpreted by the CJEU. However, according to classical international law on the interpretation of treaty provisions, the issuer is the authentic source of interpreting the norms (Linderfalk, 2007, p. 54–56). All the recommendations of the ECN start with the expression ‘the ECN Competition Authorities (the Authorities) express common views’, and ends with a disclaimer that stresses its non-binding nature, the fact that it does not give rise to legitimate expectations on the part of any undertaking or third party, and that it does not reflect any official or binding interpretation of procedural rules or the practice of any authority. Meanwhile, such **soft law** documents, meant to achieve a uniform execution of EU competition policy, are relevant to detect substantive law and the CJEU also acknowledged the practice that under certain circumstances they can give rise to legitimate expectations (Ștefan, 2013, pp. 197–200).

Harmonisation of substantive rules by such instruments goes only half way towards the proper and uniform application of EU competition law. The other half would be the procedural aspect of the sphere, which is the genesis of the meeting of direct and indirect administration. Regulation 1/2003 declares that it respects the fundamental rights and observes the principles recognised in particular by the EU Charter, thus all the provisions should be interpreted

45 Article 267(a) TFEU.
and applied with respect to those rights and principles.\textsuperscript{48} Although, again, principles cannot create competences or substitute for exact procedural guarantees, they are just interpreting existing competences and guarantees in the right way. The lack of procedural details, that serves as guarantees against the tyranny of public administration (that is, the competition authority or authorities taking part in any part of the procedure), may have consequences for individuals (Ştefan, 2013, p. 182).

Soft law measures mostly determine procedures of the ECN, apart from certain specific rules and safeguards of information exchange set forth in Regulation 1/2003. Basically, therefore, the ECN’s procedures on the work allocation regime fall beyond the reach of judicial control. The allocation of cases and the cooperation of authorities to that end in a single case are crucial for the undertaking concerned from the point of view of their rights covered by the concept of the right to good administration. Without binding selection criteria and considering the unpublicized nature of case allocation decisions taken within the ECN, it is difficult, if not impossible, to predict which authority will ultimately handle a particular case. This has important consequences for the undertakings concerned in terms of applicable procedural rights, including the right to access to documents. It also concerns substantive law and legal practice including the amount of penalties, which, for example, may be different due to the soft law nature of joint interpretative decisions. Therefore, the lack of predictability does not conform to the requirements of legal certainty (Brammer, 2008, p. 352). Extensive reliance on soft law measures alienates judicial power from the network and, consequently, results in the marginalisation of judicial control over the decisions taken within the network as a safeguard of the rights of parties under investigation as well as third parties. Likewise, it also eliminates the possibility of courts serving as a resolution forum (Cengiz, 2010, p. 673). Relying on the argumentation of Kovács, Tőth and Forgács, vertical indirect effect would let individuals rely on soft law provisions that limit the central coordinating authority, that is, the EU Commission’s discretionary powers, but this would not have relevance in private (horizontal) disputes (Kovács, Tőth and Forgács, 2017, pp. 5–6). There is even evidence that in certain cases the particular wording of soft law instruments could create some expectations on the side of undertakings (Senden, 2004, p. 421; Ştefan, 2013, pp. 166–167, 177–179). Basically, however, the Commission has discretion to depart from the guidelines it imposed upon itself, although it shall remain within the frames of the requirements of equal treatment and the protection of legitimate expectations. Therefore, the ‘legal effects of soft law are not linked, as in the case of hard law, to the

\textsuperscript{48} Regulation 1/2003, (37).
intrinsic quality of the instrument to generate rights and obligations’ (Ştefan, 2013, pp. 183–184; Voss, 2013, pp. 155–156). Instead, it is given full effect through the prism of legal principles and provision deeply rooted in Treaty provisions, that is, in hard law. The CJEU has not recognized binding legal effects of lawful soft law on individuals; however, the Court admitted binding legal effects of such instruments for the enacting institution (Ştefan, 2013, pp. 197–199).

The rule of law is a major value of integration as it is the first and outmost requirement for European administration. As a corollary to the rule of law, the principle of legality requires that actions remain under and within the law, and the principle of legal certainty requires EU legal rules to be clear and precise enough to ensure that legal relationships governed by EU law are foreseeable (Galetta, Hofmann, Puigpelat and Ziller, 2015, (8)–(9), p. 17). It means that individuals must be able to ascertain unequivocally what their rights and obligations are, and to be able to take steps accordingly, be it concerning substantive or procedural aspects of a situation. Despite the recommendations, a substantial level of convergence in the application of the rules has been achieved, but divergences subsist. According to examinations, it is due to differences in the institutional position of the individual NCAs and in national procedures and sanctions.

VII. Future path of development

Substantial law on the work of the ECN cannot ensure guarantees of the preliminary procedure that takes place within an information management network enclosing the features of enforcement and regulatory networks; ad hoc solutions based on some soft law provisions cannot substitute for legal acts and instruments that establish procedural rights for individuals (undertakings) in an administrative procedure performed within the ECN. Harmonisation in the form of a directive only addressed to Member States would not compensate for the lack of exact allocation of roles and responsibilities among all the participating authorities: the NCAs and the Commission in a transparent and predictable way.

49 Article 2 TEU.
50 See EU Charter, Article 52(1): Any limitation on the exercise of the rights and freedoms recognized by this Charter must be provided for by law and respect the essence of those rights and freedoms.
51 Network Notice, point 24, 31–32.
According to the requirements of the rule of law, and general codification conclusions of legal literature, a basic act shall be adopted before an information-management activity may be performed: it may take the form of a regulation, directive, decision, or any other instrument which has binding legal effect.\textsuperscript{53} According to the academic point of view, this basic act must not necessarily be a legislative act.\textsuperscript{54} Consequently, soft law may also fulfil this function, as it is clear from practice that it is getting accepted as an important source of law. At the same time, the existing soft law does not fill the gaps of insufficient regulation of all the procedural phases of networking, that is, the legal frames of its functioning.\textsuperscript{55}

Since the entry into force of the Lisbon Treaty, a new competence is also available as a solution. The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, may establish the necessary measures to regulate administrative cooperation to serve effective implementation. This competence is a supportive competence and the harmonisation of the laws and regulations of the Member States is excluded. This provision was a milestone in the history of administrative cooperation as it is the first provision empowering the EU legislators to legislate on administration, apart from the direct level. A legal act based on Article 197 TFEU, as a matter of fact, offers a solution. However, it shall be without prejudice (a) to the obligations of the Member States to implement Union law or to the prerogatives and duties of the Commission and it shall also be without prejudice (b) to other provisions of the Treaties providing for administrative cooperation among the Member States and between them and the Union.\textsuperscript{56} This latter provision may challenge the efficacy of the legal act on information management networking if the Commission’s activity is determined and explained by soft law measures that can be disregarded by the Commission itself. Therefore, in the case of the ECN, where not only the NCAs act within the authority power but the Commission is also entitled to do so, the legal background to regulate the cooperation and the information management activity of both shall be regulated by a basic act of binding effect to fulfil the basic requirements of European administrative procedures.

\textsuperscript{53} ReNEUAL Book VI-3, (1)–(2) (Galetta, Hofmann, Lottini, Marsch, Schneider and Tidghi, 2014, p. 245).
\textsuperscript{54} ReNEUAL Book VI-3, (15) (Galetta, Hofmann, Lottini, Marsch, Schneider and Tidghi, 2014, p 271).
\textsuperscript{55} ReNEUAL Book VI-3 (3) (15) (Galetta, Hofmann, Lottini, Marsch, Schneider and Tidghi, 2014, p. 245).
\textsuperscript{56} Article 197 TFEU.
VIII. Concluding remarks

Direct enforcement of EU law has been traditionally kept at the national level. However, in recent years, the EU’s competences in direct enforcement have expanded and its competition policy is a significant example for enforcement networks and ‘hard, soft and case law-based enforcement standards’ (Scholten, 2017, p. 1351). In trans-national networks interactions between inter-dependent actors extend well beyond national borders, and thus their own procedural regimes with all its guarantees. It should also not be forgotten that coordination represents a genuine contradiction and sets limits to the autonomy and the responsibilities of the different actors concerned (Senn, 2011, pp. 31–32). Therefore, due to the rule of law, the procedural guarantee system of this intermediate phase of the composite administrative procedure shall be clearly and transparently regulated.

The ECN is a rather successful form of cooperation despite the fact that its core issues fail to correspond to the fundamental requirements of European administrative procedures; having said that, positive changes seem to take place in the evaluation of soft law and the functioning of the system. In one way, it is a model for all the cooperation networks of authorities, as it embodies legal questions and challenges as all the networks do; the development path that the ECN has experienced serves as a lesson. On the other hand, its specificities make it unique and even if its current regulation tries to correspond to it, a basic act encompassing and clarifying the administrative procedure of its cooperation would better serve people’s Europe and the requirements of the EU vis-à-vis its own public administration.

Literature


Liability for Anti-Competitive Conduct of a Third Party under EU Competition Law

by

Magdalena Knapp*

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Abstract

The article discusses the framework of liability for anti-competitive conduct of a genuinely independent third party as set forth in relevant judgments. It refers to concepts of third party liability in the light of the principle of personal responsibility developed by doctrine and jurisprudence. The CJEU has set out important rules relating to liability of an undertaking for actions of its independent service provider. However, it still left some important issues unresolved. The paper focuses on the test for the attribution of anti-competitive conduct of a service provider and refers to its interpretation and application. It questions whether the introduced test provides sufficient legal certainty for undertakings. It briefs on the steps that must

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be taken by undertakings to distance themselves from an infringement and offers some suggestions how to limit or prevent exposure to liability.

**Résumé**

L’article traite du cadre de la responsabilité d’un tiers véritablement indépendante pour un comportement anticoncurrentiel, tel qu’énoncé dans les jugements pertinents. Il fait référence aux concepts de responsabilité d’un tiers à la lumière du principe de la responsabilité personnelle développé par la doctrine et la jurisprudence. La CJUE a énoncé des règles importantes relatives à la responsabilité d’une entreprise pour les actions de son prestataire de services indépendant. Cependant, certaines questions importantes n’ont toujours pas été résolues. L’article se focalise sur le test d’attribution du comportement anticoncurrentiel d’un prestataire de services et se réfère à son interprétation et à son application. Il s’interroge sur le point de savoir si le test introduit offre une sécurité juridique suffisante aux entreprises. Il fait un résumé des mesures à prendre par les entreprises pour se distancer par rapport à une infraction et propose des suggestions sur la manière de limiter ou d’empêcher toute exposition à la responsabilité.

**Key words:** third party, independent service provider, attributed liability, personal liability

**JEL:** K10, K21, K41.

**I. Introduction**

Recent judgments of the CJEU provide valuable insight into the circumstances where an undertaking is liable for actions of a third party. Liability for an unlawful conduct of an independent contractor is a quite recent competition law concept. It is consistent with the trend of extending the scope of Article 101 TFEU that is to include new forms of cartels and its participants as well as to ensure the effectiveness of the prohibition laid down in this article. The paper refers to situations when a company is held liable for a cartel established by its service provider without having to establish a personal involvement of the former in the infringement. The issue of an undertaking’s liability for actions of a genuinely independent third party is not codified. Consequently, there are no universal or standard rules, just the general framework of the liability regime. The article aims to synthesize relevant case law and provide rules which would allow undertakings to understand whether they are liable for actions of companies they are contracting.
In order to avoid terminological confusion, in this paper, ‘third party’ is defined as a business partner or contractor that provides services to the undertaking in question. To speak about a truly independent contractor it has to: 1) have a separate legal personality 2) bear relevant financial and economic risks and 3) act in its own name. The term third party is often used interchangeably with the notions of ‘contractor’, ‘service provider’, ‘agent’, and ‘economic operator’.

EU authorities stress the need to eliminate situations when an undertaking outsources services in order to free itself from suspicion of participating in concerted practices or anti-competitive agreements. Authorities want to attribute liability directly to an undertaking that has outsourced its activities. Accordingly, the CJEU expressed an opinion that an undertaking may be held accountable not only for its own actions, or actions of its employees, but also for the actions of independent contractors entrusted with specific tasks. The Court contributes to a wider interpretation of the prohibition laid down in Article 101 TFEU in order to ‘penalize and to prevent the creation of new forms of collusion with the assistance of undertakings which are not active on the markets concerned by the restriction of competition’. In the Court’s view, such interpretation will prevent situations aimed at circumventing it. That reasoning is also applicable to service providers.

A key role of competition authorities is to ensure that competition rules are effectively enforced. Once an infringement is found, an authority ‘must provide sufficiently precise and consistent evidence to support the firm conviction that the alleged infringement took place’. The possibilities offered by modern technology and the character of some cartels and concerted practices has

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1 This approach was presented by the Court of First Instance in para. 127 of judgment of 08.07.2008, Case T-99/04 Treuhand v Commission, ECLI:EU:T:2008:256.

2 Para. 56 of judgment of 24.03.2011, Case T-377/06 Comap SA, ECLI:EU:T:2011:108. Standard of proof is further explained in paras 63 and 64 of the judgment of 13.07.2011, Case T-53/07 Trade-Stomil sp. z o.o., ECLI:EU:T:2011:360 ‘As regards proof of an infringement of Article [101 TFEU], the Commission must prove the infringements which it has found and adduce evidence capable of demonstrating to the requisite legal standard the existence of circumstances constituting an infringement. It is accordingly necessary for the Commission to produce precise and consistent evidence to support the firm conviction that the infringement took place (…) Furthermore, it is normal for the activities entailed by anti-competitive practices and agreements to take place clandestinely, for meetings to be held in secret and for the associated documentation to be reduced to a minimum. It follows that, even if the Commission discovers evidence explicitly showing unlawful contact between traders, it will normally be only fragmentary and sparse, so that it is often necessary to reconstitute certain details by deduction. Accordingly, in most cases, the existence of an anti-competitive practice or agreement must be inferred from a number of coincidences and indicia which, taken together, may, in the absence of another plausible explanation, constitute evidence of an infringement of the competition rules’. 

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proven that it is an extremely difficult task to provide all incriminating evidence of an alleged infringement. Consequently, the CJEU introduced some presumptions to facilitate the work of the authorities. The emergence of those presumptions provides guidance for competition authorities on how to assess the limits of liability for anti-competitive conduct of a third party. That would include situations when an independent service provider facilitates collusion or is actually working on behalf of the undertaking in question, or when a number of undertakings use the same service providers to collude and exchange sensitive information to escape the radar of competition authorities. This would also ensure full effectiveness of the prohibition laid down in Article 101 TFEU as the Court stated in *AC-Treuhand.*

The paper first reviews the concepts of an undertaking’s responsibility for third party actions, referring to the principle of personal liability in competition law. Then it analyzes the circumstances when a third party is considered truly independent. Further, it refers to the framework of liability for anti-competitive conduct of a truly independent third party set forth in relevant judgments. It discusses practical implications for companies that rely on contractors and how an undertaking can distance itself from the infringement. Finally, it looks at issues that are still unresolved and call for clarification. As this article is concerned specifically with the scope of liability for anti-competitive conduct of a third party, the paper shall strive to answer the following questions:

– When is a service provider considered to be genuinely independent?
– Under what conditions may the conduct of a service provider be attributed to the undertaking in question and expose it to liability?
– How should an undertaking act to distance itself from the competition law infringement?

II. Concepts of third party liability in the light of the principle of personal responsibility

There are various cases where it seems that an undertaking is responsible for third party actions. In fact, these are the situations of personal liability where an economic entity, which may consist of several legal persons, answers for an infringement. If employees, subsidiaries or contractors are considered part of the undertaking, liability for their actions is attributed to that undertaking. Discussing the issue of liability for anti-competitive conduct of a third party requires reference to those concepts.

The first issue that will be analyzed is a violation of competition law committed by an employee. The relationship between an undertaking and a service provider may resemble that of an employer and employee with all its consequences. Well-established case law confirms that liability for an employee’s anti-competitive behavior is attributed to the employer (undertaking). It is recognized that an employee is considered part of the organizational structure of an undertaking, because he performs his duties in accordance with the requirements of the employer. He bears no economic risk and he does not act on his own behalf. The concept dates back to 1983 and continues to be used in recent judgments.

The principle set out in 1983 in *Musique Diffusion française* states that ‘to impose on undertakings or associations of undertakings fines where, intentionally or negligently, they have been guilty of infringements, is not conditional upon action by, or even knowledge on the part of, the partners or principal managers of the undertaking concerned but upon action by a person who is authorized to act on behalf of the undertaking’. Hence, there is no need for an action on the part of the employer in order to attribute liability for an employee’s infringement to the undertaking in question, mere authorization to act on its behalf suffices. The following example illustrates the principle: if an employee exchanged confidential information with a competitor of his employer, the latter may be punished for the violations, even if it did not know that such an exchange took place. An undertaking is liable for actions of its rogue employees.

The employee performs duties under the direction of the undertaking with which he concluded an employment agreement. In this sense, the employee is integrated into the structure of the economic entity – that is, an undertaking. Therefore, any illegal conduct of an employee results in the undertaking being responsible for the violations committed by the employee, regardless of the fact whether the undertaking knew or was not aware of the anti-competitive conduct of its employee. Some guidance on how to prevent and limit employer liability is provided in paragraph 27 of *Slovenská sporitelňa*:

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5 Judgment of 07.06.1983, Joined cases 100 to 103/80 *Musique Diffusion française and Others v Commission*, ECLI:EU:C:1983:158.
7 Judgment of 07.02.2013, Case C-68/12 *Slovenská sporitelňa*, ECLI:EU:C:2013:71. The case states that a service provider is not independent if in practice it is acting as an agent or employee.
case-law that when it is established that an undertaking has participated in anti-competitive meetings between competing undertakings, it is for that undertaking to put forward evidence to establish that its participation in those meeting was without any anti-competitive intention by demonstrating that it had indicated to its competitors that it was participating in those meetings in a spirit that was different from theirs. If an undertaking’s participation in such a meeting is not to be regarded as tacit approval of an unlawful initiative or as subscribing to what is decided there, the undertaking must publicly distance itself from that initiative in such a way that the other participants will think that it is putting an end to its participation, or it must report the initiative to the administrative authorities’.

In many EU jurisdictions, parent companies are liable for antitrust violations committed by their subsidiaries. There is a presumption that if a subsidiary is 100% owned by its parent company, than it is not independent and does not form a separate entity for the purpose of incurring liability. In such case, being the sole parent company is sufficient to attribute liability because the parent influences and controls its subsidiary. Even though a subsidiary has a separate legal personality, it does not have power to make autonomous decisions. For that reason, an agreement of an anti-competitive nature concluded between a parent and a subsidiary will not raise antitrust concerns, because they are not separate entities. According to the doctrine of a single economic entity, a parent company and a subsidiary are treated as one entity for the purpose of antitrust proceedings (Moisejevas and Urbonas, 2016, p. 109–111). Anti-competitive agreements concluded within a single economic unit are not unlawful due to their nature because: the entities are not independent, they do not have market autonomy and they are not perceived as competitors. Therefore, an agreement concluded between them cannot be defined as anti-competitive (Semeniuk, 2015, p. 34). For these reasons, subsidiaries are not truly independent third parties. Their actions are considered to be the actions of the undertaking in question (parent).

It is important to note in this context that a parent company which did not participate in the cartel directly is liable for it within the limits of the infringement committed by its subsidiary – in other words, the parent’s liability cannot be more severe than that of its subsidiary. The Total SA case confirms this in paragraph 44 stating that ‘in a situation where the liability of a parent company is purely derivative of that of its subsidiary and in which no other factor individually reflects the conduct for which the parent company is held liable, the liability of that parent company cannot exceed that of its subsidiary’. Moreover, it must also be recalled that there is no need for

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a formal authorization to attribute liability to the undertaking in question if it is exercising decisive influence over the third party. If an employee or subsidiary is a formal representative of an undertaking, they can be considered part of that undertaking. In such case, it is irrelevant whether they were formally appointed.\(^9\)

The *Voestalpine*\(^{10}\) judgment further explained when an undertaking and an independent contractor are treated as a single economic unit. In this case, a producer of metal products outsourced its sales to an agent on the territory of Italy, where cartel meetings were held. The agent was not authorized to sign contracts with customers, they were always concluded directly with the producer.\(^11\) It is important to note that the same agent worked also for another member of the cartel.

The court pointed out two factors that determine whether ‘two companies having a vertical relationship, such as a principal and its agent or intermediary [form] single economic unit: first, whether the intermediary takes on any economic risk and, second, whether the services provided by the intermediary are exclusive’.\(^12\) Also ‘it is necessary to ascertain whether that agent is in a position, as regards the activities entrusted to him by that principal, to act as an independent trader free to determine his own business strategy. If the agent is not in a position to act in that way, the functions which he carries out on behalf of the principal form an integral part of the latter’s activities’.\(^13\) In the presented case, the agent acted on behalf of the producer in Italy, and he did so without assuming an economic risk, which was borne by the principal and not by its agent. Regarding the second condition, the fact that the agent worked for two different undertakings is insufficient to demonstrate the agent’s commercial independence, because he was following strict instructions from the principals and bore no financial risks resulting from the contracts. However, the agent could, at the same time, be regarded as constituting a single economic unit with one of his principals, but a separate economic unit to the other member of the cartel. After all, the agent was only seemingly autonomous and he did not undertake economic risk and activities similar to those of an independent service provider. Liability for its action was attributed to the undertaking in question on the basis of the single economic entity doctrine.

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\(^{11}\) Ibid. para. 20.

\(^{12}\) Ibid. para. 139.

\(^{13}\) Ibid. para. 163.
There are also situations when liability for a violation of Article 101 TFEU is attributed to an economic successor of the infringing entity.\textsuperscript{14} The principle of economic continuity provides that an undertaking that takes over the infringing entity after the period of the infringement may also be held liable if the infringing entity during the period of the infringement either ceased to exist or is part of the same group of companies. If that entity is transferred to an independent undertaking, there is no economic continuity (Atlee, 2016). However, this concept will not be further discussed in this paper as it mainly concerns the economic continuity principle and does not include actions of independent service providers. Still, it should be mentioned as it is another broadly understood form of liability for third party actions.

The concepts discussed in this paragraph referred to situations where an employee, a subsidiary and a contractor’s autonomy was seeming. Therefore, liability for such actions was attributed to the undertaking which exercised decisive influence over them. The Court considered that they formed a single entity for the purpose of incurring liability. Consequently, if an undertaking commits an infringement, all of the legal persons that constitute the relevant single entity are regarded as jointly and severally liable for the infringement regardless of the fact whether the parent company participated in the infringement passively or actively (indirectly or directly).

III. Genuinely independent third party

For the purpose of the analysis, several landmark cases and competition law concepts were chosen which show different perspectives on the liability for third party actions. The key question that this part of the article aims to answer is when is a third party considered to be genuinely independent.

As shown by previous paragraphs, in certain situations two or more undertakings may be treated as one. Therefore, having a separate legal personality does not suffice to consider another entity as independent. The Court repeatedly held that the ‘concept of an undertaking (…) covers entity engaged in an economic activity, regardless of the legal status of the entity or the way in which it is financed. That concept must be understood as covering an economic unit, even if, from a legal perspective, that unit is made up of a number of natural or legal persons. When such an economic entity infringes the competition rules, it is for that entity, according to the principle

\textsuperscript{14} Particularly interesting and providing insight into the concept of economic continuity is judgment of 14.07.2016, Case T-146/09 RENV Parker Hannifin Manufacturing Srl, ECLI:EU:T:2016:411.
of personal responsibility, to answer for that infringement’. Generally service providers are considered independent entities. Therefore, they are not part of the service recipient’s organizational structure. It is crucial to determine whether a service provider de facto operates independently of its recipient. If independence is only seeming, that is, the service provider is legally a separate entity but actually performs his given activities under the control and strict supervision of the recipient, it might be considered to be part of the same economic unit as the parent company and the subsidiary. Accordingly, they may form a single undertaking for the purposes of Article 101 TFEU. There cannot be any links between the undertaking in question and the service provider that would lead to the conclusion that they form a single economic entity.

What other factors characterize a truly independent contractor? According to settled case law ‘it follows that the decisive factor for the purposes of determining whether a [contractor] (...) is an independent economic operator is to be found in the agreement concluded with the principal and, in particular, in the clauses of that agreement, implied or express, relating to the assumption of the financial and commercial risks linked to sales of goods to third parties (...) the question of risk must be analyzed on a case-by-case basis, taking account of the real economic situation rather than the legal classification of the contractual relationship in national law’. A contractor has to be a separate entity which bears commercial risk in its own name. For that reason, agency contracts are excluded, unless an agent carries any risk resulting from his agreement.

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15 Para. 33 Total SA.
16 Para. 25 VM Remonts.
18 Para. 46 of judgment of 14.12.2006, Case C-217/05 Confederación Española de Empresarios de Estaciones de Servicio v Compañía Española de Petróleos SA, ECLI:EU:C:2006:784. The requirement of bearing relevant economic risk is also confirmed by para. 139 Voestalpine.
19 According to the Guidelines on Vertical Restraints 2010/C 130/01 ‘the agreement will be qualified as an agency agreement if the agent does not bear any, or bears only insignificant, risks in relation to the contracts concluded and/or negotiated on behalf of the principal, in relation to market-specific investments for that field of activity, and in relation to other activities required by the principal to be undertaken on the same product market (...) If contract-specific risks are incurred by the agent, it will be enough to conclude that the agent is an independent distributor (...) Where the agent bears one or more of the relevant risks, the agreement between agent and principal does not constitute an agency agreement for the purpose of applying Article 101(1). In that situation, the agent will be treated as an independent undertaking’. Therefore, only if an agent assumes any risk resulting from his agreement is he considered an independent service provider.
An independent contractor means that the contractor is accountable for its own unlawful conduct. As a rule, acts of rogue contractors cannot automatically be attributed to its recipients. However, if certain conditions are met, the undertaking in question is liable for third party actions.

**IV. Test for the attribution of anti-competitive conduct of a service provider**

In this part, the paper focuses on liability for actions of a genuinely independent contractor which bears economic risk and is not controlled by the principal. It does not need approval for its actions, as it is operating within obligations imposed on it by an agreement. It needs to be highlighted that the contractor cannot be considered part of the undertaking in question; hence the concept of a single economic entity does not apply. The CJEU formulated a test in its recent case law for the attribution to the undertaking in question of anti-competitive conduct of an independent contractor.

The *AC-Treuhand* case discusses the liability of a cartel facilitator operating on a different market than the cartel members. *Eturas*\(^20\) is a case dealing with an antitrust violation that results from the conduct of an online platform. The judgment is followed by *VM Remonts* which further developed the reasoning and presumptions of liability for third party actions.

The first case referred to the consultancy firm AC Treuhand, which was organizing meetings for a number of cartelists. It played an active role in those meetings by resolving potential disputes between cartel members, as well as collecting and sharing confidential market data. The Court found that AC-Treuhand violated Article 101 TFEU by facilitating and coordinating a cartel among producers – the conduct of the consultancy firm had direct effect on the formation and functioning of the cartel. The Court said that the entity was aware of the anti-competitive object of the collaboration between the parties and contributed to that goal.\(^21\) Another important issue that was introduced by the judgment is that an undertaking and a service provider do not have to operate on the same market, that is, on the market affected by the infringement of competition law.\(^22\) The Court relied strongly in this judgment on the *effet utile* argument,\(^23\) which makes the interpretation wide and vague. For that reason, the judgment received some critical comments – sound and

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\(^{21}\) Para. 37–39 *AC-Treuhand*.

\(^{22}\) Ibid. para. 27, 33–36.

\(^{23}\) Ibid, para. 36.
reasonable justification was sacrificed on the altar of full effectiveness of Article 101 TFEU (Busher, Herz, and Vedder, 2015; Lamadrid and Villiers, 2015).

The factual background of the Eturas case is as follows: the online platform Eturas and 30 Lithuanian travel agencies were fined for participating in a concerted practice of coordinating discounts applicable to bookings made via the online system E-TURAS. A new, smaller online discount rate was communicated through personal electronic accounts, given to each travel agency that had access to the booking system. After sending the message, Eturas automatically implemented the discount cap. The main concern in the proceedings was whether sending a message containing a discounts cap could ‘constitute sufficient evidence to confirm or to raise a presumption that the economic operators participating in the E-TURAS booking system knew or ought to have known about that restriction, even though some of them claim not to have had any knowledge of the restriction’.24

The CJEU stated that if travel agencies were aware of the content of the message, this would constitute the key element of the anti-competitive practice. Subsequently, it would give rise to a presumption that they participated in that practice by tacitly assenting to the new discount cap.25 Hence, the awareness of the infringement is a prerequisite of its existence, unless undertakings take steps to distance themselves from the concerted practice. Accordingly, the CJEU introduced the presumption of knowledge about the infringement. Sending a message alone is not enough to conclude that its addressees were aware of the content of that message. Knowledge must stem from other objective and consistent indicia.26

VM Remonts is the landmark case which further develops the liability regime for third party actions. It introduced another rebuttable presumption of liability for an anti-competitive conduct of an independent service provider. The judgment addressed the issue of liability of an undertaking27 for bid-rigging arrangements set up and run by a consultancy firm, which was beyond that undertaking’s control. The service provider colluded with two other

25 Ibid. para. 44. Also para. 31 AC-Treuhand which states that ‘passive modes of participation in the infringement, such as the presence of an undertaking in meetings at which anti-competitive agreements were concluded, without that undertaking clearly opposing them, are indicative of collusion capable of rendering the undertaking liable under Article [101 TFEU], since a party which tacitly approves of an unlawful initiative, without publicly distancing itself from its content or reporting it to the administrative authorities, encourages the continuation of the infringement and compromises its discovery’.
26 Para. 39 and 40 Eturas.
27 The undertaking in question, Partkias kompanija, hired law firm to prepare a tender offer. The latter entity subcontracted the task to MMD lietas, a consultancy firm.
tenderers in a bid for a public contract. The Latvian competition authority in its decision imposed a fine on all three tenderers.\textsuperscript{28} The judgment of the Regional Administrative Court of Latvia annulled the decision in so far as it made a finding of infringement against the undertaking which hired the consultancy firm; still, it upheld the decision with regard to the other two tenderers.\textsuperscript{29}

In paragraph 33, the CJEU referred to conditions which determine the liability of an undertaking for the acts of an independent contractor. These include the following:

\begin{itemize}
\item ‘the service provider was in fact acting under the direction or control of the undertaking concerned, or
\item that undertaking was aware of the anti-competitive objectives pursued by its competitors and the service provider and intended to contribute to them by its own conduct, or
\item that undertaking could reasonably have foreseen the anti-competitive acts of its competitors and the service provider and was prepared to accept the risk which they entailed.’
\end{itemize}

The CJEU stated that an undertaking is liable if any of the aforementioned conditions are met.

The first condition raises no doubts, as it has already been explained and refers to issues analyzed in this paper. If the existence of organizational, economic and legal links between a parent company and its subsidiary or an undertaking and a service provider results in the provision of direction or control by the undertaking in question, then, there is no doubt in such circumstances that the undertaking can be held liable for the unlawful conduct of the service provider.

However, the second and third conditions have been criticized (Talbot, 2016, p. 234–235; Thomas, De Stefano and Jubrail, 2016; Knapp, 2016, p. 101–102) for their ‘extending’ approach to liability and for creating an almost automatic presumption which may be troublesome to rebut.

With regard to the second condition, the CJEU stressed that an undertaking can be held responsible for participating in concerted practices and agreements, if it was aware of the anti-competitive goals pursued by its competitors and the service provider, and intended to contribute to the unlawful practices. Both conditions are met if the undertaking intends to disclose confidential

\textsuperscript{28} Interestingly, the NCA did not consider the liability of the consultancy firm that organized and oversaw the bid-rigging.\textsuperscript{29} The case was appealed to the Supreme Court of Latvia which asked the Court of Justice for a preliminary ruling. The judgment of the Supreme Court of Latvia was issued on 31.10.2016 and it dismissed the proceedings, therefore the judgment of the Regional Administrative Court of Latvia is final.
business information to its competitors via the service provider or gives explicit or tacit approval to do so.\textsuperscript{30} The CJEU clarified it further indicating that this condition will not be met if the service provider voluntarily and without the knowledge of the undertaking in question used confidential information to prepare competitive offers.

The third condition blurred the limits of liability as it refers to a situation where an undertaking has no knowledge of the anti-competitive intentions of the service provider, but could reasonably foresee that there would be a breach of competition law. The competent authority carries out an \textit{ex post} assessment of that undertaking’s behavior. It seems that the aim of the assessment is to include situations when an undertaking engages contractors to avoid direct participation in any form of prohibited practices. The introduction of such a presumption imposes an obligation which is very difficult to fulfill by undertakings. It implies that an undertaking should closely monitor its contractors. In practice, this is a burdensome task because companies usually lack the knowledge and human resources necessary to supervise all the activities of their contractors. The silver lining here might be the fact that the burden of proof lies with the competition authority, which must prove in an indisputable manner that the undertaking knew or at least could find out that the actions of its service provider were meant to restrict competition. If an undertaking had to show evidence to rebut this presumption, this could turn, in practice, into ‘mission impossible’. The case \textit{VM Remonts} proposes a more undertaking-friendly approach, than the conclusion reached by the Advocate General in his opinion.\textsuperscript{31} However, it still carries many challenges for undertakings that outsource most of their activities.

Although the conditions of the test are not novel, as they were already introduced in older judgments,\textsuperscript{32} the test has not referred to liability for third party actions. Recent case law contributes to the interpretation of Article 101 TFEU and attempts to provide guidance both to authorities, on how to apply relevant competition law provisions, and to undertakings, on how to escape liability.

\textsuperscript{30} Para. 30 \textit{VM Remonts}.

\textsuperscript{31} Opinion of Advocate General Wathelet delivered on 03.12.2015 in Case C-542/17 \textit{VM Remonts}, ECLI:EU:C:2015:797. In his opinion, AG Wathelet proposed a reversed burden of proof, that it, the undertaking would have to provide evidence sufficient to rebut all of the presumptions indicating that the company colluded with/or through a service provider.

\textsuperscript{32} Para. 86–86 judgment of 08.07.1999, Case C-49/92 P \textit{Anic Partecipazioni}, ECLI:EU:C:1999:356.
V. Grounds for exemption from liability for actions of a genuinely independent contractor

The implications of the discussed cases are particularly important for undertakings which engage many contractors in their daily operations. It is not rare for competitors to share the same service providers, such as sellers, intermediaries and internet platforms. An undertaking will have to show due diligence and monitor closely the activities of its service providers, to minimize the risk of liability for their anti-competitive conduct and the possibility of potential claims for damages due to competition law infringements.

It is also worth noting that in VM Remonts, the realization was irrelevant for the attribution of liability that it was not the undertaking in question that hired the service provider. The law firm which was the intermediary and engaged the service provider was completely omitted. This means that the undertaking may be responsible for violations committed by a subcontractor. This can cause major problems for an undertaking, which usually has no information or resources necessary to closely supervise all of the outsourced activities and service providers, if it uses services of many intermediaries. Moreover, usually a subcontractor is accountable to the entity with which he concludes an agreement for specific works (Knapp, 2017, p. 102). Interestingly, in AC-Treuhand and Eturas, the cartel facilitator was fined for its antitrust conduct; by contrast, the subject of a consultancy firm providing services was not brought up. in VM Remonts Neither the Latvian NCA nor the CJEU discussed the issue of liability of the service provider which organized and supervised the cartel.

What must an undertaking do to exempt itself from liability? In light of relevant case law, if an undertaking wants to escape liability it should clearly distance itself from any unlawful conduct of a rogue contractor in a way that leaves no doubt that it was not a part of the cartel (Thomas, De Stefano and Jubrail, 2016). The CJEU provided in Eturas an exemplary list of means for undertakings to distance themselves from an infringement. This can take the form of a public announcement, information to other parties to the anti-competitive conduct, notice to a competition authority or other means, since the list is non-exhaustive. The Eturas and AC-Treuhand cases confirm that a third party can facilitate unlawful cooperation. In Eturas, the cooperation took a form that prevented any direct contact between the travel agencies co-using the platforms (Lawrance and Lisner, 2017). Another judgment penalized the consultancy firm which set up and ran the cartel meetings. It shows that if an undertaking fails to clearly distance itself from an anti-

33 Para. 46–49 Eturas.
competitive practice, it may be held liable for actions of independent service providers. However, it is still ambiguous what evidence and other objective and consistent indicia will be taken into consideration and how they will be assessed by national courts to justify the presumption of having knowledge of an infringement (Lawrance and Lisner, 2017).

A practical implication for undertaking is that closer scrutiny of the contractual relationships with third parties, entrusted with activities that may raise competition law concerns, is required. Moreover, agreements must be carefully drafted, including confidentiality clauses or provisions limiting the possibility of a service provider cooperating with the competitors of the undertaking in questions (through exclusivity clauses). Although, these clauses do not completely eliminate the risk, they reduce it significantly. It is advised to constantly and comprehensively monitor current external and internal activity. The adoption of an appropriate compliance policy, and implementing rules for early detection of potential infringements, might be particularly justified and desirable in this case.

VI. Issues left unresolved

There are some matters that are still unresolved and raise concerns. First, how should the expression ‘reasonably have foreseen’ be determined? It is not sufficiently clear which circumstances count as ‘foreseeable’. Same doubts apply to the presumption of knowledge established in *Eaturas* and confirmed by *VM Remonts*. An undertaking can monitor closely its direct contractors, but checking subcontractors might be beyond its capabilities, because the contractor will not usually disclose such data due to trade secrets or market competition. The question arises to what an extent can an undertaking be required to review its contractors? This seems to be stretching the limits of liability, but, at the same time, it does not provide for a sufficient level of clarity as to how it should be interpreted. Though there are no references to *AC-Treuhand* in *VM Remonts*, the former judgment contributes to the interpretation of this condition by providing guidance on how to understand ‘foreseeability’ should be understood. The notion may depend on various factors, including ‘content of the text in issue, the field it covers and the number and status of those to whom it is addressed’. Moreover, the result is still foreseeable, even if an undertaking must get legal advice to consider the full implications of its conduct. The interpretation provided by the Court raises many doubts and

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34 Para. 42 *AC-Treuhand*.
questions (cf. Busher, Herz and Vedder, H., 2015; Canu, 2015). A company’s basic task is to conduct its business and provide services, not to dedicate most of its resources to a detailed verification of all its contractors. Overturning the presumption might cause many difficulties for companies.

Another question is what standard of proof is required to determine whether an undertaking is aware of a possible violation of Article 101 TFEU. There are certain requirements that competent authorities must meet. Principles governing the assessment of evidence and standard of proof can be found in national laws. Hence, the presumptions for liability originate in EU law, but handling evidence is governed by domestic rules of the Member States (Rusu, 2016, p. 2). In practice, this means that the outcome of a case greatly depends on the applicable legislation of a particular Member State, therefore different regimes translates into different outcome. It is the task of national courts to decide whether an undertaking fulfilled the conditions set out by the CJEU. In order to do so, a national court uses domestic rules on the assessment of evidence and standard of proof, and takes into account all the circumstances of the case. The court must then assess if the circumstances of the case (such as the dispatch of a message or possibility to reasonably foresee the anti-competitive acts of competitors and independent service provider) may constitute sufficient evidence.

The next issue refers to limits of liability. The gravity of the infringement is assessed on the basis of the unlawful conduct; as well as whether the undertaking in question participated in all aspects of an anti-competitive practice, or whether it only played a minor role therein. However, what if an undertaking’s liability arises directly from its service provider’s conduct – is the undertaking in question liable only within the limits of the infringement committed by its service provider? Should the corresponding reasoning from the single economic entity doctrine be applied whereby a parent company’s liability depends exclusively on the facts constituting the infringement committed by its subsidiary and to which its liability is closely linked.

**VII. Conclusion**

It is beyond doubt that an undertaking may be liable for infringements committed by its service providers. The liability of an undertaking cannot be ruled out even in the case of a genuinely independent contractor, which should be solely accountable for its own actions. As demonstrated by the aforementioned case law, to escape liability, an undertaking must prove it was not aware that an infringement existed or that a service provider was involved
in anti-competitive practices. If the undertaking in question had no knowledge of the infringement, it still has to satisfy the ‘foreseeability’ condition, that is, show it did everything to identify the full implications of its actions and the actions of its service provider; and make sure none of them raised competition law concerns.

An undertaking is liable when a third party provides services only seemingly as an independent contractor and is, in fact, under the control of the undertaking in question or is related to it via organizational, economic and legal links. In this case, the single economic unit doctrine will apply and the aforementioned grounds for defense will, most probably, not be applicable.

There is a visible shift towards extending the interpretation of Article 101 TFEU; such course of action involves the risk of stretching this legal concept by using an interpretation that is overly broad. The judgments are part of the CJEU’s case law on the scope of the subjective elements of liability for the involvement in a cartel established or facilitated by a service provider. Undertakings have to keep in mind that conduct of their subsidiaries and service providers may expose them to liability for fines and potential damages claims. Therefore, they not only have to keep an eye on the behavior of employees and entities associated with them on the basis of a single economic entity, but also on independent contractors and subcontractors as well as consider also the IT systems which they co-share with their competitors. The case by case approach will probably shift slightly, and subsequent judgments will work out the full implications and more detailed interpretation of the test.

**Literature**


Private Antitrust Enforcement Without Punitive Damages: 
A Half-Baked Reform?

by

Claudia Massa*

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Abstract

Directive 2014/104/EU on private antitrust enforcement opted for the exclusion of punitive damages from the category of recoverable damages following a violation of antitrust law. This article will outline the concept of punitive damages and analyse the relevant case-law of the courts of the Member States, of the ECtHR and of the ECJ. Then, it will examine the regime laid down in the Directive and consider the possible reasons why the European legislator opted for this exclusion. Thus, the opportunity to introduce such a provision into the European legal system will be evaluated, taking into consideration the problem of overdeterrence, the problem of the division of functions between public and private enforcement, and making a comparison with the relevant provisions of Directive 2004/48/EC on the

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enforcement of intellectual property rights. Finally, a possible modification of Article 3(3) of the Directive will be suggested, in the framework of the review that the Commission is required to undertake by December 27, 2020.

Résumé


Key words: competition law; private antitrust enforcement; compensation; punitive damages; deterrence

JEL: K21, L40

I. Introduction

In the field of competition law, an action for damages deriving from an antitrust violation is an important civil remedy that, firstly, has the function of protecting the rights of individuals. It is debated whether an action for damages must also have a deterrent purpose towards the companies that engage in anti-competitive conduct on the market. Directive 2014/104/EU\(^1\) (hereinafter, the Damages Directive) arguably leaves this deterrent function to public enforcement. On the other hand, in various jurisdictions, the deterrent function is entrusted to so-called punitive damages, a common law concept of

Anglo-American origin, recognized by the Court of Justice of the European Union\(^2\), which consists of the award of a further sum of money, in addition to that necessary to compensate the injured party for the harm suffered, as a consequence of the anti-competitive conduct.

After having framed the concept of punitive damages and having analysed the relevant case-law of the courts of the Member States, of the European Court of Human Rights and of the Court of Justice of the European Union, this article examines the regime laid down in the Damages Directive\(^3\) and discusses the reasons why, when drafting this Directive, the European legislator opted for the exclusion of punitive damages from the category of recoverable damages following a violation of antitrust law.

Subsequently, this article will evaluate the opportunity to introduce such a provision into the European legal system, taking into consideration the problem of overdeterrence and the division of functions between public and private enforcement. Also, a comparison will be made with the relevant provisions of Directive 2004/48/EC on the enforcement of intellectual property rights.

Finally, a possible modification of Article 3, paragraph 3 of the Damages Directive will be suggested, in the framework of the review that the Commission is required to carry out for the submission of a report to the European Parliament and the Council by 27 December 2020, as per Article 20 of the Directive.

II. Punitive damages in the case-law

Punitive damages are a typical concept of common law countries and they are used especially in the United Kingdom\(^4\) (Cappelletti, 2015) (except


\(^3\) Although Article 3, paragraph 3 excludes punitive, multiple and other types of damages, due to space constraints, this chapter will only focus on punitive damages.

\(^4\) The first judgement that recognized punitive damages was issued in England in 1763 (Huckle v. Money, [1763] 2 Wils. 205, 95 Eng. Rep. 768 (K.B.)). Later, the concept of punitive damages was transplanted to the United States. In the field of competition law, the first ruling whereby the UK Competition Appeal Tribunal (CAT) awarded punitive damages to the victim of an abuse of a dominant position was issued on 5 July 2012 (case 2 Travel Group Plc v. Cardiff City Transport Services Limited).
for Scotland\(^5\) (Fulton, 2017)), in the Republic of Ireland,\(^6\) in Cyprus, in the United States, and in Canada (Gotanda, 2003; Bau 2014; Schirripa, 2017). They consist of the award to the victim of a sum of money in addition to what is strictly necessary to compensate the harm suffered.\(^7\)

Under British law, punitive damages contribute, together with compensatory damages, to the achievement of specific objectives, such as punishing the tortfeasor for his behaviour and dissuading market players from engaging in socially harmful behaviours. Moreover, they reward the injured party for enforcing his rights and grant him a further sum of money beyond what is needed to compensate the harm suffered, when the latter appears inadequate\(^8\) (Schirripa, 2017, Croff, 1981, p. 600 et seq.).

Similarly, in the United States, in the event of non-contractual liability\(^9\) (Spoto, 2008, p. 351), courts may impose punitive or exemplary damages in addition to compensatory damages, if the infringer has acted with malice or gross negligence (Cappelletti, 2015, p. 807; Galanter and Luban, 1993, p. 1393, 1397–99). The compensatory function, typical of the remedy for tort law, is therefore accompanied by a punitive and deterrent purpose, which is typical of a penal sanction. Moreover, exemplary damages – according to some of the American legal scholars (Galanter and Luban, 1993, p. 1393, 1397–99;...
Cappelletti, 2015, p. 807) – have also become a tool of public regulation for the prevention of harmful conduct, since a private citizen who has been the victim of, for example, an antitrust violation, can take the position of Private Attorney General and bring his punitive claim against socially unwanted conducts (Rabkin, 1998, p. 196; R.C. Meurkens, 2014, p. 27 et seq.; Schirripa, 2017; Iannuccelli, 2015, p. 226).

In the field of US competition law, in particular, there is a special form of compensation with over-compensatory, deterrent and punitive purposes known as ‘treble damages’. It consists of a sum of money equal to three times the amount of the harm suffered that the judge automatically awards to the injured party. This instrument was introduced to encourage private plaintiffs to enforce antitrust laws (Cavanagh, 2005, p. 150 et seq. and et seq.), but it also has the effects of punishing the infringer and discouraging others from engaging in anti-competitive conducts (Baer, 2014; Wils, 2009, p. 17 et seq.).

In other European countries (Koziol, 2008, p. 750; Rouhette, 2008, p. 322 et seq.), punitive damages have been, at least initially, regarded by courts as incompatible with national rules on torts and civil liability (Schirripa, 2017; L. Meurkens, 2014, p. 10 et seq.; Saravalle, 1993, p. 875; Borgia, 2008, p. 851 et seq.). In these countries, in fact, damages have an exclusively compensatory function and they seek to indemnify the injured person for the harm suffered through the material restoration of the status quo ante or the payment of an amount of money. The principle on which the damages are based is that of the restitutio in integrum, which consists of re-establishing the same situation


13 Italy, Germany, Austria, Switzerland, Spain, France, Belgium.
in which the injured party would have been found if a violation had not been committed. Therefore, in a system of this kind, punitive damages are inconceivable because they pursue a different objective, namely deterrence.

In some of these countries, however, there has recently been an attitude of greater openness by national courts, at least with regard to the recognition of foreign rulings that impose punitive damages awards (Zarra, 2016, p. 968; Quarta, 2016, p. 1159B; Lopez De Gonzalo, 2017, p. 714).

In Italy, for example, the Court of Cassation originally took the view that the idea of punishment and sanction was alien to the system of civil liability and claimed that its only function was the restoration of the injured party’s property sphere. However, in 2015, the Court of Cassation stated that the sanctioning function of damages is compatible with the general principles of the Italian legal order. In doing so, the Court took into consideration the legislative reforms that have gradually attributed to the compensation system a sanctioning connotation (Lopez de Gonzalo, 2017, p. 436), alongside the (however preponderant) compensatory-reparatory one. Also the Italian Constitutional Court ruled that civil liability may have both a retributive and compensatory function. However, the definitive turnaround of Italian jurisprudence took place in 2017, when the Court of Cassation ruled that the concept of punitive damages is not ontologically incompatible with the Italian legal system, provided that the foreign punitive damages award is based on a sufficiently precise provision and complies with the legality and proportionality principles (Zarra, 2017, p. 722; Lopez De Gonzalo, 2017, p. 714).

Also the French legal system has become gradually less hostile to punitive damages. Indeed, the French Supreme Court overruled a decision of a lower court, which had ruled that punitive damages are incompatible with French public policy. The French Supreme Court ruled that the principles underlying an award of punitive damages are not in themselves contrary to public policy, but that incompatibility may result from the awarded sum of


16 In this sense, the following have been reputed to indicate the will of the legislator to overcome the traditional reluctance to grant a lato sensu (in a broad sense) punitive character to the compensation: Article 124, paragraph 2 and 131, paragraph 2, of the Legislative Decree n. 30/2005 (which, in the field of patent and trademark, have replaced Articles 86 R.d. 1939/1927 and 66 R.d. 929/1942); Article 140, paragraph 7 of the Legislative Decree n. 206/2005 (on consumer protection); Article 709-ter, n. 1, n. 2) and n. 4), c.p.c. (in the field of non-fulfilment of child custody obligations) and many others.

17 Decision of the Constitutional Court, 11 November 2011, n. 303; decision of the Constitutional Court, June 23, 2016, n. 152.

18 Judgment of the Italian Court of Cassation, United Sections Chambers n. 16601 of 5 July 2017.
money, if it is disproportionate in relation with the injury suffered and the breach of contractual obligations. Thus, foreign punitive damages awards can in principle be recognised in France unless they are disproportionate to the harm sustained.\(^{19}\)

The enforcement of punitive damages has also been allowed in a Spanish ruling where the Supreme Court stated that Spanish law does not provide for a strict separation between the civil and the criminal compensation systems: punitive damages, therefore, can be used to make up for the inadequacies of criminal law.\(^{20}\)

As far as the European Courts are concerned, their positions are divergent: the European Court of Human Rights has consistently rejected, even in cases of serious violations of fundamental rights guaranteed by the ECHR, applicants’ requests aimed at obtaining, in addition to material and morals damages, the award of punitive damages.\(^{21}\) The Court of Justice of the European Union, on the other hand, established that reparation of harm as a result of breaches of EU law must be commensurate with the harm suffered, but it also stated that national courts may award specific damages, such as exemplary damages, pursuant to claims or actions based on European law, if such damages may be awarded pursuant to similar claims or actions based on domestic law.\(^{22}\)

With particular regard to competition law, the Court of Justice first confirmed in the \textit{Courage} judgement the compatibility with EU law of the prohibition of unjust enrichment, which seemed to exclude the possibility for national courts to impose punitive damages.\(^{23}\) By contrast, in the subsequent \textit{Manfredi}\(^{24}\) judgment, the Court established the possibility for national courts to increase

\(^{19}\) Judgment of the French Court of Cassation, First Civil Chamber, n. 1090 of 1 December 2010.

\(^{20}\) Judgment of the Spanish Supreme Court, \textit{Miller Import Corp. v. Alabastres Alfredo, S.L.}, of 13 November 2001 (Exequátur No. 2039/1999). However, for some commentators the judgment should be interpreted narrowly and as limited to the specific facts of the case. \textit{Cf.} J. De Bruyne, De Potter de Ten Broeck and Van Hiel, 2015, p. 218–221.


\(^{23}\) Judgment of the European Court of Justice, Case C-453/99, \textit{Courage Ltd v Bernard Crehan e Bernard Crehan v Courage Ltd e altri}, EU:C:2001:465, para 30: ‘Community law does not prevent national courts from taking steps to ensure that the protection of the rights guaranteed by Community law does not entail the unjust enrichment of those who enjoy them’.

damages for deterrent purposes, that is, in the absence of a connection with
the amount of harm actually suffered by the victim. To this end, in the absence
of EU rules governing that field, it is for the domestic legal system of each
Member State to set out the criteria for determining the extent of the damages
for harm resulting from an antitrust violation, provided that the principles
of equivalence and effectiveness are observed.\textsuperscript{25} Therefore, according to the
European Court of Justice, ‘it must be possible to award particular damages,
such as exemplary or punitive damages, pursuant to actions founded on the
Community competition rules, if such damages may be awarded pursuant to
similar actions founded on domestic law’.\textsuperscript{26}

\section*{III. The recoverable damage in Directive 2014/104/EU}

The Damages Directive takes an ambiguous position on the issue of punitive
damages: on the one hand, it expresses the intention to follow the case-law
of the Court of Justice, on the other hand, it clearly excludes every form of
over-compensation in several points.

Recital n. 12, in fact, states that: ‘[t]his Directive reaffirms the \textit{acquis
communautaire} on the right to compensation for harm caused by infringements
of Union competition law, particularly regarding […] the definition of damage,
as stated in the case-law of the Court of Justice’.\textsuperscript{27} The reference to the case-
law of the Court, and in particular to the \textit{Manfredi} judgment, would therefore
allow punitive damages to be admitted in actions based on EU competition
rules, at least when they are recognized in similar actions based on domestic
law.

Article 3, paragraph 2 goes in the opposite direction providing that the
right to full compensation covers the actual loss and the loss of profit, plus
the payment of interest, so it does not seem to admit the award of additional
amounts by way of punitive damages.\textsuperscript{28} This provision – just like the
Communication on the quantification of damage\textsuperscript{29} – in fact, states that ‘full
compensation shall place a person who has suffered harm in the position in

\begin{itemize}
  \item \textsuperscript{25} Ibid. paras 92 and 98.
  \item \textsuperscript{26} Ibid. para 93.
  \item \textsuperscript{27} Emphasis added.
  \item \textsuperscript{28} Joined Cases C-295/04 a C-298/04, \textit{Manfredi, supra}, para 100.
  \item \textsuperscript{29} Communication from the Commission on quantifying harm in actions for damages
        based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European
        Union, OJ C 167, 13.6.2013, p. 19–21, para 6, which says that: ‘Compensation for harm suffered
        means placing the injured parties in the position they would have been in had there been no
        infringement of Article 101 or 102 TFEU’.
\end{itemize}
which that person would have been had the infringement of competition law not been committed’.

Article 3, paragraph 3 has a similar content inasmuch as it categorically excludes the possibility that compensation leads to ‘overcompensation, whether by means of punitive, multiple or other types of damages’. This exclusion is reiterated by Recital n. 13 of the Directive: ‘[w]ithout prejudice to compensation for loss of opportunity, full compensation under this Directive should not lead to overcompensation, whether by means of punitive, multiple or other damages’.

In light of an overall assessment of these hermeneutical elements, it follows that, despite the contradictions, the Damages Directive precludes national courts from awarding punitive damages for the infringement of EU antitrust provisions.

IV. Some considerations on the exclusion of punitive damages from private antitrust enforcement

In view of the contradictory nature of the content of the Damages Directive, it is not surprising that the course that led to the choice of the exclusion of punitive damages was tortuous and controversial (Vanleenhove, 2012). In fact, the Commission stated in the 2005 Green Paper that, under certain conditions, it would have been appropriate to allow the court to automatically double damages in the case of horizontal cartel infringements. This proposal arose from the intent to provide for an incentive to the private enforcement of competition law, and it was evidently inspired by the ‘treble damages’ of US antitrust law. Three years later, in the White Paper, this proposal disappeared, as the main objective was to improve the conditions for the exercise of the right to compensation for all damages suffered as a result of an infringement of antitrust rules and, therefore, the guiding principle of this document was the idea of complete compensation. However, in the working document accompanying the White Paper, the Commission included...
punitive damages in the *acquis communautaire*, stating that the Court did not consider them to be contrary to European public order. Therefore, provided that they were awarded in accordance with the general principles of EU law – including fundamental rights – punitive damages based on an infringement of EU competition rules should not be excluded. The Commission also stated that, in accordance with the principle of equivalence, the award of punitive damages should have been possible if it could have been granted on the basis of similar actions based on domestic law and under not less favourable conditions.\(^{34}\) However, this approach was ultimately not included in the final text of the Directive.

The European legislator’s choice not to provide for any form of over-compensation in this Directive seems to stem from the desire not to deviate from the prevailing legal traditions of the Member States. In fact, as mentioned above, the case-law of many Member States (with the exception of the United Kingdom – Scotland excluded – and the Republic of Ireland) did not recognize punitive damages at first, considering them to be incompatible with systems based on civil liability. The approach changed in some countries only recently, and in any case after the entry into force of the Damages Directive. Bearing witness to what has just been said, the White Paper states that: ‘[t]he policy choices proposed in this White Paper therefore consist of balanced measures that are rooted in European legal culture and traditions’.\(^{35}\) Part of the legal scholarship considered that the above reference to legal traditions was made in order to justify the refusal to introduce punitive damages as an instrument of reaction to damage caused by a violation of competition law rules (Montanari, 2017).

Other authors have advanced the thesis whereby the European legislator would have excluded punitive damages to keep public enforcement clearly separate, entrusted to the European Commission and to the National Competition Authorities, from private enforcement (Pallotta, 2017, p. 624), entrusted to the national judicial authorities, according to the two-track logic (separate-tasks approach) (Wils, 2009, p. 15; Valerini, 2013, p. 231). On the basis of this distribution, public enforcement has the powers of the public authority, while private enforcement must use only the instruments of civil protection, whose function must not be distorted (Iannuccelli, 2015, p. 222; Fonderico, 2015, p. 11). Therefore, according to the proponents of this thesis, the European legislator did not provide for punitive damages in order to avoid entrusting to private enforcement the punitive and deterrent function, which, instead, belongs to public enforcement.

\(^{34}\) Ibid., paras 198 and 199.

\(^{35}\) White paper, *supra*, 3.
There has been much discussion among legal scholars (Barcellona, 2008, p. 120; Bastianon, 2006, p. 321–356; Salomone, 2007, p. 875; Denozza and Toffoletti, 2009, p. 101) on the function that can be carried out by private enforcement. It has emerged, in particular, that damages can perform an exclusively compensatory function or a sanctioning or deterrent function36 (Taddei Elmi, 2014, p. 183). In the view of the European legislator, however, obtaining ‘full compensation’ means only restoring, for anyone who suffered damage, the situation in which it would have been found if the infringement had not been committed, which is equivalent to compensating the actual loss, the loss of profit and the interests.37 Therefore, the attention is more focused on the position of the injured party than on the reprehensible conduct of the infringer, and the deterrent effect of the compensation becomes an accessory consequence of an action that has, as its priority, the restoration of the suffered harm.38

Overall, the Damages Directive, in line with the legal traditions of the Member States and the two-track logic, has endorsed the view that the quantification of damages serves exclusively a compensatory function39 (Bastianon, 2009, p. 140) and it leaves the deterrent function to public enforcement.

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37 The legal-economic analysis of the extent of the harm actually suffered by the victim of anti-competitive conduct is very complex. In any case, whatever the parameter (profits, price, costs) chosen to evaluate and quantify the harm suffered, the extent of the harm is always represented by the difference between the situation in which the victim is found after the other illegal behaviour (so-called plaintiff’s actual condition) and the situation of the victim in a hypothetical world in which the anti-competitive practice had not been put in place and all other conditions are the same (so-called plaintiff’s but-for condition). On this point, see Bastianon, 2006. Cf. Casolari, 2017, p. 4 et seq.; Al Mureden and de Pamphilis, 2017, p. 127 et seq.

38 On the relationship between the deterrent and the compensatory function of compensation for damages, see Denozza and Toffoletti, 2009, p. 104–105, 117.

39 Cf. White paper, supra, that affirms that: ‘The primary objective of this White Paper is to improve the legal conditions for victims to exercise their right under the Treaty to reparation of all damage suffered as a result of a breach of the EC antitrust rules. Full compensation is, therefore, the first and foremost guiding principle’. Moreover: ‘Improving compensatory justice would therefore inherently also produce beneficial effects in terms of deterrence of future infringements and greater compliance with EC antitrust rules’ (para 1.2).
V. On the advisability of providing for punitive damages in private antitrust enforcement. A possible solution

Public enforcement ensures a certain level of protection for individuals. However, this protection could be significantly more intense if the Directive would provide for the possibility for national courts to award punitive damages, if necessary. In fact, in the context of competition, compensating only the harm suffered by the victim could not make the infringer lose the profits from the infringement, thus encouraging the latter to repeat the prohibited conduct. This danger could be averted with the recognition of further punitive compensation.

In this regard, it has been noted that this solution may have some contraindications (Cavanagh, 2005, p. 171; Buccirossi, Ciari, Duso, Spagnolo and Vitale, 2009). Indeed, on the one hand, it is true that forms of punitive damages, such as the US ‘treble damages’, may be appropriate in terms of deterrence in the case of concealed illegal behaviours (for example, price fixing, division of markets and collective boycotts), given the reasonable probability that the conduct will not be discovered and therefore punished. On the other, it is also true that punitive damages can create problems of excessive deterrence (so-called ‘overdeterrence’) in cases of not concealed illegal conducts (for example, tying or monopolistic overcharges), with the damaging consequence that pro-competitive, and therefore legal, behaviours could be discouraged for fear of being condemned to the payment of considerable amounts as damages. The appropriate level of deterrence, according to these legal scholars, should be determined on the basis of the likelihood that the unlawful conduct will be discovered, but this is very difficult to establish (Cavanagh, 2005, p. 171).

Therefore, in order to avoid problems of unjustified over-compensation and overdeterrence that may derive from the award by the court of a compensation corresponding to a fixed amount, that does not depend on the type of illegal conduct undertaken (as in the case of ‘treble damages’), the Damages Directive should allow the court to make a case-by-case assessment. Following this assessment, the court should be allowed – preferably on the basis of an economic legal analysis – to impose (either of its own motion or at the request of the plaintiff) the payment of a further amount of money in addition to that strictly necessary to compensate the harm suffered, that makes the infringer lose all the profits from the infringement and that has a deterrent effect, dissuading market players from engaging in similar anti-competitive conducts in the future.

Indeed, if on the one hand it is true that damages are intended primarily to perform a compensatory function, and that the field reserved to public
enforcement must not be invaded, it is true on the other hand that the deterrent function of damages cannot be neglected and so it should be elevated to a goal, albeit a secondary one, of the system of private antitrust enforcement.

A further reason to support this thesis lies in the fact that public competition authorities may not always be able to ascertain and punish anti-competitive conducts. The investigation activity and the pursuit of such conducts sometimes involve very high costs. Thus, the gap in the deterrent function of public enforcement could be closed with private enforcement through the provision of punitive damages.

Therefore, the division of functions between private and public enforcement should be structured as follows: the function of preventing and deterring market players from anti-competitive behaviours should be shared between public and private enforcement (Denozza and Toffoletti, p. 119-120); compensation for damages suffered by victims of anti-competitive behaviours should be provided via private enforcement through compensation for damages; the punitive function should, instead, remain a matter of public enforcement.

In such a system, the possible recognition of punitive compensation operated by national courts would support both the preventive and deterrent function of private enforcement as well as its compensatory role. This solution is inspired by what has been defined by legal scholars as the ‘deterrence approach’ (Wils, 2009, p. 17.), as opposed to the ‘separate tasks approach’ adopted by the European legislator first in the White Paper and then in the Damages Directive.

The proposed solution, namely that of giving the court the discretion in quantifying the damage, so as to adapt it to the present case and to create a sufficient deterrent effect for the future, would also favour greater consistency with other acts of the European legislator. Directive 2004/48/EC on the

40 In fact, some American legal scholars claim that the US federal lawmaker created private enforcement to integrate public enforcement, for fear that the government did not have the necessary resources to discover, investigate and prosecute all violations of antitrust laws. On this point, Cf. Cavanagh, 2005, p. 152–153; L. Meurkens, 2014, p. 26.
41 The authors emphasize that the complementarity of private and public actions resides in the fact that they produce different qualities of deterrence.
42 There are some legal scholars that propose a third system in addition to public and private enforcement: public compensation. This system would give public authorities the task of modulating the sanction taking into account compensatory requirements, then transferring the wealth obtained from the convicted companies to damaged parties, when it is possible to identify them, or to exponential entities operating on the market damaged by the cartel. On this point, see Ezrachi, Ioannidou, 2012, p. 132; Iannuccelli, 2015, p. 222.
enforcement of intellectual property rights, for example, explicitly allows national judicial authorities to provide for ‘punitive’ compensation. This rule was interpreted by the Court of Justice, which stated that Directive 2004/48/EC ‘does not have the aim of introducing an obligation to provide for punitive damages’ but at the same time it ‘cannot be interpreted as a prohibition on introducing such a measure’. This judgement is part of the jurisprudential line of the Court of Justice which some legal scholars defined as ‘possibilist’ with respect to the admissibility of compensatory remedies of a not-strictly-compensatory nature (Busnelli, 2009, p. 920), a line which also includes the aforementioned Manfredi ruling and the Brasserie de Pêcheur judgment.

Moreover, in the Report on the application of the Directive 2004/48/EC, the Commission says that when damages awarded by the courts fail to match the level of profit made by the infringers, they do not currently appear to effectively dissuade potential infringers from engaging in illegal activities. Therefore, in such cases, it could be considered whether the courts should have the power to grant damages commensurate with the infringer’s unjust enrichment, even if they exceed the actual damage incurred by the right holder (Connor and Lande, 2007, p. 2–4).

In light of the above, it is difficult to understand why the violation of competition law gives rise to less stringent remedies than those envisaged for the violation of intellectual property rights. The European legislation should offer a minimum standard of protection, leaving the possibility to the

44 Article 13, paragraph 1 of Directive 2004/48/EC, in fact, states that: ‘When the judicial authorities set the damages: (a) they shall take into account all appropriate aspects, such as the negative economic consequences, including lost profits, which the injured party has suffered, any unfair profits made by the infringer and, in appropriate cases, elements other than economic factors, such as the moral prejudice caused to the rightholder by the infringement; or (b) as an alternative to (a), they may, in appropriate cases, set the damages as a lump sum on the basis of elements such as at least the amount of royalties or fees which would have been due if the infringer had requested authorisation to use the intellectual property right in question’.

45 Judgement of the European Court of Justice, case C-367/15, Stowarzyszenie Oławskiego Telewizja Kablowa, EU:C:2017:36, para 27.

46 Ibid., para 28.

47 Judgement of the European Court of Justice, reunited case C-46/93 e C-48/93, Brasserie du Pêcheur, supra, related to a case of liability of a Member State for an infringement of European law. The Court affirmed that the compensation for exemplary damages, based on the ‘finding that the public authorities concerned acted oppressively, arbitrarily or unconstitutionally’ may, if that conduct constitutes or aggravates a breach of Community law, be recognised ‘if such damages could be awarded pursuant to a similar claim or action founded on domestic law’ (para 89).

legislations of the Member States to provide for more stringent remedies against the infringer. Moreover, it should not impose a ceiling, which is indeed very stringent, on national remedies.

Overall, in Directive 2014/104/EU it was advisable to adopt a less rigid solution, of greater openness to the possibility of referring to national courts the choice to provide for punitive damages or, at least, to quantify the harm in such a way as to fully protect victims of anti-competitive practices, and to discourage the recurrence of wrongdoings.

VI. Conclusion

With the Damages Directive there has been a significant change in the approach to the concept of punitive damages in Europe. As seen above, in fact, the initial hostile attitude of the European courts towards this concept has gradually turned into acceptance, at least in the context of the recognition of foreign decisions. This also happened in the wake of Court of Justice rulings, which stated that a particular form of damages, that is, exemplary or punitive damages, could be awarded in actions based on European competition rules if it may be awarded in similar actions based on domestic law. By contrast, with the Damages Directive the European legislator has reversed the course, ruling out every form of over-compensation in the context of private antitrust enforcement.

This choice, as previously stated, is objectionable for various reasons. First of all, because it is at odds with the previous case-law of the Court of Justice and with the rules on compensation laid down in Directive 2004/48/EC, thus giving rise to an inexplicable inequality between victims of anti-competitive conduct and victims of intellectual property rights infringements. Secondly, because private antitrust enforcement should ensure an effective compensation of the harm suffered, and it should ensure that the infringers forfeit all the profits obtained from their anti-competitive conduct. Third, because private antitrust enforcement should also perform a deterrent function so as to discourage future anti-competitive conduct. Arguably, without punitive damages, private enforcement for the infringement of EU antitrust law boils down to an incomplete, half-baked solution.

Therefore, it is submitted that the Commission should radically rethink the rule contained in Article 3, paragraph 3 of the Damages Directive in the context of the review that the Commission is required to make, in accordance with Article 20 of the Directive, for the presentation of a report to the European Parliament and to the Council by 27 December 2020.
In particular, the new version of Article 3, paragraph 3 of the Directive should arguably enable national courts to award punitive damages, or at least leave them additional discretion in quantifying anti-competitive harm, so as to enable damage awards to completely offset the profits obtained by the antitrust infringers. In any case, the new provision should enable national courts to award damages on the basis of the peculiar feature of each case, preferably on the basis of an economic legal analysis. This discretion would also avoid the problem of unjustified over-compensation and of overdeterrence that arises when courts are required to recognize a fixed amount as punitive compensation (as in the case of ‘treble damages’), since courts would have a certain margin of discretion in deciding the sum to be awarded in the light of the type of unlawful conduct committed and the circumstances of the case. Under these conditions, antitrust damages would be an effective tool to fully protect the victims of anti-competitive conduct, and to deprive antitrust infringers of all the profits that they had obtained. Finally, damage awards could yield an important deterrent effect, discouraging future anti-competitive conduct by the infringer and by other market players.

**Literature**


LEGISLATION & CASE LAW REVIEWS

Selectivity in Fiscal Aids: Recent Developments

by

Gabriella Perotto*

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Abstract

The notion of fiscal aid is becoming crucial in determining the relationship between supra-national integration and national tax sovereignty; the selectivity criterion is often key in the assessment of compatibility of fiscal measures with Article 107(1) TFEU. Therefore, the notion of selectivity as defined by the recent case-law of the CJEU and decision-making practice of the Commission is fundamental in order to understand the actual allocation of powers in direct taxation matters. Against this backdrop, the aim of the present article is to establish what the current notion of selectivity is in fiscal aids, assessing whether the approach used by the CJEU and the Commission share common patterns, and evaluating the impact of such interpretation on the division of competences within the EU. In particular, this article offers a critical reading of the recent European Commission v. World Duty Free case and of the so-called Tax Rulings Decisions.

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Résumé

La notion d’aide fiscal est en train de devenir cruciale dans la détermination des relations entre l’intégration supranationale et la souveraineté fiscale nationale. Le critère de la sélectivité joue souvent un rôle fondamental dans la détermination de la compatibilité des mesures fiscales avec l’article 107 (1) TFUE. Par conséquent, la notion de sélectivité, comme déterminée par la récent jurisprudence de la CJUE et la pratique décisionnel de la Commission, est fondamentale pour comprendre la répartition des pouvoirs en matière de taxation directe. Dans ce contexte, le but du présent article est d’établir quelle est la notion actuelle de sélectivité dans les aides fiscale, en évaluant si les approches utilisées par la CJUE et la Commission partagent un modèle commun et l’impact de cette interprétation sur la répartition des compétences au sein de l’UE. En particulier, cet article offre une lecture critique du récent arrêt Commission européenne c. World Duty Free et des soi-disant «Tax Rulings».

Key words: State aid; fiscal aid; selectivity, Spanish Goodwill; tax rulings; allocation of powers; tax harmonization

JEL: K21

I. Introduction

Article 107(1) TFEU lays down the requirements that qualify a State intervention in the economy as an aid incompatible with the internal market, which is therefore forbidden. In particular, it provides that ‘any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market’. The notion of State aid mostly derives from the interpretation of these criteria, as elaborated by the Court of Justice of the European Union (hereinafter: CJEU).¹ By analysing the CJEU case-law, it is self-evident that these requirements have a different impact on State aid assessment, even though they are cumulative criteria that formally have the same importance on the evaluation (Boccaccio, 2016).

In determining the compatibility of a tax measure with State aid rules, selectivity is often the crucial element, since other conditions laid down in

Article 107(1) TFEU are almost always satisfied (Bartosch, 2009; Lovdahl Gormsen, 2016). The notion of selectivity was developed by the CJEU and the Commission mostly in cases where the measure at stake was a fiscal benefit, also because of the importance of the requirement in this context.

Moreover, fiscal aids ‘lie on the boundary of the division of competence’ between the EU and its Member States (Nicolaides, 2007). Therefore, the selectivity criterion plays a pivotal role in this division of powers in direct taxation matters, since it draws a red line between what is left to the discretion of the Member States and what is covered, instead, by the notion of State aid subjected the control of the Commission. On this ground, the notion of selectivity in fiscal aids as defined by the most recent CJEU case-law and Commission decision-making practice is key in determining the extent of the EU Institutions’ ‘interference’ with the national fiscal sovereignty of the Member States.

In the light of the above, the aim of the present article is to establish what the current notion of selectivity for the purpose of Article 107(1) TFEU is in relation to tax measures; assessing whether the approaches used by the CJEU and the Commission share a common pattern; and if they could truly impinge upon the fiscal sovereignty of the Member States. Therefore, section II purports to define the concept of selectivity in fiscal aids, section III and IV focus on recent developments in the CJEU case-law and Commission decision-making practice respectively, with specific reference to the World Duty Free judgment and the Commission decisions on tax rulings. Lastly, in section V, some conclusions will be drawn from the framework provided.

II. Selectivity in fiscal aids: the background

The extension of the notion of selectivity takes a decisive role in determining the scope of the application of Article 107(1) TFEU with regard to fiscal measures. The notion has been mostly shaped by the CJEU, which contributed to the development of the concept of selectivity by identifying its constitutive elements. Moving from the assumption that the evaluation of selectivity should be made on the grounds of the practical effects produced by the measure, without taking into account its formal structure,² the CJEU identified two types of selectivity: geographical (or regional or territorial) and material selectivity.

Geographical selectivity concerns measures that grant more favourable treatment to undertakings of a specific part of the national territory compared to others. The turning point in the CJEU case-law on regional selectivity occurred with the judgment on the Azores case\(^3\) (Moreno González, 2017). In this judgment, the Court of Justice considered the extent to which the low tax regime applied to the Autonomous Region of the Azores, and adopted by an infra-State body, constituted a selective measure compared to the general Portuguese tax system. The Court of Justice stated that for the assessment of the selectivity of a measure, there must be an examination of whether the infra-State body detained a sufficiently autonomous power (institutional, procedural and financial) with respect to the central authority, detailing the criteria that shall be used for this evaluation, and whether the measure actually applies to all undertakings of the territory under the infra-State body’s competence (Stuart, 2017; Lindsay-Poulsen, 2008; Bousin and Piernas, 2008; Da Cruz Vilaca, 2009). This approach towards regional selectivity was confirmed and specified in the subsequent case-law of the CJEU, such as the UGT Rioja case\(^4\), which discussed the compatibility of a fiscal scheme approved by the Historical Territories of the Basque Country that entailed a lower tax rate compared to the rest of Spain.

The legal framework seems less certain with regard to material selectivity where the case-law is more casuistic (Moreno González, 2017; Pérez-Bernabeu, 2017). Material selectivity affects measures that are aimed at granting an advantage to a limited number of beneficiaries on the ground of discriminatory criteria. The assessment of selectivity relies on the well-known, three-step analysis\(^5\) developed by the CJEU. Over the years, the analysis has been refined and clarified, but it still involves a certain degree of uncertainty due to some interpretative difficulties and the discrepancy between the case-law of the CJEU and the Commission practise (Pérez-Bernabeu, 2017). The three-step analysis, or ‘derogation test’, consists of the following stages. First, it is necessary to identify the ‘the common or normal regime under the tax system applicable in the geographical area constituting the relevant reference framework.’\(^6\) Since fiscal aids can be considered as a relief from a burden (instead of a positive benefit), it is extremely important to identify the reference framework that

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\(^3\) Court of Justice, Judgment of 6 September 2006, Case C-88/03, Portuguese Republic v Commission of the European Communities.

\(^4\) Court of Justice, Judgment of 11 September 2008, Joined cases C-428/06 and C-434/06, Unión General de Trabajadores de La Rioja (UGT-Rioja) and Others v Juntas Generales del Territorio Histórico de Vizcaya and Others.

\(^5\) Commission Notice on the notion of State aid, cit., para. 126–128.

makes it possible to compare the contested measure with normal tax, or the tax that would have otherwise been paid by the beneficiary (Nicolaides, 2015; Arena, 2017c). The second step of the assessment concerns the comparison of the measure with the benchmark established in the prior stage of the analysis, as well as demonstrating that the measure derogates from that common regime by imposing a different treatment for economic operators that, in light of the objective assigned to the tax system of the Member State concerned, are in a comparable factual and legal situation. Third, even if it is selective, the measure can nonetheless be considered as being compatible with the internal market. Indeed, this stage calls for an inquiry into whether the measure is justified by the nature or the general scheme of the system and is thus ‘not selective in nature even though it gives an advantage to the undertakings which are able to benefit from it.’

The so-called *de facto* selectivity constitutes a peculiar type of material selectivity. *De facto* selectivity characterizes measures that, despite being formally general, have selective effects. The CJEU first elaborated this notion in the *Gibraltar* case, where the contested measure was a corporate tax reform that involved: company registration fee, payroll tax and business property occupation tax (the BPOT). Moreover, according to the so-called profit cap, undertakings had to pay due taxes only when achieving the minimum threshold of profits fixed at 15%. The CJEU considered the corporate tax system in itself to be *de facto* selective, since it was designed to give preferential treatment to the group of the beneficiary undertakings that, because of their nature, fulfilled the requirements (Aalbers, 2017). Hence, with the *Gibraltar* judgment, the Court of Justice definitely established the principle of the effect of the measure as the cornerstone of state aid assessments.

### III. The CJEU case-law: the extension of the notion of selectivity and of limitations on Member States’ sovereignty

The selectivity requirement has been defined by the CJEU mostly in a series of cases concerning tax measures. The notion has an inherently fluid character, since it needs to adapt to new scenarios.

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7 Ibidem.
8 Ibidem, para. 144.
9 Court of Justice, Judgment of 15 November 2011, Joined cases C-106/09 P and C-107/09 P, European Commission (C-106/09 P) and Kingdom of Spain (C-107/09 P) v Government of Gibraltar and United Kingdom of Great Britain and Northern Ireland.
Against this backdrop, the recent judgment in European Commission v. World Duty Free\(^{10}\) focused on the notion of selectivity and trying to establish its boundaries. The case fell under the scrutiny of the Court of Justice after the appeal of the Autogrill\(^{11}\) and Banco Santander\(^{12}\) judgment, decided by the General Court and subsequently joined. The measure brought to the attention of the General Court in Autogrill and Banco Santander was a Spanish provision that allowed undertakings taxable in Spain – in this case Banco Santander SA, Santusa Holding SL and Autogrill España – to deduct, in the form of an amortisation, the goodwill resulting from the acquisition of shareholdings in foreign companies from the basis of assessment for the corporate tax for which the undertaking is liable.\(^{13}\) These shareholdings had to reach at least 5% and they had to be held without interruption for at least one year.\(^{14}\) The Commission qualified the measure as State aid due to the fact that it was applicable exclusively to undertakings respecting the criteria provided (in particular, the acquisition of shareholdings in Spanish companies was not covered by this benefit).

The General Court annulled the decision of the Commission because of the lack of an evaluation of a specific element, namely the ex ante identification of a ‘category of undertakings which are exclusively favoured by the measure at issue’.\(^{15}\) Indeed, the General Court tried to introduce this new assessment in the original three-steps analysis, focusing on the evaluation of the discriminatory nature of the measure (Jaeger, 2015) and considering that ‘for the condition of selectivity to be satisfied […] the mere finding that a derogation from the common or ‘normal’ tax regime has been provided for cannot give rise to selectivity’.\(^{16}\) In other words, the reasoning adopted by the General Court was that if a measure derogates from the reference framework but is open to all undertakings, it is not possible to compare the situation of the beneficiaries and those who are excluded by the field of the application of the measure (Staviczky, 2015). Moreover, the mere application of specific conditions for the granting of the measure – albeit unusual or difficult to be met by undertakings – does not mean that the selectivity requirement is fulfilled (Temple Lang, 2015). In general, scholars considered this approach

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\(^{10}\) Court of Justice, Judgment of 21 December 2016, Joined cases C-20/15 P and C-21/15 P, European Commission v World Duty Free Group SA and Others.

\(^{11}\) General Court, Judgment of 7 November 2014, Case T-219/10, Autogrill España, SA v European Commission.

\(^{12}\) General Court, Judgment of 7 November 2014, Case T-399/11, Banco Santander, SA and Santusa Holding, SL v European Commission.

\(^{13}\) Ibidem, para. 14.

\(^{14}\) Ibidem.

\(^{15}\) Ibidem. para. 49.

\(^{16}\) Ibidem.
to be an improvement since it made it possible to overcome the formalistic distinction between beneficiaries and non-beneficiaries of an aid (Nicolaides, 2015). Furthermore, the judgments seemed to be a good starting point for the CJEU to clarify the controversial notion of selectivity in fiscal aids, also with reference to the so-called selective advantage, by addressing, in particular, the tendency to combine the analysis of the selectivity and economic advantage criteria (Girau and Petit, 2015; Jaeger, 2015).

The cases were joined and submitted to the decision of the Court of Justice that, in accordance with AG Wathelet’s Opinion, subverted the judgments of the General Court, which ruled the measure to be State aid. In particular, AG Wathelet stressed the excessively formalistic and restrictive approach of the General Court in seeking to identify a particular category of undertakings exclusively favoured by the measure, instead of giving room to the essential question, namely whether that measure differentiates between undertakings which are in a comparable situation. Moreover, the AG pointed out that ‘the fact that the conditions imposed by the measure at issue were not very strict and the benefits which that measure conferred were therefore available to many undertakings does not call into question its selective nature but only its degree of selectivity’.

The most interesting aspect of the World Duty Free judgment lies in the analysis of the selectivity requirement made in the light of the Gibraltar ruling, giving therefore a kind of ‘authentic interpretation’ of the latter. In particular, the Court of Justice stated that the introduction of a further assessment in the selectivity test – namely the ex ante identification of a specific category of undertakings – is not in line with settled case-law, specifying further that it is not possible to derive this principle from the Gibraltar case. The Court of Justice pointed out that, as stated in Gibraltar, ‘the selectivity of a tax measure can be established even if that measure does not constitute a derogation from an ordinary tax system, but is an integral part of that system’ (that is, the so-called de facto selectivity) and it does not entail the ex ante identification of a specific category of undertakings since it is already consistent with settled case-law of the CJEU to the effect that ‘it is sufficient, in order to establish the selectivity of a measure that derogates from an ordinary tax system, to demonstrate that that measure benefits certain operators and not others,

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18 Ibidem, para. 85.
19 Ibidem, para. 88.
20 World Duty Free, cit. para. 71.
21 Ibidem, para. 76.
although all those operators are in an objectively comparable situation in the light of the objective pursued by the ordinary tax system.\textsuperscript{22}

In sum, \textit{World Duty Free} ends up extending the notion of selectivity, by narrowly construing \textit{Autogrill} and \textit{Banco Santander} where the General Court tried to move the evaluation of selectivity to \textit{ex ante} instead of \textit{ex post}. By contrast, in \textit{World Duty Free}, the Court of Justice seems to consider selective measures as those that derogate from the reference framework and that entail a different treatment, regardless of the potential accessibility of the measure. According to some commentators, this approach could lead to a major extension of the notion of selectivity, which could have the effect of increasing the capacity of the Commission to interfere with national fiscal choices (Derenne, 2017). Moreover, this approach arguably turns the selectivity test into an irrelevant evaluation by shifting the focus of the assessment exclusively on the economic advantage granted by the measure.

\section*{IV. The Commission decision-making practice: the notion of selective advantage and the identification of the reference framework}

Recent Commission decision-making practice had to face the issue of defining the selectivity requirement in dealing with tax rulings. Indeed, since 2013, the Commission has been investigating the tax ruling practice of Member States by setting up a dedicated Task Force Tax Planning Practices, in order to fight the so-called BEPS (base erosion and profit shifting). In December 2014, this inquiry was extended to all Member States and resulted in several decisions to initiate formal investigations. Until now, the Commission adopted five negative final decisions involving Luxembourg,\textsuperscript{23} Ireland,\textsuperscript{24} Belgium,\textsuperscript{25} the Netherlands,\textsuperscript{26} and there are still four formal investigations ongoing involving

\begin{itemize}
\item \textsuperscript{22} Ibidem.
\end{itemize}
the Netherlands, Luxembourg and the UK. The Commission ordered the recovery of the contested aids mostly on the ground of the conclusion that the advanced pricing agreements at stake, being at odd with the arm’s length principle, were selective. The decisions are currently under the scrutiny of the General Court, after challenges brought by both the Member States and the taxpayers involved.

In order to have a better understanding of the issue of selectivity in relation to the aforementioned Commission decisions, it is necessary to briefly examine the tax ruling instrument as used by the Member States. Since the Treaties do not confer competences onto the EU in the field of direct taxation, Member States retain the power to design their tax system, albeit every fiscal measure must comply with EU law and, in particular, with its State aid rules. Therefore, Member States can adopt tax rulings, which are binding decisions issued by their tax authorities, at taxpayers’ request, in order to find out how applicable domestic tax provisions will be applied to a specific case. Tax rulings are instruments of unarguable importance in providing legal certainty to undertakings; they help them foresee future costs that they will have to bear because of taxation of a certain situation or transaction.

A peculiar type of tax ruling is known as Advance Pricing Agreement (hereinafter; APA), which is an arrangement that determines, in advance of controlled transactions, an appropriate set of criteria (e.g. method, comparables and appropriate adjustments thereto, critical assumptions as to future events) for the determination of the transfer pricing for those transactions over a fixed period.
period of time’. Unlike transactions between non-integrated companies (that is, companies which are not part of a group) that are assumed to be conducted under market conditions, intra-group transactions may be at odds with market terms, as they are estimated by the corporate group itself. Therefore, this system can lead to the manipulation of profit allocation in order to shift revenues to low tax countries. In order to avoid such a distortion, the OECD has formulated the so-called ‘arm’s length principle’, which can be applied by means of five reliable methods that make it possible to calculate the correct transfer pricing for intra-group transactions. The selection of the method is often ambiguous and complicated and it can lead to very different outcomes. Although the source of the arm’s length principle is non-binding, it is considered to be a globally recognized standard (Iliopoulos, 2017; Joris and De Cock, 2017).

APAs are considered practices that enhance taxation transparency and predictability as well as prevent double taxation. Therefore, they are not per se incompatible State aids, as long as they do not confer a selective economic advantage. The mere fact that the advantage granted derives from an agreement, and therefore a negotiation, between a company and the tax authorities of a Member State does not imply the selectivity of the measure. Indeed, it is necessary to prove that the tax ruling was issued on the ground of non-objective or custom-made criteria (Iliopoulos, 2017). In order to make this evaluation, the Commission Notice on the Notion of State Aid and the Working Paper on State Aid and Tax Ruling both recall the arm’s length principle as allegedly endorsed by the Court of Justice in the case Forum 187, where it was used to determine whether a fiscal measure prescribing a method for an integrated group company to determine its taxable profit gives rise to a selective advantage for the purpose of Article 107(1) TFEU.

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33 European Commission, Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee on the work of the EU Joint Transfer Pricing Forum in the field of dispute avoidance and resolution procedures and on Guidelines for Advance Pricing Agreements within the EU, COM/2007/0071 final, p. 9.


35 The arm’s length principle is defined in Article 9 of the OECD Model Tax Convention and it is further elaborated in the OECD Transfer Pricing Guidelines.


37 Commission Notice on the notion of State aid, cit., par. 172.

38 Kingdom of Belgium and Forum 187 ASBL v. Commission, cit.

The introduction of the arm’s length principle in the evaluation of the selective advantage of fiscal measures gave rise to a number of criticisms. At first, it is necessary to remark that the *Forum 187* judgment does not make an explicit reference to the arm’s length principle. Instead, the Court of Justice merely affirmed that in order to assess whether a fiscal scheme (in this case a Belgian tax regime for authorized coordination centers) was to be considered a derogation from the reference framework granting an economic advantage, it had to be compared with ‘the ordinary tax system, based on the difference between profits and outgoings of an undertaking carrying on its activities in conditions of free competition’\(^{40}\) (Joris and De Cock, 2017). Therefore, it has been noted that it is not straightforward to consider the arm’s length principle as an implied corollary of the evaluation *ex Article 107 TFEU* ‘independently of whether a Member State has incorporated this principle into its national legal system’\(^{41}\) solely on the ground of the reference made in the *Forum 187* judgment to the ‘conditions of free competition’. Indeed, it is not possible to derive from that statement the notion of the arm’s length principle, such as the one adopted by the Commission (Gormsen, 2016; Joris and De Cock, 2017; Kyriazis, 2016).

Another controversial issue is the fact that the introduction of such a vague concept could lead to legal uncertainty for companies, which is exactly the opposite of what APsAs try to reach. Indeed, as seen above, the calculation of the correct transfer pricing according to the arm’s length principle is a hard task since it depends on several factors. This exercise consists of assessing something that is purely formal since transfer prices are, because of their nature, exempt from market influences (Giraud and Petit, 2017).

Moreover, the arm’s length principle is used for the identification of both the requirements of economic advantage as well as selectivity, merging them into the so-called ‘selective advantage’ test. More specifically, the Commission considers that if APAs lead to an unjustified reduction of the tax liability a companies; such a ‘reduction constitutes both the advantage granted by the tax measure and the derogation from the system of reference’.\(^{42}\) On this matter, in the *Commission v. MOL* case,\(^{43}\) the CJEU has recently highlighted the autonomy of the selectivity criterion stating that ‘the requirement as to selectivity under Article 107(1) TFEU must be clearly distinguished from the concomitant detection of an economic advantage, in that, where the Commission has identified an advantage, understood in a broad sense, as

\(^{40}\) Kingdom of Belgium and *Forum 187 ASBL v. Commission*, cit., para. 95.

\(^{41}\) Commission Notice on the notion of State aid, cit., para. 172.

\(^{42}\) See Decision on State aid implemented by the Netherlands to Starbucks, *cit.*, par. 253 and Decision on State aid which Luxembourg granted to Fiat, *cit.*, para. 217.

\(^{43}\) European Commission v MOL, *cit.*
arising directly or indirectly from a particular measure, it is also required to establish that that advantage specifically benefits one or more undertakings’.44 Nevertheless, in the subsequent paragraph, the Court of Justice specified that ‘the selectivity requirement differs depending on whether the measure in question is envisaged as a general scheme of aid or as individual aid. In the latter case, the identification of the economic advantage is, in principle, sufficient to support the presumption that it is selective’.45 However, it should be noted that this judgment does not entail the conflation of the two requirements; it merely establishes that, for individual aids, there is a rebuttable presumption of fulfillment of the selectivity requirement when the economic advantage is already assessed (Arena, 2017a; Kyriazis, 2016). Indeed, even if they share some similarities, these two requirements have a different function: whereas the economic advantage test requires a comparison between the advantage deriving from the measure and market terms, the selectivity test involves a comparison between the beneficiary’s treatment and the treatment of other undertakings in a similar legal and factual situation (Joris and De Cock, 2017).

Some scholars argued that the Commission approach toward this presumption could lead to a ‘potentially dangerous development in EU State aid law’ under many perspectives. First, economic advantage and selectivity are two separate conditions, and thus they require two separate analyses. Second, the arm’s length principle is not ‘well equipped’ to assess whether the measure is selective, but only to assess the economic advantage (Joris and De Cock, 2017; Lovdhal Gormsen, 2016).

These arguments are not fully convincing. The use of ‘selective advantage’ in Commission practice is not a novelty and it traces back to its 1998 Direct Business Taxation Notice46 (Arena, 2017b); there is also a trend in the case-law of the CJEU to treat these two criteria together (Joris and De Cock, 2017). Moreover, since AP As are usually individual aids, the issue of the conflated analysis of the two requirements is not relevant (Arena, 2017a; Douma and Kardachaki, 2016; Iliopoulos, 2017) since the presumption of selectivity, deriving from the assessment of the economic advantage, is in line with the CJEU case-law.47 Therefore, the Commission seems to follow the way paved by the CJEU, without adding any further elements or widening its scope.

Major concerns derived also from another core aspect of the selectivity test: the identification of the reference framework. Indeed, this is a crucial element for the aforementioned three-steps analysis, because it is the benchmark

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44 Ibidem, para. 59.
45 Ibidem, para. 60.
47 Ibidem, para. 60.
against which the measure is compared to and, hence, it can strongly affect the outcome of the analysis. At first, it should be noted that APAs are theoretically possible for every group of companies, whilst non-integrated companies are excluded since they are not part of a group and therefore, by definition, they are not involved in transfer pricing issues. In recent Commission practice related to APAs, general corporate income tax was identified as the reference framework. However, identifying such a benchmark seems rather theoretical and illogical. Since corporate groups and non-integrated companies are clearly in a different legal and factual situation in relation to transfer pricing (the latter by definition do not need to face this issue), it would have been more reasonable to identify the reference framework in corporate tax rules applied to corporate groups, that is, in specific transfer pricing rules (Giraud and Petit, 2017; Verschuur and Stroung, 2017). Indeed, this narrower framework enabled some multinational companies to benefit from more lenient treatment in the evaluation of their transfer pricing as compared to other corporate groups that were in a similar legal and factual situation. This legal threshold would have been harder for the Commission to meet, but it would have led to the same result by following a line of reasoning that is more logical, concrete and coherent with State aid rules (Giraud and Petit, 2017).

V. Conclusions

The requirement of selectivity, as applied in the domain of State aid law and in relation to tax measures, is a complex notion. Indeed, assessing whether a tax benefit (that is, derogation from the normal tax system) can be seen as an expression of a Member State’s discretional power on fiscal policies, or if it falls within the scope of the application of Article 107(1) TFEU, is controversial. The definition of selectivity in fiscal aid involves politically sensitive issues, such as the allocation of powers between Member States and the EU in matters concerning direct taxation.

The analysis suggests that the extension of the notion of selectivity is a common trend shared by the CJEU and the Commission – as noted above, both tend to broaden the notion of selectivity. Indeed, on the one hand, the Court of Justice rejected the attempt of the General Court to limit the notion and, on the other hand, the Commission identified a broad benchmark as a reference framework, blurring the lines between selectivity and the existence of an advantage. Since selectivity is the most relevant criterion to be assessed in tax measures, an extensive interpretation will inevitably result in a limitation of national fiscal sovereignty in direct taxation by modifying the division of
powers between the EU and its Member States, while it is settled-case-law that direct taxation (which clearly includes corporate taxation) falls within the competences of Member States. In particular, Member States can design their corporate tax systems in a way they consider most appropriate and best suited to their economies (Verschuur and Stroungi, 2017; Joris and De Cock, 2017); their discretion in this field is limited by their duty to ensure effective application of EU law and, hence, shall be exercised consistently with the latter (Arena, 2017a; Azoulai, 2011; Iliopoulos, 2017). Limiting the analysis to these considerations – that are common ground among scholars – it does not seem that the EU is overreaching its powers within the scope of the application of Article 107(1) TFUE. However, there are some issues that cast some doubts upon the validity of such a strong interference of the EU into the tax sovereignty of its Member States.

The first concern that arises is whether there is a limit to the stretching of the notion of selectivity. Indeed, if there are no limits to the extension of this notion, the Commission would play the role of a ‘supra-national tax authority’, as the US Treasury claimed. That would add further uncertainty, since undertakings will not be able to rely on national measures fearing a subsequent intervention by the Commission. Moreover, in tax ruling cases, the Commission relied on a notion – the arm’s length principle – that is not univocal. A clarification of the notion of the arm’s length principle, as adopted by the Commission, would be necessary in order to increase predictability; a specification of the legal basis on which this soft law concept is turned into hard law would also be necessary. Indeed, the reference made to the Forum 187 judgment does not resolve the doubts arising from such a use of the arm’s length principle.

Secondly, over the years we have witnessed a convergent evolution, on one side, of the international soft law concept of harmful tax competition between Member States and, on the other side, of the notion of fiscal aid for the purpose of State aid control meant to fight unfair competition among undertakings (Traversa and Flamini, 2015). Nowadays State aid rules are openly used to tackle harmful tax competition, and its collateral phenomena

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49 Court of Justice, Judgment of 19 June 2014, Joined Cases C-53/13 and C-80/13, Strojírny Prostějov, a.s. and ACO Industries Tábor s.r.o. v Odvolací finanční ředitelství, para 23 and Court of Justice, Judgment of 3 October 2006, Case C-290/04, FKP Scorpio Konzertproduktionen GmbH v Finanzamt Hamburg-Eimsbüttel, para 30.

such as fiscal dumping, aggressive tax planning and international tax evasion and avoidance, but this specific aim has already been clear since 1998 when the Commission Notice on Direct Business Taxation\(^5\) was adopted (Jeager, 2017). State aid rules, although being a useful instrument to fight harmful tax competition, cannot (and should not) be used as a full substitute for the positive approximation of the corporate tax systems of EU Member States (Traversa and Flamini, 2015). Indeed, Commission decision-making practice seems to pursue the approximation of national corporate tax laws, even though it would be necessary to follow the procedure provided by Article 115 TFEU.\(^5\) The efforts of the EU in this field (that is, coordination of corporate tax systems) are clear, as demonstrated by the number of instruments proposed or adopted in this regard\(^3\) (Cachia, 2017).

The impression is that these decisions, at least to some extent, pursue a political aim with a risk of a ‘backdoor’ tax harmonization (Stuart, 2016). All tax-ruling decisions are now under the scrutiny of the General Court, but the formulation of reliable predictions about their outcome would be extremely difficult. Nevertheless, it is certainly desirable for the CJEU to provide a clear and solid position towards the various issues previously pointed out, such as in relation to the identification of the correct reference framework, the assessment of the ‘selective advantage’, and the use of the arm’s length principle. Irrespective of the approach that the CJEU will choose to follow, its judgments will be a strong indicator of the actual allocation of powers between Member State and the EU in the area of direct taxation.

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\(^5\) Commission notice on the application of the State aid rules to measures relating to direct business taxation, cit.

\(^5\) Article 115 TFEU provides that: ‘Without prejudice to Article 114, the Council shall, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament and the Economic and Social Committee, issue directives for the approximation of such laws, regulations or administrative provisions of the Member States as directly affect the establishment or functioning of the internal market.’

Literature


The French System of Antitrust Enforcement: 
A Sui Generis Monist Model

by

Andrea Pezza* 

CONTENTS

I. Introduction
II. The proceeding before the French Competition Authority
III. The strengths and the weaknesses of the French system
IV. Conclusion

Abstract

The paper examines strengths and weakness of the French system of competition enforcement, with the aim of contributing to the discussion on the institutional design of systems of competition law enforcement. In this regard, special attention will be devoted to choosing to introduce a clear separation between investigative and adjudicative functions within the same institution: while this solution ensures compliance with the impartiality principle, it also implies a lack of coordination between the board and the investigative services, which could have negative consequences for the administrative activity of the institution.

Résumé

L'article examine les forces et les faiblesses de l’Autorité de la concurrence française, dans le but de contribuer au débat sur la structure institutionnelle la plus appropriée pour les autorités de la concurrence. À cet égard, une attention particulière sera

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accordée à l’introduction – dans le même Autorité – d’une séparation entre les services d’instruction et le Collège: une solution qui assure l’impartialité des choix pris par l’institution, mais qui détermine aussi une manque de coordination entre le Collège et le Services d’instruction qui peut avoir des effets négatifs sur l’activité administrative de l’institution.

**Key words:** competition law; France; impartiality; rights of defence; autorité de la concurrence

**JEL:** K21

### I. Introduction

The institutional design of a system of competition law enforcement is an issue that – since the early 2000 – has often been the topic of debate. The present paper aims at contributing to the discussion examining the French competition system, as structured following the reform approved in 2008 by the President of the French Republic N. Sarkozy.

As it will be shown, the main peculiarity of the French system is the presence of measures aimed at ensuring the adoption of an impartial decision, as required – *inter alia* – also by Article 6 of the European Convention on Human Rights (hereinafter; ECHR). However, alongside this feature, the French system presents a great number of other characteristics that deserve attention and that will be scrutinized in order to assess their compliance with other requirements laid down in Article 6 ECHR.

Such analysis would make it possible to define the strengths and weaknesses of the system, and could provide some food for thought even for amending other systems of competition law enforcement.

### II. The proceeding before the French Competition Authority

The current French system of competition enforcement was set up in 2008, when the *Loi pour la Modernisation de l’Economie*¹ instituted the *Autorité de la Concurrence* (hereinafter; ADC) and transferred to it relevant competences

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¹ Law 2008-776 of 4 August 2008. See also the *Ordonnance n. 2008-1161* of 13 November 2008 that amends the French Commercial Code. The law is part of an extensive programme of reform launched by the President of the French Republic N. Sarkozy for stimulating the economic growth of the country, elaborated on the basis of the works of the *Commission pour...*
which were, at that time, shared between the Conseil de la Concurrence and the Ministry of Economic Affairs (Lasserre, 2008 pp. 2–4).

As it will be shown, the major characteristic of such a system is represented by the clear separation between investigative and adjudicative functions: in fact, although the ADC – like the greatest part of European competition enforcers – cumulates both of those functions (they are all ‘monist models’), it has introduced strong provisions aimed at ensuring a functional separation between the investigative services and the Board.

The investigation is, in fact, carried out by the investigative services (Services d’Instruction), placed under the responsibility of the Rapporteur General, with no specific involvement of the Board. In particular, the Rapporteur General is in charge of designating the official responsible for the investigation (Rapporteur), supervising the proper conduct of the investigation, and ensuring the quality of the documents produced (Communication of the preliminary findings, Report of Inquiry and other documents). Furthermore – at the request of the Rapporteur or of a party – the Rapporteur General may also appoint an expert to carry out technical activities indicated by the parties, to be dealt with in adversarial proceedings.

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2 Before the reform, competition policy was shared between the Conseil de la Concurrence and the Ministry of Economic affairs, with the latter responsible for merger control and for ensuring the compliance of undertakings with the Conseil’s decisions.

3 With the exception of Austria, Denmark, Finland, Ireland, Sweden, which adopt a dualist model, characterized by the attribution of investigative and adjudicative functions to different institutions (generally the first one is attributed to the competition authority, while the second to a specialized Court).

4 The Services d’Instruction are composed if five sections, plus a person responsible for the leniency procedures: i) Competition (in charge of carrying out the investigations and making opinions); ii) Investigations (in charge of inspections and gathering of information); iii) Concentrations; iv) regulated professions; v) economic service.

5 The Rapporteur General – like the Deputy Rapporteur General – is appointed for a term of four years (renewable only once) and is chosen among the members of the Council of State, judges, category A officials or those who – having a diploma giving access to category A officials – have gained at least five years of experience in the field of competition law (see Code du Commerce, art. R-461-3).


7 See Code du Commerce, art. L-463-8 and R463-16. It should be pointed out that respecting ‘adversarial’ proceeding does not mean that the parties should be present to all the technical operations put in place by the expert, being sufficient that they are constantly informed and in the position of expressing their opinions (see Cons. Conc., Decision 04-D-79).
During the first stage of the investigation – devoted to the collection of evidence – parties do not fully enjoy their rights of defence, given that they cannot access the file\(^8\) nor ask to be heard.\(^9\)

These guarantees, in fact, are recognized only after the investigative service has sent to the parties its statement of objections, to which it is possible to reply within two months, with a possible extension.\(^10\) The same timeframe is also granted to the French Government, which is a party by law in all antitrust proceedings. Upon receipt of any observations, the investigative services generally prepare a Report of Inquiry – which is then notified to the parties, the Government Commissioner and the ministers concerned – to which it is possible to reply within two months.\(^11\)

Moreover, as from the receipt of the statement of objections, the French system ensures the protection of the parties’ procedural rights. In particular, from that moment, the correct application of the rules of procedure is ensured by a *Conseiller Auditeur*,\(^12\) who: i) suggests to the *Rapporteur General* the adoption of measures able to overcome detected problematic points;\(^13\) ii) collects written observations on procedural issues\(^14\) sent by the parties, as well as any replies from the *Rapporteur General* and/or other parties to the proceedings;\(^15\) iii) prepares an Investigation Report on the application of the rules of procedures, which is submitted to the President of the ADC at least ten days before the hearing, as well as communicated to the *Rapporteur General* and the other parties to the proceedings.\(^16\)

The investigation stage ends with the written replies to the statement of objections (and, when applicable, to the Report of Inquiry), and a dossier is

\(^8\) See Paris Court of Appeal, 26 January 2012.


\(^10\) According to art. L463-2, the *Rapporteur General* – in exceptional circumstances – may extend the deadline for submitting the replies by one month. Such decision cannot be challenged before the Court.

\(^11\) However, according to art. L-463-3, the *Rapporteur General* may inform the parties – when sending the statement of objection – of his intention to send the case directly to the Board, without preparing the Report of Inquiry.

\(^12\) According to art. L-461-4 of the *Code du Commerce*, such role could be assigned to a judge or to someone who presents the same guarantees of independence, and the appointment is made by the Minister of Economy, after consultation with the Board. According to the annual Report for 2016, the *Conseiller Auditeur* intervened in eleven procedures: http://www.autoritedelaconcurrence.fr/doc/ra2016_conseiller_auditeur.pdf.


\(^14\) The complaint should concern facts that happened before the receipt of the invitation to the oral hearing before the Board: see *Code du Commerce*, art. R-461-9.

\(^15\) See *Code du Commerce*, arttt. L-461-4 and R-461-9

sent to the ADC Board\textsuperscript{17} for adjudication. In particular, the President assigns the case to one of the eight formations\textsuperscript{18} which – from that moment – will be in charge not only of the adoption of the final decision, but also of the resolution of any procedural issues brought to its attention by the Conseiller Auditeur.

With regard to the definition of procedural disputes, the Chairman examines the report prepared by the Conseiller Auditeur who – if the Chairman deems it appropriate – might be invited to take part in the oral hearing in order to illustrate his position.\textsuperscript{19} Therefore – although the Conseiller Auditeur plays a fundamental role in assisting in the correct execution of the procedure – the resolution of procedural issues is entrusted exclusively to the Board, which adopts the measures deemed most appropriate. A solution that – as highlighted by some authors (Lasserre, 2009, p. 10) – appears to be the most balanced, because the attribution of a decisional power directly to the Conseiller Auditeur would have implied the need to provide parties with an immediate jurisdictional remedy, with a clear impact on the on-going proceedings (in terms of their duration and increased complexity); attributing to the Board the decisional power even on procedural issues ensures, instead, the conclusion of the proceedings within reasonable time, while at the same time does not deprive parties of the possibility of challenging the conclusions reached by the Board on procedural aspects, given that the final decision can be challenged before the competent court also in relation to these aspects.

Subsequently, the Board examines the case during an in camera hearing, which the parties and the representative of the Government are allowed to attend. During the hearing, the Board may hear the parties requesting it, in addition to any other person whose hearing is considered useful for the

\textsuperscript{17} The Board is made up of a President, four Vice-Presidents and twelve non-permanent members. Pursuant to art. L461-1 of the Code du Commerce, the President is appointed by decree of the President of the Republic of France. By contrast all other members are appointed by the Minister of Economy and include: i) six judges (or former judges) of the Council of State, the Court of Cassation, the Court of Auditors or other administrative or ordinary judicial bodies; ii) five persons chosen for their competences in economics or in matters of competition and consumer protection; iii) five persons who work or have worked in the production, distribution, crafts, services and liberal professions sectors.

\textsuperscript{18} See art. 37 of the Rules of Procedure of the ADC (Decision of 30 March 2009, JORF No. 0080 of 4 April 2009). Nowadays it is possible to distinguish among: i) a ‘plenary’ format (composed of all 17 members of the ADC); ii) a ‘permanent’ one (composed of the President and four vice-presidents), two ‘enlarged’ ones (composed, respectively, of the President, four vice-presidents and 6 non-permanent members) and four ‘simple’ ones (presided over by one of the vice presidents and composed of five non-permanent members). See http://www.autoritedelaconcurrence.fr/doc/formations_college_nov17.pdf.

purposes of the decision on the case. At the end of the hearing, the Board, if validly constituted, adopts a decision by a majority of the members present.

The decisions taken can be appealed within a month before the Paris Court of Appeal, which may fully review the decision; the judgment could then be challenged before the Court of Cassation on points of law only.

### III. The strengths and the weaknesses of the French system

As it has been shown in the previous paragraph, the main feature of the French system is surely the clear separation existing between investigative and adjudicative functions, which ensures the impartiality of the Board from both a substantial and a procedural point of view, also allowing the Board to re-examine the case with a fresh pair of eyes (OECD, 2015 p. 11 and Lasserre, 2014, p. 3).

This feature has been praised by all French high Courts: the Constitutional Court, in the CanalPlus/TPS case, highlighted that the rules of procedure of the ADC were respectful of the principles of independence and impartiality,

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20 See Code du Commerce, art. L-463-7. The same article also specifies that the Rapporteur General and the Government can submit written observations.

21 Art. 45 of the internal regulation of the ADC sets the minimum number of members for the plenary format to eight persons, and the minimum number of members for the permanent commission and the simple sections to three persons.


23 According to art. D-311-9 of the Code de l’Organisation Judiciaire, the Paris Court of Appeal has the exclusive competence to rule on appeals brought against ADC decisions concerning anticompetitive agreements and abuses of dominant position.


25 This is the result of a long process, which begun in 1999 with the COB v Oury ruling (see Cour de cassation, Ad. Plen., 5 February 1999), where the French Supreme Court – examining the proceeding before the Commission des opérations de bourse (COB, the French Financial Markets Regulator) – observed that respecting the due process principle required a sufficient degree of separation between investigation and adjudication, and consequently the Rapporteur should have been excluded from the meetings of the Board: a conclusion that was reached also in relation to the proceedings before the competition authority, which shared with the COB both the nature of an independent authority and the decision-making process (see Cour de cassation, ch. Comm., 5 October 1999, SNC Campenon Bernard SGE). It is appropriate to point out that the presence of the Rapporteur in the decision-making stage was not the only provision likely to constitute a violation of the principle of due process: in fact, one year after the COB v Oury ruling, the Court of Appeal Paris heavily criticized the proceeding before the COB, since the offices in charge of the investigation and decision-making activities were composed by the same people (see the Paris Court of Appeals, March 7 2000, KPMG, 1ere chambre, section H, 1999/15862).
required of an independent administrative authority with sanctioning powers, and confirmed the absence of ‘confusion between the investigating and the sanctioning function’;\textsuperscript{26} likewise, the Court of Cassation in the France Télécom case rejected a request for a constitutional preliminary ruling made by the applicant aimed at assessing the constitutional compatibility of the provisions on the ‘functional separation’ of the ADC;\textsuperscript{27} finally, the Council of State in the Colruyt case – by reviewing the internal decision-making process of the ADC – found the existence of an effective functional separation between investigation and adjudication and, thanks to that, excluded a violation of the principle of impartiality.\textsuperscript{28}

Moreover, the current structure of the French system of antitrust enforcement seems also to be compliant with the impartiality principle enshrined in Article 6 of the European Convention of Human Rights (ECHR).

The ECHR requires, in fact, every court to offer sufficient guarantees to exclude any legitimate doubt in respect of its impartiality.\textsuperscript{29} Such requirement should, in principle, be met also by administrative authorities with fining powers, given that the European Court of Human Rights (hereinafter; ECtHR) – adopting a substantial approach\textsuperscript{30} – has put them on the same level as judicial courts.\textsuperscript{31} In examining the structure of administrative authorities, the ECtHR recognized that the presence within the same institution of an investigative and an adjudicative body is not \textit{per se} incompatible with Article 6

\begin{itemize}
  \item \textsuperscript{26} See Conseil Constitutionnel, Decision n° 2012-280 QPC 12 October 2012.
  \item \textsuperscript{27} See Cour de cassation, 30 November 2010. The Court observed that the request of the applicants ‘ayant, notamment, pour objet et pour effet de parfaire la séparation des fonctions d'instruction et de décision au sein de l'Autorité de la concurrence, […] ne présente pas de caractère sérieux au regard des exigences qui s'attachent aux dispositions, règles et principes de valeur constitutionnelle invoqués’.
  \item \textsuperscript{28} See Council of State, 24 June 2013 n. 360949, Société Colruyt France et établissements FR Colruyt.
  \item \textsuperscript{29} See ECtHR, Micallef v Malta, 15 October 2009, § 93.
  \item \textsuperscript{30} See ECtHR, Engel and Others v. the Netherlands, 8 June 1976, § 82. In that case, the ECtHR elaborated on three criteria to assess whether a particular penalty is a criminal penalty for the purposes of art. 6 ECHR: the classification of the offence in national law, the nature of the offence, and the degree of severity of the penalty imposed on the offender. If one of the three criteria is met, the penalty is assessed as ‘criminal’ and the guarantees provided by art. 6 ECHR become applicable.
  \item \textsuperscript{31} However, the ECtHR has clarified that the imposition of a fine by an administrative authority is not \textit{per se} incompatible with the ECHR, in so far as this decision can be challenged before a court which offers all of the guarantees afforded by art. 6(1) ECHR and can exercise powers of full judicial review over the measure in question (see ECtHR, Menarini Diagnostics v Italy, 27 September 2011).
\end{itemize}
ECHR, provided that a separation (or, at least, a functional segregation) between the two bodies is ensured.\(^{32}\)

Such an internal separation (or segregation) is in effect present in the French system and makes the latter also a good source of inspiration for improving proceedings before the European Commission: although in fact both the French and the European systems of antitrust enforcement are ‘monist’ models, the latter does not seem to be compliant with Article 6 ECHR. In this regard, it is sufficient to recall that in the European Commission system, the separation between the adjudicative body (that is the College of Commissioners) and the investigative body (that is Commission services)\(^ {33}\) is less evident, given that the latter drafts not only the statement of objections (which is, in effect, an act of the investigative body) but also the final decision (which is, instead, an act of the adjudicative body) (Temple Lang, 2015 p. 195). A circumstance that – as highlighted by the European Commission already forty years ago – has brought the ‘feeling of insatisfaction with the fact that the Commission holds concurrently powers of investigation, examination and decision’ (European Commission, 1979 § 16).

Whilst the adjustments made to the French system allow it to comply with the impartiality principle, they also expose it to some criticism. In fact, unlike other monist systems – where investigative bodies tend to follow (more or less cogent) instructions coming from the Board (which therefore exercises control over the case all along the proceeding) – the functional segregation that characterizes the French system precludes any form of control of the Board over the work of the investigating team. However, the risk exists that the work of the adjudicative body would be reduced in the majority of cases to an uncritical approval of the case team’s position. In fact, due to the structure of the proceeding, the case is examined by the Board for the first time at the end of the investigative stage and so – in order to allow the Board to adopt an informed decision – it would be necessary to provide the latter with enough time to review the entire case-file. However, such operation would take a lot of time, and would hardly be possible in the timeframe of the proceedings: a circumstance that suggests the absence of a critical review on the conclusions reached by the investigating team.

Moreover, there is the risk that investigators send firms statements of objections with charges that go far beyond what would be reasonable and justified. This is because investigators do not know the opinion of the Board.

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\(^{32}\) See ECtHR, Dubus v France, 11 June 2009, §§ 57–60, where it was excluded that the French Commission bancaire was impartial in the meaning of art. 6 ECHR.

\(^{33}\) In this regard, see case C-209/78, Van Landewyck v Commission, 29 October 1980 § 81, where the ECJ held that the European Commission ‘cannot, however, be classed as a tribunal within the meaning of Article 6 of the European Convention for the Protection of Human Rights’. 
on the case and so – in order to avoid having their case sent back by the Board – tend to include in the statement of objections any potential violations of the law (even those that are not well-founded) leaving it then to the Board to take the decision on which charges to found the case. This is an approach that aggravates the parties’ defences, obliging them to reply even to those charges which are considered clearly unfounded (Jenny, 2016, pp. 25–26).

Beside the adjustments adopted to ensure the impartiality of the proceeding – and which, as we have seen, have both advantages and disadvantages – the French system presents other strengths and weaknesses also.

The French model, in particular, has the advantage of providing parties with two moments to respond in writing to the allegations of the investigative service (that is in response to the statement of objection and to the Inquiry Report). This surely represents a strengthening of the adversarial principle, which – according to the ECtHR – makes it necessary to give each party the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party, in order to be able to influence the decision of the judge.34

Moreover, such a model offers also to the parties an oral hearing before the Board when they can reply orally to the investigative services. Even under this profile, such a system appears in line with the case law of the ECtHR that requires giving the parties the opportunity to try to persuade the adjudicating body during a dedicated hearing.35 Once again, such system could be a source of inspiration for the European one, as in the latter the hearing takes place before an official (the hearing officer), with the consequence that Commissioners – in adopting their decision – have to reconstruct the hearing relying only on ‘second-hand’ information: the intermediate report of the hearing officer36 and the (merely potential) report made by EU Commission officials which assisted the hearing.37

Despite these objective points of strengths, the system appears, in other ways, unable to ensure the parties’ right of defence.

In fact, the first part of the investigative stage (that is before the notification of the statement of objections) is too unbalanced in favour of the investigative service, with no instruments to protect the parties against potential abuses of the investigating team. Parties, in particular, do not have the right to be

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34 See ECtHR, Rowe e Davis v United Kingdom, 16 February 2000, § 60.
35 See ex multis, ECtHR, Martinie v France, 12 April 2006, § 40.
37 See Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU, OJ C 308/211, § 108.
heard by the investigative service and cannot have access to the documents of the proceeding, even when the Rapporteur wants to hear the party. This represents not only a clear breach of the adversarial principle, which implies and incorporates the right of access to the documents relevant for the case, \textsuperscript{38} but also of the equality of arms principle, given that – denying access to the file before the hearing – the investigative service is placed in a position of substantial advantage \textit{vis-à-vis} its opponent.\textsuperscript{39}

The lack of balance in the proceedings in favour of the investigative services is confirmed by the legislative choice to attribute to the \textit{Conseiller Auditeur} the competence of ensuring the correct application of the rules of procedure starting from the moment of the notification of the statement of objections\textsuperscript{40} (see Article R461-9). A provision that clearly leaves the parties without protection for the entire first stage of the proceedings appears to be in breach of the parties’ rights of defence.

In the light of the above, it appears appropriate to extend the protection granted to the parties in the adjudicative stage to also cover the investigative stage of the proceedings. This would allow parties to invoke, starting from the time of the actual opening of the proceeding, all those procedural rights (such as the right to access to the file and to be heard) that at the present can be invoked only after the notification of the statement of objections, thus ensuring compliance with Article 6 ECHR.

\textbf{IV. Conclusion}

The analysis carried out in this paper made it possible to reflect on a new potential structure for enforcement agencies, characterized by the functional segregation between investigative and adjudicative bodies, in line with Article 6 ECHR. However, while such model offers, on one side, the advantage of ensuring the autonomy of the adjudicative body from the investigative one,\textsuperscript{41} on the other side it does not necessarily ensure the adoption of an impartial decision, especially if the functional segregation is not accompanied by other adjustments that enable the Board to re-examine the case effectively.

\textsuperscript{38} The strict relation between the adversarial principle and the right to be heard has been acknowledged also by the ECI, joined cases C-56/64 e 58/64, \textit{Consten and Grundig}, 13 July 1966.

\textsuperscript{39} See ECtHR, \textit{Delcourt v Belgium}, 17 January 1970, § 34.

\textsuperscript{40} See \textit{Code du Commerce}, art. R-461-9.

\textsuperscript{41} On this point, see the opinion expressed by Moses J and recalled by the ECtHR, \textit{Tsfayo v United Kingdom}, 14 November 2006, § 33, whereby ‘One of the essential problems which flows from the connection between a tribunal determining facts and a party to the dispute is that the extent to which a judgment of fact may be infected cannot easily be, if at all, discerned’.
Moreover – and more in general – the study of the French system represents also an occasion to evaluate whether a model where the investigative body is separated from the adjudicative one is preferable to one where the two bodies are instead more integrated: although in fact the impartiality principle – as interpreted by ECtHR – requires such a separation, the absence of coordination between the two bodies could have a negative impact on respecting the defence rights of the parties.

In conclusion, the analysis of the French system and the brief considerations on its main strengths and weaknesses can offer some food for thought to the debate on the design of competition authorities, thus adding a new ‘piece’ to a very complex puzzle.

Literature


The EU 2018 Draft Directive on UTPs in B2b Food Supply Chains and the Polish 2016 Act on Combating the Unfair Use of Superior Bargaining Power in the Trade in Agricultural and Food Products

by

Anna Piszcz*

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Abstract

The Polish Act on Counteracting the Unfair Use of Superior Bargaining Power in the Trade in Agricultural and Food Products was adopted on 15 December 2016 and entered into force on 12 July 2017. The new legal framework resembles, in some places, the legal rules contained in the 2007 Act on Competition and Consumer Protection, elsewhere resembles the 1993 Act on Combating Unfair Competition. Therefore, the article reviews the new Polish provisions taking into account the previous system including the prohibition of the abuse of a dominant position and the prohibition of unfair competition. This publication is intended to point out the peculiarities that characterize the new provisions. Readers will find here an assessment of recent Polish developments and suggestions for further development of the Polish legal framework in the EU context. In particular, the

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review critically analyses some solutions of the 2018 EU draft Directive on unfair trading practices in business-to-business relationships in the food supply chain and shows what amendments to the Polish legal framework will be needed, if the Directive is adopted in the current version.

Résumé

La loi polonaise sur la lutte contre l’utilisation déloyale du pouvoir de négociation supérieure dans le commerce des produits agricoles et alimentaires a été adoptée le 15 décembre 2016 et est entrée en vigueur le 12 juillet 2017. Le nouveau cadre juridique ressemble, à certains endroits, aux règles juridiques contenues dans la loi de 2007 sur la concurrence et la protection des consommateurs, qui ressemble d’ailleurs à la loi de 1993 sur la lutte contre la concurrence déloyale. Par conséquent, l’article examine les nouvelles dispositions polonaises en tenant compte du système précédent, notamment l’interdiction de l’abus de position dominante et l’interdiction de la concurrence déloyale. Cette publication est censée mettre en évidence les particularités qui caractérisent les nouvelles dispositions. Les lecteurs trouveront ici une évaluation des développements récents en Pologne et des suggestions pour le développement du cadre juridique polonais dans le contexte de l’UE. En particulier l’article analyse de manière critique certaines solutions du projet de directive de l’UE de 2018 sur les pratiques commerciales déloyales dans les relations interentreprises au sein de la chaîne d’approvisionnement alimentaire et indique quelles modifications dans le cadre juridique polonais seront nécessaires si la directive soit adoptée dans la version actuelle.

Key words: superior bargaining power; unfair use of superior bargaining power; trade in agricultural and food products; agricultural and food sector; public enforcement; private enforcement; enforcement authority; national competition authority; unfair trading practices; UTPs; business-to-business relationships; food supply chain; B2b food supply chain; small and medium-sized entrepreneurs; small and medium-sized enterprises; SMEs; suppliers; producers; producer organisations; associations of producer organisations; non-SMEs; buyers; ‘one-sided’ protection

JEL: K21, K23, Q18

I. Introduction

The objective and purpose of this study is to provide an overview of existing Polish provisions on counteracting the unfair use of superior bargaining power in the trade in agricultural and food products with a focus on a similar legislative initiative in the EU. The aim of this research is to critically analyse
both: the solutions applied by the Polish legislation (taking into account the previous system including the prohibition of the abuse of a dominant position and the prohibition of unfair competition as a background) and the 2018 draft Directive of the European Parliament and of the Council on unfair trading practices in business-to-business relationships in the food supply chain (hereinafter, the draft Directive). From the research aim the following questions emerge as being essential to achieving the research aim: What are the peculiarities that characterize the new provisions? What are the results of the assessment of recent Polish developments? What suggestions for further development of the Polish legal framework in the EU context can be formulated? What amendments to the Polish legal framework will be needed, if the draft Directive is adopted in the version published so far? The point of the analysis is both normative and descriptive. The comparative method is used, as the analysis of the Polish legal framework can benefit from being examined in the light of the solutions provided for in the draft Directive.

II. Background

The Polish Act on Counteracting the Unfair Use of Superior Bargaining Power in the Trade in Agricultural and Food Products2 (the Anti-Power Act,3 hereinafter, the APA), submitted by the government to the lower chamber of the Parliament (Sejm) on 25 July 2016, was adopted on 15 December 2016. But it was not the first time an attempt has been made to introduce a specific legal framework for business-to-business (B2b) relationships in the food supply chain in Poland.

Already 14 months before the governmental submission, a group of deputies of the Polish People’s Party submitted to the Sejm a draft Act on Combating the Unfair Market Practices of Entrepreneurs Conducting the Trade in Agricultural and Food Products against the Suppliers of Those Products.4 Not without grounds, this first draft Act of 2015 was heavily criticised by, among others, the Supreme Court,5 the Bureau of Research of

3 In Polish tzw. ustawa antyprzewagowa.
the Sejm as well as commentators (Affre and Skołubowicz, 2015) for being incompatible with the constitutional principles of the freedom of economic activity, proportionality and equality. The proposed provisions were imprecise and did not meet the requirements of correct legislation. Furthermore, they endowed some terms with a new meaning, differing from the usual one. The new legislation was to be publicly enforced by the President of the Office of Competition and Consumer Protection (in Polish Prezes Urzędu Ochrony Konkurencji i Konsumentów, hereinafter, the UOKiK President) – as the competent administrative authority – on the basis of complaints. The vacatio legis proposed for the new legislation was 30 days. Having been submitted to the Sejm only a few months before parliamentary elections, the draft Act might have been driven by political considerations. However, the Polish Parliament is subject to the principle of discontinuation, which leads to the result that a bill submitted to the previous Parliament is not decided on by the new one. As of 11 November 2015, the 7th term of the Polish Parliament has ended and its legislative works, including works on the above-mentioned draft Act, were discontinued.

The next draft Act (draft APA) submitted by the government on 25 July 2016 was, in general, free of the aforementioned problems and was passed into law. The APA resembled in some places the legal rules contained in the 2007 Act on Competition and Consumer Protection (the Anti-Monopoly Act, hereinafter, the AMA), elsewhere resembled the 1993 Act on Combating Unfair Competition (hereinafter, the ACUC). After a 6-months vacatio legis, the APA came into force on 12 July 2017. Only as a digression, it can be seen that the APA is one of the examples of the ‘publicisation’ of civil (private) matters (the transfer of competences from civil justice to public administration in Poland), more precisely its form consisting of adding legal bases for public enforcement to already existing legal bases for private enforcement, which then results in a dual enforcement system (Piszcz, 2018).

9 The remaining two forms are: (1) ‘de-privatisation’ of civil (private) cases, i.e. the legislature moves them from civil proceedings to administrative proceedings (non-dual system of enforcement), e.g. the abstract control of standard forms of agreements concluded with consumers was moved to competences of the UOKiK President from the Court of Competition and Consumer Protection in 2016; (2) de facto ‘publicisation’ taking place where, in a dual system of enforcement, private enforcement is, in fact, poor (empowered persons are usually passive even though this results in the lack of compensation) and a public enforcer tends to place an obligation on an infringer to pay to those injured a so-called ‘public compensation’
The UOKiK President, as a competent administrative authority, conducted 12 preliminary proceedings within the first three months of the application of the APA (UOKiK, 2017). On 5 March 2018, the first decision was adopted by the UOKiK President.10

The chronology described above can be related to works conducted by EU institutions with regard to unfair trading practices (UTPs) in B2b food supply chains (more: Di Marcantonio and Ciaian, 2017; Renda et al., 2014). In this context, the EU Commission’s works started with its Green Paper on unfair trading practices in the business-to-business food and non-food supply chain.11 The Green Paper was published on 31 January 2013 and signalled the launch of a three-month long public consultation to gather information from interested parties. Next, in July 2014, the Commission released a communication titled ‘Tackling unfair practices in the B2B food supply chain’12 encouraging Member States to look for ways to improve protection of small food producers and retailers against the unfair practices of their sometimes much stronger trading partners. The first Polish draft Act of 2015 could have been considered to be inspired by the Commission’s communication, albeit the 2-page explanatory notes accompanying the draft Act do not mention EU works at all.

The next EU document, ‘Report from the Commission to the European Parliament and the Council on unfair business-to-business trading practices in the food supply chain’ of 29 January 2016,13 referred to in its explanatory notes to the Polish APA (performing a largely justificatory function).14 The Commission concluded therein that at this stage there was no need for EU legislative measures in the field of UTPs. The Commission’s took this view based on the idea that operators in the supply chains should participate in voluntary schemes designed to reduce UTPs, and Member States should provide effective and independent enforcement at national level. So, regulatory initiatives in the discussed field were left to Member States. In Poland, the manifestation of the above is the APA. However, within one year from the publication of the Commission’s report, the European Parliament,15

the European Economic and Social Committee\textsuperscript{16} and the Council\textsuperscript{17} all called for actions to be taken at the EU level. Hence, the Commission prepared its proposal against UTPs in B2b food supply chains, which was preceded by an open public consultation from August to November 2017.\textsuperscript{18} The draft Directive of the European Parliament and of the Council on unfair trading practices in business-to-business relationships in the food supply chain (hereinafter, the draft Directive) was published on 12 April 2018.\textsuperscript{19}

The Polish APA has been widely discussed and has come under strong criticism (Jurkowska-Gomułka, 2017; Krasnodębska-Tomkiel, 2017; Namysłowska and Piszcz, 2017; Podrecki, 2017; Sroczyński, 2017; Bolecki, 2017; Szwedziak-Bork, 2017; Roszak and Turno, 2017; Kohutek, 2017; Stawicki, 2017). When compared to corresponding provisions in the draft Directive, the fact will be discussed below that there are differences between the two, in particular in the context of the aims and the scope \textit{ratione personae} of the legal frameworks, the prohibited UTPs and also powers of the enforcement authority; these issues are regulated in a different way in both systems and must contribute to the discussion.

### III. Aims

Although before the APA there was no specific legal framework for counteracting the unfair use of superior bargaining power in Poland, those who faced such practices within the Polish territory were formally able to seek redress based on other laws available at that time. The legal bases for private enforcement could be found (and still can) in the 2013 Act on Payment Terms in Commercial Transactions,\textsuperscript{20} the 1964 Civil Code,\textsuperscript{21} as well as in the ACUC. The latter statute declares in its Article 1 that it regulates counteracting and combating unfair competition in the public interest as well as in the interests of entrepreneurs and customers. Article 3 paragraph 1


\textsuperscript{17} Conclusions of 12 December 2016 on strengthening the position of farmers in the food supply chain and tackling unfair trading practices, No. 15508/16.

\textsuperscript{18} See https://ec.europa.eu/info/consultations/food-supply-chain_en.

\textsuperscript{19} COM(2018) 173 final, 2018/0082 (COD).

\textsuperscript{20} Act of 8 March 2013 on Payment Terms in Commercial Transactions (Journal of Laws of 2013, item 403, as amended).

defines an act (practice) of unfair competition as an activity contrary to the law or *bonos mores* which threatens or infringes the interest of another entrepreneur or customer (therefore, private interest and – most of all – the one privately enforced before courts of civil law). However, those statutes, to the extent that they cover the unfair use of superior bargaining power, have *de facto* been considered difficult to enforce and ultimately ineffective. Weaker parties to commercial transactions have often been afraid of retaliation and/or compromising an existing commercial relationship with the stronger party, a realisation also noted by the Commission in its Explanatory Memorandum to the draft Directive, which discusses the so-called ‘fear factor’.22 Owing to this, they have not been willing to seek redress before a court of civil law even till the end of the relationship.23 This has not translated into a lack of such civil cases, since from time to time, after the termination of the relationship, the weaker party has indeed pursued a so-called ‘divorce case’ and sought redress (even though in practice civil proceedings might have been long-lasting and expensive).

On the other hand, before the APA, public enforcement in the discussed field was available only where a specific unfair practice fell within the scope of the AMA, as a rule, as an abuse of a dominant position (Article 9 AMA). The AMA lays down the framework for the development and protection of competition and sets out the principles of the protection of interests of entrepreneurs and consumers undertaken in the public interest. The existence of this public interest has to be proven in each individual case; the review courts used to require this from the UOKiK President.24 However, unfair practices of entrepreneurs without dominant positions in a given market have been left outside the scope of the AMA and in such cases the UOKiK President was not competent to intervene.

In such circumstances, a specific, publicly enforced prohibition of the unfair use of superior bargaining power has seemed necessary. The legislature might have felt that by the APA they were filling an important lacuna within public

22 Explanatory Memorandum, p. 2, 5–6, 10.
23 Explanatory notes to the APA, supra note 12 at p. 3.
24 For instance judgement of the Supreme Court of 5 June 2008, III SK 40/07, OSNP 2009, No. 19–20, item 272: ‘The premise of violation of public interest is the criterion for selecting of cases undertaken by the antimonopoly authority. Decision on institution, conducting and concluding antimonopoly proceedings should indicate and describe the public interest justifying the antimonopoly intervention. (…) Violation of public interest takes place when anticompetitive behaviour affects “a wider circle of market participants” or when it resulted in the other adverse market effects’; judgement of the Supreme Court of 7 January 2010, III SK 16/08, OSNP 2010, No. 13–14, item 177: ‘The public interest covers the protection of competition as a mechanism guaranteeing free entrance of undertakings to the market’. See Blachucki, 2013, p. 90.
enforcement. Article 1 APA states that the APA lays down the rules and procedures ‘in order to ensure the protection of the public interest’. However, Article 7 paragraph 2 APA considers the use of superior bargaining power unfair where it is contrary to bonos mores and threatens or infringes a vital interest of the other party. It has been pointed out in several publications that the need for the UOKiK President, as an enforcement authority, to prove and protect private interests when intervening in individual contractual relationships may, in fact, lead to situations where the UOKiK President protects the public interest to a very small extent only or that the latter barely exists in particular cases (Jurkowska-Gomułka, 2017, p. 15–19; Sroczyński, 2017, p. 657–658; Krasnodębska-Tomkiew, 2017, p. 689).

The second, closely related problem is what may in fact be included in the broad notion of ‘public interest’ used in Article 1 APA. Certainly, the protection of competition as understood under the AMA cannot (Jurkowska-Gomułka, 2017, p. 15). In order to answer the question, commentators have analysed the aims of the legislation in question, as declared in the explanatory notes to the APA, which pointed to the following aims: the protection of food security (as a part of national security), the protection of food safety and quality and, thereby, the protection of its consumers. But the aims declared by the legal drafters are only one side of the story. On the other side, there is whether these aims are real and, in reality, shared by the enforcer. Interestingly, in the first and only decision adopted under the APA in the Cykoria case,25 the UOKiK President did not refer to any of the values mentioned in the explanatory notes. Drawing on the jurisprudence related to the AMA, the enforcer explained only that an infringement of the public interest occurs mainly when the activity (practice) of a given entrepreneur threatens the general interest of the society or of a wider circle of market participants. From there, this reasoning proceeded to the conclusion that in the scrutinised case the public interest manifested itself in the scale of the practices in question; adverse effects of the practices might have arisen for a wide range of addressees, including each supplier contracting with the infringer. The enforcement authority avoided confirming or denying the interpretation of the aims of the legislation authored by the legal drafters and somehow accepted by the legislature once having adopted the APA.

The above-mentioned documents were issued before the publication of the draft Directive. Are the aims of the latter met by the declared aims of Polish legislation? Keeping in mind that the Commission wants to reduce the occurrence of UTPs, and address the current situation of under-protection, one must notice that the values underpinning the draft Directive are scattered

around the text of the Commission’s proposal. First, in the Explanatory Memorandum, the Commission mentions the protection of small and medium-sized suppliers in the food supply chain (insofar as they sell food products to buyers who are not small and medium-sized) and, thereby, ‘contributing to a fair standard of living for the agricultural community, an objective of the common agricultural policy under Article 39 TFEU’. Second, measures at the EU level consisting of common UTP rules would aim to improve the governance of the food supply chain. Third, the Commission’s proposal, like the Polish APA explanatory notes, touches upon food safety, however, indirectly in words: ‘operators that are not subject to UTPs may be left with more economic margin to invest in producing in environmentally sustainable and climate-friendly ways and to prevent food waste, or they may feel less pressured to compensate for the lost margin by cutting corners when it comes to environmental and food safety legislation’. In the Legislative Financial Statement, it is declared that the objective of the Commission’s proposal is to contribute to the priority of ‘a deeper and fairer internal market with a strengthened industrial base’, which is translated into the general objective of ‘viable food production’ of the Common Agricultural Policy. The specific objectives are: maintaining market stability, enhancing agricultural producers’ income and improving agricultural competitiveness.

The two sets of values (interests) protected hardly overlap, a fact that can be seen in the Table 1.

The Commission admitted that the aim of its proposal is to protect interests of some market operators. That is what the Polish governmental legal drafters have seemed to be afraid of; perhaps it was very hard for them to reconcile, in principle, private interests of some market operators with the public interest under the ‘roof’ of UOKiK, which is responsible, first and foremost, for competition protection (and certainly not agricultural policy). Do the differences shown above mean that the APA will need to be amended if the draft Directive is adopted? To this question there can be but one answer – a negative one. The discussed values (interests) are contained in the APA explanatory notes. An updated set of values (interests) drawing on the Directive will not need to appear in the Act amending the APA in order to transpose the Directive into Polish laws; however, it might appear in its explanatory notes.

26 Explanatory Memorandum, p. 4.
27 Ibid, p. 4, 6. See also recital 7 of the preamble to the draft Directive.
29 Ibid, p. 11.
30 Legislative Financial Statement, point 1.4.1.
31 Ibid, point 1.4.2.
### Table 1: Values (interests) protected in the Polish APA and the Commission’s proposal

<table>
<thead>
<tr>
<th>Value/interest protected</th>
<th>Polish APA</th>
<th>Commission’s proposal</th>
</tr>
</thead>
<tbody>
<tr>
<td>Food security</td>
<td>YES</td>
<td>NO</td>
</tr>
<tr>
<td>Food safety</td>
<td>YES</td>
<td>YES (indirectly)</td>
</tr>
<tr>
<td>Food quality</td>
<td>YES</td>
<td>NO</td>
</tr>
<tr>
<td>Consumers</td>
<td>YES (indirectly)</td>
<td>NOT DECIDED(^{32})</td>
</tr>
<tr>
<td>SMEs’ interests</td>
<td>NO</td>
<td>YES</td>
</tr>
<tr>
<td>Fair standard of living, enhancing income</td>
<td>NO</td>
<td>YES</td>
</tr>
<tr>
<td>Environment</td>
<td>NO</td>
<td>YES (indirectly)</td>
</tr>
<tr>
<td>Deeper and fairer internal market</td>
<td>N/A</td>
<td>YES</td>
</tr>
<tr>
<td>Viable food production</td>
<td>NO</td>
<td>YES</td>
</tr>
<tr>
<td>Maintaining market stability</td>
<td>NO</td>
<td>YES</td>
</tr>
<tr>
<td>Improving agricultural competitiveness</td>
<td>NO</td>
<td>YES</td>
</tr>
<tr>
<td>Competition</td>
<td>NO</td>
<td>NO(^{33})</td>
</tr>
</tbody>
</table>

Source: own study based on the Explanatory Notes to the APA and the Commission’s proposal.

### IV. Scope ratione personae

The provisions on the scope *ratione personae* of the APA show dissimilarities from the Commission’s proposal. The protection against UTPs under the APA covers both suppliers and buyers (‘two-sided’ protection) in B2b food supply chains (Article 1 and 6) and is not limited to small and medium-sized entrepreneurs/enterprises (SMEs). It is considerably different from the protection provided for in the draft Directive that is going to be applied in B2b food supply chains only to suppliers (‘one-sided’ protection) classified as SMEs and only as regards their sales to buyers which are not SMEs (Article 1(2)).

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\(^{32}\) See the Explanatory Memorandum at p. 10–11: ‘partial harmonisation of UTP rules at EU level is expected to have limited effects on consumers. In the open public consultation, operators do in general not claim that UTPs (e.g. by the SCI) lead to advantages for consumers, for example through lower consumer prices that become possible through margins that were extracted from upstream suppliers through UTPs. It is sometimes argued that consumer prices are negatively affected by below-cost-sales prohibitions, but these are not covered by the impact assessment. The consumer organisations which have reacted to the consultation encourage public UTP rules because they expect a longer-term negative effect of UTPs on consumer prices’.

\(^{33}\) Even though certain links to competition policy are defined.
The preamble to the Directive and the Explanatory Memorandum clarify that the protection covers both national and foreign SME agricultural producers, including their organisations such as cooperatives, and other SME suppliers, including manufacturers, distributors and intermediaries along the food supply chain if they sell to non-SME buyers established in the EU.34

First, a technical remark needs to be made on the notion of ‘small and medium-sized enterprise’ (Article 2(c) of the draft Directive). Its definition refers to the definition of micro, small and medium-sized enterprises set out in the Annex to Commission Recommendation 2003/361/EC.35 This reference rightly results in that – contrary to the literal reading of the words defined in Article 2(c) of the draft Directive (‘small and medium-sized enterprise’) – microenterprises are within the scope ratione personae of the draft Directive. What raises doubts is that the EU legislature would impose on Member States a requirement to follow a non-binding act (Recommendation) via a reference to the latter made in a legally binding act (Directive), even though the necessary identical definitions are also contained in a legally binding act, namely Commission Regulation 651/2014,36 and more precisely, in Article 2 of Annex I to this Regulation. This might be corrected by national legislatures,37 but why make mistakes that can be avoided?

The scope ratione personae of the draft Directive lets us make some general anticipatory remarks regarding the potential of the EU legislation (if adopted in the proposed shape) to contribute to the protection against UTPs. First, the draft Directive does not focus at all on the period of time or the moment when the victim needs to be an SME and the infringer needs to be a non-SME. When do the staff headcount and financial requirements determining whether one falls into the SME category (in the case of the victim) and the non-SME category (in the case of the infringer) need to be met (jointly)? At any time during the UTP (pursuant to recital 11 of the draft Directive unfair trading practices may occur at any stage of the sale of a food product, that is before, during or after a sales transaction)? And later on? At a time of lodging a complaint to the enforcement authority? During the proceedings of the latter? It seems that the first solution would be the most effective. We should also bear in mind that if this is not clarified by the EU legislature, Member

34 Recitals 7–8 of the preamble to the draft Directive; Explanatory Memorandum, p. 13.
States are very unlikely to have any ambitions to add any provisions that would clarify this. It also needs to be emphasised that the data applicable to the staff headcount and financial amounts is that relating to the latest approved accounting period and calculated on an annual basis. The ex-post assessment of the SME/non-SME status may raise doubts in terms of legal certainty.

Second, faced with the limitations resulting from the draft Directive, it would be impossible to apply the Directive to the protection of buyers of food products who have weak bargaining power in B2b supply chains (compared to suppliers). Inexplicably, the Commission’s proposal postpones the problem of their protection until the review of the application of the Directive provided for in Article 11.\footnote{See recital 19 sentence 2 in the preamble to the draft Directive.} In practice, the use of UTPs by suppliers occurs, even though they are not as frequent as UTPs of buyers of food products. Leaving them outside the scope of the Directive does not seem justified.

Third, UTPs of SME buyers as well as UTPs against non-SME suppliers do not fall within the scope of the draft Directive. The Commission does not seem preoccupied with the risks posed by situations where unequal bargaining powers and UTPs result from a ‘relative’ disproportion between the bargaining positions of the parties to a contract, and not only from a disproportion between their size measured by way of staff headcount and financial ceilings. The Explanatory Memorandum makes clear that ‘the commercial relationships of large players who are less likely to be affected by UTPs or who can be expected to counter-vail undue pressure to “suffer” UTPs, and who would not be subject to the fear factor (…) in the same way as SME operators’ are to fall outside the scope of the protection.\footnote{Ibid, p. 6.} But how is this choice of a targeted protection justified by the Commission? A targeted protection is considered ‘more proportionate at this stage’ and SME suppliers are ‘often the ones who cannot defend themselves against UTPs due to their lack of bargaining power’.\footnote{Ibid, p. 9–10.} The relevant rules should apply to business conduct by larger, non-SME, operators in the food supply chain as they are ‘the ones who normally possess stronger relative bargaining power when trading with SME suppliers’.\footnote{Recital 9 of the preamble to the draft Directive.} So, it seems that the Commission has based its choice on some dominant ‘regularities’ in statistics; the words ‘often’ and ‘normally’ seem to be the key words here.

The most frequent victims of UTPs deserve protection and the most frequent infringers deserve sanctions under the Directive. But those categories of entrepreneurs which are endangered by UTPs only sometimes and those who are endangered by UTPs of SMEs (e.g. the biggest medium-sized...
entrepreneurs) are not to be protected by the Directive. This poses at least two dangers. First, it will be quite easy for some companies buying food to remodel their structures so that buyers are no longer non-SMEs (however, not beyond the mere category of ‘autonomous enterprises’). The apportionment of turnover and employees may be a way to circumvent the prohibition of UTPs. There may also be a risk of pressures faced by SME suppliers to merge into bigger non-SME entities/groups. Moreover, the definition of the supplier contained in Article 2(b) of the draft Directive (‘any agricultural producer or any natural or legal person, irrespective of their place of establishment, who sells food products. The term “supplier” may include a group of such agricultural producers or such natural and legal persons (…)’) seems burdened with the risk of narrowing down the catalogue of factually protected entities. That is because the definition does not specify criteria for a ‘group’ whereas staff headcount and financial criteria of any group covered by Article 2(b) should be summed up for the purpose of the assessment of the SME status of a given entity. Are groups in the meaning of Article 2(b) only legally recognised groups or capital groups? The interpretation of this word should not go beyond them if it is not to narrow the scope of the protection.

Furthermore, the Commission expressly refers in the Explanatory Memorandum to the preventive and deterrent character of the rules established by the draft Directive. We should bear in mind, however, that the ‘piecemeal’ approach with regard to the scope ratione personae of the Directive will tend to undermine preventive and deterrent effect of the proposed regime. Therefore, the protection against UTPs should instead be defined in terms of absolute fairness considerations or a ‘relative’ disproportion, rather than the size of the parties to a contractual relationship.

The question arises whether Poland (as well as other Member States whose legal frameworks are characterised by the broader scope ratione personae) will be obliged to limit the scope of its national provisions. Article 1(1) of the draft Directive utilises the minimum harmonisation approach; it is related literally to a list of prohibited UTPs and rules concerning their enforcement. Article 8 allows Member States to design legislation going beyond the rules of the Directive but it defines them enumeratively as those set out in Articles 3, 5, 6 and 7, provided that such national rules are compatible with the rules on the functioning of the internal market. Recital 10 sentence 3 of the preamble to the draft Directive guarantees more precisely that Member States should not be precluded from adopting and applying on their territory stricter national laws protecting SME suppliers and buyers against unfair trading practices occurring in business-to-business relationships in the food supply chain, subject to the

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42 Explanatory Notes, p. 1, 3, 5, 14. See also recital 15 of the preamble to the draft Directive.
limits of EU law applicable to the functioning of the internal market.\textsuperscript{43} This
will explicitly allow for a ‘two-sided’ protection, if the Member States opt for
it. But the question is if Member States are able to protect – with the same set
of rules – entrepreneurs having weaker bargaining power vis-a-vis their trading
partners regardless of their size. The answer to this question should be in
affirmative. An opposite mindset would be the antithesis of what effectiveness
of protection against unfairness is supposed to be about. The EU measures
are to be only complementary to measures existing in Member States and the
code of conduct of the Supply Chain Initiative\textsuperscript{44} applied regardless of size.\textsuperscript{45}
The only limits to the possibilities of broader protection are those of EU law
applicable to the functioning of the internal market (Article 8), and it would
be difficult to find EU laws that would be contrary to such broad protection.
It is worth recommending, however, that this issue should be added to the
Directive in an unambiguous manner, at least to its preamble before it is
adopted.

The approach taken to the protection framework by the draft Directive
is considerably simpler compared to the APA. Under the APA a ‘superior
bargaining power test’, including various conditions, needs to be satisfied
before a practice can be considered unfair (Article 7 paragraph 1). Superior
bargaining power is such a position of the buyer toward the supplier where the
supplier does not have sufficient and actual opportunities to sell agricultural
or food products to other buyers, and where there is a significant disparity
in economic potential between the two parties, which puts the buyer at an
advantage, or such position of the supplier toward the buyer where the buyer
does not have sufficient and actual opportunities to purchase agricultural or
food products from other suppliers and where there is a significant disparity
in economic potential between the two parties, which puts the supplier at
an advantage. It can be seen that the legislature put superior bargaining
power under a very restrictive test and its conditions are proving difficult to
Jurkowska-Gomułka, 2017, p. 17–18). As a result, this may be the Achilles
heel for the enforcement of the APA by the UOKiK President. If the Polish
legislature repeals this test while making the necessary adjustment to the
scope \textit{ratione personae}, this will significantly simplify the proceedings before
the UOKiK President.

\textsuperscript{43} Recital 17 adds that the rules laid down in the Directive ‘should not impair the possibility
for the Member States to maintain existing rules that are further-reaching or to adopt such rules
in the future, subject to the limits of Union law applicable to the functioning of the internal
market’.

\textsuperscript{44} See http://www.supplychaininitiative.eu/.

\textsuperscript{45} Explanatory Memorandum, p. 3, 11.
Another question is whether Member States could retain exceptions to the scope *ratione personae* of the prohibition of UTPs. Choosing a positive answer to this question (after the adoption of the Directive) would not be grounded. The draft Directive neither allows nor provides for any exceptions to Article 1(2). The Polish system of exceptions contained in Articles 2-3 APA consists of three types of exceptions (where the APA is not applied):

1) subjective exclusions (Article 3 APA) – they are justified by organisational ‘buyer – supplier’ relationships of a special type and are related to UTPs in the following relationships: (a) cooperative – its member, (b) agricultural producer group – its member, (c) member of a preliminarily recognised producer organisation for fruit and vegetables – another member thereof, (d) member of a recognised producer organisation for fruit and vegetables – another member thereof;

2) exclusion of direct supplies in the meaning of Article 1(2)(c) of the Regulation of the European Parliament and of the Council 852/2004,\(^\text{46}\) that is direct supplies, by the producer, of small quantities of primary products to the final consumer or to local retail establishments directly supplying the final consumer – Article 2 APA at the beginning (*in principio*);

3) *de minimis* rule applied if any of the following conditions is not met:
   
   (a) the aggregate turnover between the parties in the year of commencement of the proceedings concerning the prohibited practices or in any of the 2 years preceding that year exceeds the amount of PLN 50 000 (approx. EUR 12 000) – Article 2(1) APA,

   (b) in the year preceding the year of commencement of the proceedings concerning the prohibited practices, the turnover of the infringer (or, in the case of the infringer being part of a capital group, the turnover of such group) exceeds the amount of PLN 100,000,000.00 (approx. EUR 24 000 000) – Article 2(2) APA.

Commentators stated that those thresholds remained too small, which would result in a broader (too broad?) scope for intervention of the enforcement authority (Jurkowska-Gomułka, 2017, p. 10; Krasnodębska-Tomkiel, 2017, p. 689; Salitra, 2017, p. 132; Stawicki, 2017). Certainly, with the Directive the Commission does not try to solve the problem of potential overload of enforcement agencies with possibly the smallest cases. If the version of the draft Directive proposed so far is adopted, all the current exceptions would need to be deleted from the APA. The idea of an appropriate level to set the law-enforcement thresholds at in the Directive might be rethought, save that

the Commission considers the limitation of potential buyers to non-SMEs to be the only such threshold.

V. Prohibited UTPs

The draft Directive does not contain a general clause of UTP but it creates two minimum lists of prohibited UTPs (even though Article 1(1) declares that it establishes ‘a minimum list’ of prohibited UTPs). First, it lists in an enumerative way trading practices that are considered as unfair by their very nature and so deviating from them should not be subject to the parties’ contractual freedom (‘black list’, Article 3(1)(a)–(d)). The blacklisted practices take place where:

– a buyer makes (simplifying) delayed payment;
– a buyer cancels orders of perishable food products at such short notice that a supplier cannot reasonably be expected to find an alternative to commercialise or use these products;
– a buyer unilaterally and retroactively changes the terms of the supply agreement concerning the frequency, timing or volume of the supply or delivery, the quality standards or the prices of the food products;
– a supplier pays for the wastage of food products that occurs on the buyer's premises and that is not caused by the negligence or fault of the supplier.

Additionally, the second list defines practices that are considered unfair unless agreed to in clear and unambiguous terms at the conclusion of the supply agreement (‘grey list’, Article 3(2)(a)–(d)). They take place where:

– a buyer returns unsold food products to a supplier;
– a buyer charges a supplier payment as a condition for the stocking, displaying or listing food products of the supplier;
– a supplier pays for the promotion of food products sold by the buyer;
– a supplier pays for the marketing of food products by the buyer.

A ‘rule of reason’ regulatory approach, recommended in the literature (see Sexton, 2017, p. 15), has not been adopted. Member States are to be under the obligation to ensure that both lists constitute overriding mandatory provisions which are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the supply agreement between the parties (Article 3(4)).

An exhaustive and detailed list of prohibited practices does not exist under the Polish APA. Article 7 paragraph 2 uses a general clause whereby the use of superior bargaining power is considered unfair if it fits both of the following requirements:
– it is contrary to bonos mores,
– it threatens or infringes a vital interest of the other party.

The exemplary list of prohibited practices (Article 7 paragraph 3 APA) contains:
– unjustified termination or threatening with the termination of a contract;
– arrangements whereby only one of the parties is entitled to dissolve, terminate or withdraw from a contract;
– making the conclusion or continuation of a contract subject to acceptance or fulfilment by the other party of other obligations which have neither substantive nor customary connection with the subject of such a contract;
– unjustified extension of payment periods for the agricultural or food products supplied.

A lot of attention has been given to these provisions in literature (Namysłowska and Piszcz, 2017, p. 91–115; Bolecki, 2017, p. 63–74; Manteuffel and Piaskowski, 2017, p. 42–45; Salitra, 2017, p. 132–136). Looking at them from the interpreter’s viewpoint, commentators have criticized the general clause for its inherent vagueness (Roszak and Turno, 2017, p. 29; Manteuffel and Piaskowski, 2017; Blachucki and Jóźwiak-Górny, 2018, p. 156). Conceptually, the approach adopted in the APA is close to the one used in the ACUC (even though the third example of prohibited practices is patterned after one of the anti-competitive practices, more precisely the so-called ‘tying’). Therefore, it shares properties of the latter, including the unpredictability of the general clause. It is even expected that open references may be interpreted broadly and in a rather ‘aggressive’ manner, that is not only in the case of really serious infringements but also to a variety of more subtle market situations (Stawicki, 2017). On the other hand, interpretations of the general clause – that has been extensively examined in a number of contexts related to combating unfair competition – may act as an inspiration for the interpreter of Article 7 APA, making the interpretation smoother.

The implementation of the Directive will not require Polish legislature to switch to a model of a legal framework that does not contain a general clause. Furthermore, a general clause may in fact involve the UTPs defined in the draft Directive, especially since Article 7 paragraph 3 APA gives only an exemplification of prohibited practices. However, we need to take into account also that the draft Directive requires Member States to protect SME suppliers against UTPs with ‘overriding mandatory provisions’. This will result in adding required provisions to the APA on the protection available to SME suppliers against UTPs that are black- and grey-listed in the Directive. As already mentioned above, the Directive is going to be but a minimum harmonisation act. The main implication of this is, on the one hand, that Member States can prohibit more types of UPTs than those listed in the Directive. They can also
introduce stricter lists of prohibited practices, for instance, they can blacklist practices that are grey-listed in the draft Directive. On the other hand, this means that many areas may be left where the legal systems of the Member States will differ quite substantially from one another with regard to the protection of entrepreneurs against UTPs.

VI. Enforcement authority and its powers

The draft Directive takes an approach to enforcement of the prohibition of UTPs that is based on decentralisation (enforcement by Member States). Therefore, Member States are required by Article 4 of the draft Directive to designate a competent authority for the enforcement of the prohibition of UTPs. In cases where there is no legal framework at all, Member States would have to implement the new measures, including designating an enforcement authority; in cases where the legal framework does exist, they would need to make the necessary adjustments (if any), including in the design of the enforcement authority. The Commission does not dictate directly in the draft Directive that the model of enforcement has to be administrative in nature. However, once the Commission considers the practical value of relying on contract law (or self-regulatory initiatives) as limited, at the same time it expects Member States to entrust administrative authorities with the enforcement of the prohibition of UTPs (recital 6 of the preamble to the draft Directive). So, national authorities must have the power to take effective action against UTPs regardless of whether alternative remedies may be available, including under a code of conduct.

The analysis of the literal reading of Article 6 of the draft Directive leads to the conclusion that each Member State should designate one administrative authority that will investigate cases as well as take enforcement decisions concerning them (rather than an administrative authority that only carries out the investigations and then brings the cases before a court for a decision on substance and/or on a fine). The enforcement authority does not have to be a newly established one. Member States can expand the mandate of an existing authority to realise economies of scope. Interestingly, the Explanatory Memorandum submits the example of existing enforcement authorities in the area of competition law (national competition authorities; hereinafter, NCAs).47 By the way, it is worth mentioning that UTP rules will be compatible with and complementary to EU competition rules.48

48 Ibid, p. 3.
Under the Polish APA, the UOKiK President as a single administrative authority – responsible first and foremost for the protection of competition and consumers – investigates cases and adopts administrative decisions (Article 8) subject to judicial control upon an action by the alleged author of the infringement. It can be stated that an effective remedy against the decision of an enforcement authority is provided for the infringer, which is compatible with the rights of defence (in terms of Article 48 of the Charter of Fundamental Rights of the European Union).

Choosing the UOKiK President as the authority enforcing the APA has been criticised by commentators (Jurkowska-Gomułka, 2017, p. 9–18; Krasnodębska-Tomkiel, 2017, p. 688–690). It has been pointed out that the UOKiK President is not a specialised authority and the legislature should have chosen an authority competent in agricultural policy (Jurkowska-Gomułka, 2017, p. 14–18). Concern has also been expressed that a new trend might have appeared consisting of entrusting the UOKiK President with regulatory competences in markets not covered by the competences of any other specialised authority (Krasnodębska-Tomkiel, 2017, p. 690). The Directive will provide arguments for the choice of the UOKiK President as the authority enforcing the APA.

According to recital 13 sentence 2 of the preamble and Article 5 and 6(a) of the draft Directive, the enforcement authority should be able to act either on its own initiative or by way of complaints. The Polish AMA procedural provisions were intended (to some extent at least) to be a model for the APA; the explanatory notes accompanying the APA referred to procedural competition law as a point of reference with respect to the newly introduced solutions. A distinctive ‘trademark’ of the enforcement of competition law in Poland is that under the AMA there are no statutory grounds for the initiation by the NCA of proceedings upon a complaint – the UOKiK President commences proceedings solely on its own initiative. Hence, the status of a party to the proceedings is reserved to those to whom the infringement is, rightly or wrongly, attributed to by the UOKiK President. An alleged victim of an infringement may notify the UOKiK President in writing of his suspicion that prohibited practices have taken place and the identity of a victim who submitted a notification is confidential. However, such a notification is not binding upon the UOKiK President (does not oblige the UOKiK President to initiate proceedings) and, in the case of ex officio initiation of proceedings, a victim who submitted a notification is not a party to the proceedings and cannot appeal against the resulting decision. A victim who submitted a notification is informed in writing about the ex officio initiation of proceedings or about insufficient grounds for such initiation;

49 Ibid, p. 11.
information must explain the reasons for what the UOKiK President decided to do in the case. However, a letter containing such information from the UOKiK President cannot be questioned before a court. The same approach is adopted in the APA (Article 9) which has been criticised in the literature (Jurkowska-Gomulka, 2017, p. 12).

The specificity of proceedings conducted on the basis of the APA compared to competition proceedings is, however, determined by the fact that in competition proceedings a notification may be filed by any person; by contrast, under the APA only a victim of a prohibited practice is entitled to submit such notification. The right to submit a notification has not been conferred on producer organisations or associations of producer organisations whose member(s) or member(s) of their members are affected by a prohibited practice, even though such right could have proven effective in tackling the fear factor; no wonder this approach faced criticism in literature (Jurkowska-Gomulka, 2017, p. 12). Moreover, the last solution is not in line with Article 5(2) of the draft Directive. By way of digression, the latter is faulty from the perspective of the employed legislative technique and is, in fact, redundant, since a supplier has the right to submit a complaint enshrined in Article 5(2) and, moreover, the definition of a supplier contained in Article 2(b) includes *inter alia* producer organisations and associations of producer organisations.

It is ambiguous how a ‘complaint’ should be construed for the purposes of the draft Directive. Should the Polish ‘notification of the suspicion of prohibited practices’ be understood as a complaint in the meaning of the draft Directive? If so, only paragraph 2 of Article 5 of the draft Directive will need to be transposed as it currently has no equivalent in the Polish APA. The analysis of the draft Directive supports the conclusion that the concept of a ‘complaint’ includes the ‘notification’ provided for in the APA. It is definitely noticeable that the draft Directive does not require Member States to equip the complainant with the rights of a party or a ‘quasi-party’ to administrative proceedings. Article 5(4) only obliges Member States to introduce provisions whereby the enforcement authority considers that there are insufficient grounds for acting on a complaint, it shall inform the complainant about the reasons. It does not state, however, that the complainant should have the right to appeal against such communication. Admittedly, recital 14 of the preamble to the draft Directive refers to the issue of procedural rights, but only in the context of the procedural rights of the defendant when enforcement authorities act upon complaints. Furthermore, the same recital of the preamble stipulates that the enforcement authorities should be ‘able to accept and act upon complaints’. Consequently, they will not be obliged to accept a complaint and initiate proceedings (which would later be terminated after establishing that the complaint was not grounded).
The enforcement authority needs to be given certain minimum enforcement powers inspired by best practices in Member States’ existing regimes. Member States shall ensure that the enforcement authority is properly equipped and conferred with the powers (listed in Article 6(a)–(f) of the draft Directive) to:

- initiate and conduct investigations;
- require buyers and suppliers to provide all necessary information in order to carry out investigations on the prohibited trading practices;
- take a decision establishing an infringement of the prohibitions and require the buyer to terminate the prohibited trading practice, or abstain from taking any such decision, if such decision would risk revealing the identity of a complainant or disclosing any other information in respect of which the complainant considers disclosure harmful to his interests, provided that the complainant has identified that information (Article 5(3));
- impose pecuniary fines that shall be effective, proportionate and dissuasive taking into account the nature, duration and gravity of the infringement;
- publish its decisions on substance and on fines;
- inform buyers and suppliers about its activities, by way of annual reports, which shall inter alia describe the number of complaints received and the investigations initiated and closed by it; for each investigation, the report shall contain a summary description of the matter and the outcome of the investigation.

In particular, it can be expected that the powers to impose fines and to publish decisions may increase the deterrent effect. It also needs to be pointed out that based on Article 8, the powers of the relevant enforcement authority may go beyond the aforementioned list if a Member State designs to do so. At this stage of the discussed developments, the powers of the UOKiK President go even beyond Article 6(a)–(e) of the draft Directive. The UOKiK President may: start and conduct investigations, but not dawn raids (Article 16 APA); gather all necessary information from entrepreneurs (Article 14 APA); issue mentioned decisions (Article 26 APA) (except for abstaining from taking a decision for the reasons described in the draft Directive) as well as commitment decisions (Article 27 APA); impose fines of up to 3% of the annual turnover (in its accountancy meaning); as well as impose procedural fines and periodic penalty payments of up to EUR 10 000 per day (Article 33–39 APA).

50 The UOKiK President is also obliged to publish the decisions taken in this context (Article 30 APA). These powers are largely modelled on the

[50 Subject to Article 26 paragraph 3 APA, the burden of proof in administrative proceedings rests on the UOKiK President.]
powers of the NCA; only the last power – related to annual reports on cases regarding UTPs – is not explicitly provided for under Polish legislation.

In general, procedural provisions of the APA use references to the AMA so frequently that, due to literature, this legal framework could have been included into the AMA (Krasnodębska-Tomkiel, 2017, p. 688–689). In turn, the AMA refers to other statutes, including, for example the Administrative Procedure Code. Therefore, it can be said that the system of multi-level references to statutes does not foster readability of the APA (Namysłowska and Piszcz, 2017, p. 13).

VII. Conclusions

What can be said in general about the developments described above? Some provisions of the new draft Directive give rise to doubts about how to construe them and we can expect a wide discussion thereon. In turn, the Polish APA has already been the subject of extensive critical commentary; it has been reported to have been successfully applied in only one decision so far. Certainly, both analysed documents have some defects and generate problems with their interpretation.

The scrutiny of the relevant provisions of the Polish APA and the Commission’s proposal shows that the former is different from the latter on a number of issues. These include the design of their aims (protected values/interests), the scope ratione personae, the concept of prohibited practices and the list thereof. In particular, Polish solutions regarding the scope ratione personae (not only SMEs and not only suppliers protected) seem better in terms of the effectiveness of protection against unfair trading practices.

On the other hand, there are some similarities between the two analysed sets of solutions. Similarly to the Commission’s proposal, the Polish legal framework is sectorial, that is limited to food supply chains. The Polish legislature considered choosing the NCA to be the authority enforcing the prohibition of unfair B2b practice as a good solution. The powers of the enforcement authority have been regulated in a way similar to the powers of the NCA and also to the model provided for in the draft Directive, as if the Polish legislature anticipated the outcome of the Commission’s works.

The legislative works in the EU institutions shall be continued. Since it seems that some problems have not been specifically addressed by the EU legal drafters (e.g. exceptions to the scope ratione personae), it would be advisable for the aforementioned points to be discussed as widely as possible. Key to the EU initiative is the acknowledgement that minimum harmonisation
is sufficient at this stage (but it remains to be seen whether this assumption survives). The publication of the Directive will make the Polish legislature (as well as the legislatures of other Member States) launch further legislative works regarding the adjustment of the national enforcement system of the prohibition of UTPs to the minima (or above it – where allowed) and requirements of the Directive. In the course of these works, legal drafters should remember that both the minimum approach and taking advantage of the minimum harmonisation clause would provide a number of gains and losses. Legislative works should thus be accompanied by careful scrutiny of the proposals with respect to both their compatibility with EU law and the prospective effectiveness of enforcement of the prohibition of UTPs. Due consideration should be given to the issues raised in this article; it should also be ensured that legal drafters are provided with the necessary breadth of expertise. What the Polish legal framework may profit from thanks to the implementation processes is, in particular, the simplification of the tests utilised at the moment by the APA including the ‘superior bargaining power test’. The issue of the powers of the enforcement authority seems much easier but even here the review of its activities with respect of EU legislation will be necessary.

Literature


Bolecki, A. (2017), Nieuczciwe wykorzystywanie przewagi kontraktowej przez sieci handlowe względem dostawców żywności – przykłady praktyk potencjalnie zakazanych. internetowy Kwartalnik Antymonopolowy i Regulacyjny, 8(6), 60–75.


Maciej Gac, *Group litigation as an instrument of competition law enforcement – analysis based on European, French and Polish experiences*, University of Warsaw Faculty of Management Press, Warsaw 2017, 532 pages

A key theme of the book under review here is the engagement of individuals (mainly consumers) in the enforcement of competition law. The involvement of consumers in a competition case, and their will to initiate proceedings against antitrust infringers before civil courts, seems to be natural fuel for the development of private enforcement of competition law – Maciej Gac confirms this straight in the title of his book by presenting group litigations as an instrument for the enforcement of competition law. However, the author does not describe this instrument in the title of the book as effective or efficient – this seems to be an intentional omission, because one of the hypothesis of this book is that – despite good prospects – group litigations do not play a sufficient role in competition law enforcement (‘National solutions on group litigations do not ensure effective protection of individuals against competition law infringements, and, if not empowered with a coherent and binding approach to collective redress at the EU level, may lead to limited and unequal protection of EU citizens against competition law infringements’, page 29).

The structure of the book reflects its title and consists of two parts: the first focuses on general issues of competition law enforcement; the second provides an analysis of the EU and national legislative approach towards group litigations. Both of these general parts are divided into chapters. The structure is largely motivated by the author’s research goals and his clearly formulated hypothesis (Introduction, pages 19-31). What is valuable, and makes the book more intriguing for readers, are the titles of individual chapters – they are not simply descriptive but each of them reflects the author’s preliminary considerations about a certain topic (such as: Part. I, Chapter 2: *Private Enforcement of Competition Law in Europe: Towards Coherent Regime of Antitrust Law Enforcement*) or pose a question (for instance, Part II. Chapter 1: *The European Way Towards Common Approach to Collective Redress – What is the Direction?*). The style in which the titles of the chapters are formulated allows readers to follow easily the author’s perspective upon the analyzed issues. This approach seems to be highly useful, although some readers can find it annoying.

The first part of the book presents and analyses the general background for further, detailed considerations on group litigations (or to be precise: collective redress). The author starts with posing a question on the mutual relationships between public
and private enforcement of competition law (Chapter 1: Between Public and Private Enforcement – Inconsistency or Mutual Complementing?). Presently in 2018, but also at the end of 2016 (which the author declared to be the date of completing the book) the answer to the question from the chapter’s title was rather obvious: public and private enforcement of competition law are not equal modes, but they can complement each other. The title of the second chapter focusing on the way ‘towards a coherent regime of antitrust law enforcement’ confirms this conclusion. The considerations presented in the commencing two chapters of the first part do not go beyond a summary of well-known thesis, opinions and ideas – nothing new for antitrust lawyers and antitrust academics, although readers who are not well-acquainted with the long-standing debate on the model of competition law enforcement can find it interesting.

In my view, the real intellectual adventure starts with chapter 3 where the author provides the characteristics of group litigations in the context of ‘a modern system of competition law enforcement’. In the subchapter titled The concept of a group litigation (page 144), the author provides a pretty long list of those features of group litigations that make it possible to consider this enforcement mode as a ‘solution to the problems of individual claims’ (page 147). It is correctly underlined that a group litigation increases individuals’ access to justice in many ways: by lowering the cost of litigation, by overcoming ‘rational apathy’ of injured individuals, by limiting the ‘diffuse of interests’, etc. The author also underscores that a group litigation reduces asymmetry between the victims of law infringements and the perpetrators. In the author’s view, even if I am slightly sceptical about this point, a group litigation can also contribute to a better detection, prosecution and deterrence of anticompetitive behaviours. Finally, a group litigation means greater judicial economy and predictability. In the further part of chapter 3, the author presents a classification of various types of litigation mechanisms, including a division into opt-in and opt-out mechanisms. The analysis of these mechanisms was conducted with references to a few foreign legislations including, for example Denmark, Norway and Brazil. The list of ‘typical problems of group litigation mechanisms’ is contained in subchapter 4. (pages 178–198). What this part of the book lacks is, in my view, an explanation if the list of problems presented in this book is exhaustive, and why these particular types of problems were considered by the author as worth analyzing. It is likely that all the crucial problems of group litigations, including the sensitive issue of financing a litigation, are covered by the content of this book.

The further part of the third chapter in the first part of the book is dedicated to the American system of class actions, since it is treated by Maciej Gac as ‘a starting point in the introduction of a group litigation mechanism in the area of competition law’ (page 199). The author is rather successful in proving that an effective mechanism of class actions can contribute to a better enforcement of the law so – regarding these issues – the European Union should generally follow the American example. However, it should exclude all the weaknesses of the American system that were recognized in the practice, especially abuses of the group litigation model. Indeed, as the author proves in the further part of the book, the criticism of the American model of class actions became an inspiration for the origins of the EU model of collective redress.
The first part of the book finishes with the author’s statement that ‘only through further changes in the area of private enforcement, and introduction of a wide and uniform mechanism of group litigation, the previously described hybrid model of competition law enforcement may be fully achieved (…)’ (page 237). As a supporter of a balanced coexistence of public and private enforcement of competition law, I fully agree with this opinion.

The second part of the book (Towards increased efficiency of competition law enforcement in Europe – a need for a common approach to collective redress) deals with detailed solutions found in a set of legislation issued at the EU and at the national level. Firstly, the author presents developments of the idea of collective redress in the EU using either a historical or functional perspective. Maciej Gac focuses his criticism of the European model partly on formal aspects of introducing a collective redress model; the latter has been done through a non-binding instrument – a recommendation that leaves Member States with a vast area of choices of what individual solutions to apply – Member States are not obliged to implement the Recommendation on collective redress. Obviously, the formal status of the act dealing with group litigation mechanisms in Europe is not the only reason for the author’s critical attitude towards the European solutions. Taking under consideration either formal or substantive aspects of the Recommendation on collective redress, he directly calls this approach of the EU institutions (mainly the European Commission and the European Parliament) as ‘disappointing’ (page 303).

The second chapter in the second part of the book considers ‘selected national solutions’ on collective redress. However, readers do not find here a wide selection of national legislations. Even if Maciej Gac writes in the title of the chapter ‘from French dilemmas to Polish clear-cut solution’, there is, in fact, nothing in between – the selection is actually limited to France and Poland only. Surely, this fact does not undermine the content and the meaning of the book under review – Polish and French legislations are juxtaposed on the basis of rational arguments, and the objectives of the comparisons between two elements are easily identifiable.

What is valuable in the analysis of national laws is the fact that the author does not solely focus on existing or proposed solutions; he also tries – in compliance with the title of the book – to refer these considerations to the enforcement of competition law, sometimes widening his conclusions to consumer protection (for example Part. II. Subchapter 3.1. Specific based approach – consumers and competition protection, p. 347–350). Such references to competition/antitrust law can be easily found in the French part of the book (Part II. Chapter 2.1. French ways towards group litigation – how to find a proper equilibrium) and in the European part (Part II. Chapter 3. The European Way Towards a Common Approach to Collective Redress – How to Achieve the Goal?). I am slightly disappointed that in the Polish part (Part II. Chapter 2.11. Polish solution on collective redress – a step towards protection of individuals against competition law violations) references to competition law cases are so modest, they are also not identifiable in the list of content, even if the case law in this area is non-existent. However, it must be underlined that the Polish chapter on collective redress is more empirical by its nature because it presents cases judged by Polish courts (see Part II.
Chapter 2.II.3.1.1. and 3.1.2.). The author is quite enthusiastic about the solutions found in Polish legislation, which in his view can be – after some improvements – an example to follow for future European legislation on collective redress. Personally I do not share his high opinion about the Polish rules on collective redress since I think that this law failed the ‘efficiency test’. Still, Maciej Gac seems to be aware of the weaknesses of the Polish solutions. In his proposals for EU legalisation (Part II. Chapter 3), he tries to eliminate the imprecision of the Polish law that negatively influences the efficiency of the regulation.

The book written by Maciej Gac is certainly worth recommending and not only for antitrust lawyers as the title may suggest. Regarding the issue of group litigations, the book goes far beyond competition law. The author presents broad, overall characteristics of national legislations on collective redress in Poland and France, where competition law is only an exemplary field where the application of national rules can be verified and checked. Undoubtedly, the real value of the book is the unequivocal and well-founded assessments of national solutions on collective redress expressed by the author. While reading that ‘All these arguments allow us to claim that the recent French solution in the area of group litigation has limited chances of success’ (page 362) or ‘As the Polish experience with group litigation shows, due to the lack of greater precision in the formulation of the group litigation mechanism (....), the individuals are still reluctant to refer to this method of law enforcement’ (page 430), readers are convinced that they are facing the mature opinions of a person who conducted a very deep research project into the topic and so his opinions can be relied on.

The book is well-structured and accompanied by a sufficient selection of sources (the literature on group litigations is vast so it is easy to get lost in the multitude of materials). It is written in an accessible language that can be easily understood even by non-lawyers or lawyers not well-acquainted with competition law or group litigations.

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The Book entitled ‘Implementation of the EU Damages Directive in Central and Eastern European Countries’, edited by Professor Anna Piszcz, was published in Warsaw, Poland in 2017. The publication date of this book was perfectly chosen, bearing in mind that Directive 2014/104/EU on antitrust damages actions (hereinafter, the Damages Directive) was signed into law on 26 November 2014 and published in the Official Journal of the European Union on 5 December 2014. All Member States were obliged to implement the Directive by 27 December 2016. However, this was not an easy task since it involved a whole package of new legal provisions aimed at increasing the amount of private enforcement.

The Directive introduced a package of novelties to substantive and procedural law. In some Member States, discussions arose whether it is enough to only amend their Laws on Competition; others thought that the Civil Code and Civil Procedure Code should also be amended. Therefore, the Damage Directive was initially a big challenge for national legislators, while the implemented provisions may now become a challenge for judges and attorneys.

The book was prepared based on national reports written by legal experts from countries of Central and Eastern Europe (CEE countries). In the national reports, authors shared their national experiences on the topic of private enforcement of competition law as well as proposals concerning the implementation of the Damages Directive. The editor aimed to ensure uniformity of the national reports and asked the national experts to address a number of specific, most important questions related to the implementation of the Directive. The clear and recurring structure of the national reports helps to understand specific peculiarities of separate Member States in a comparative way.

All the national reports aimed to shed light on the history, manner and scope of the implementation of the Damages Directive in the specific Member States. This approach makes it possible to compare different national laws and to arrive at critical proposals.

The Damages Directive raises especially interesting legal and practical challenges in the areas of: the quantification of damages, passing-on of overcharges, joint and several liability, consensual dispute resolution and others. There is a lack of case law,
or even of detailed literature, in relation to the above-mentioned topics. Therefore, comprehensive and comparative legal research concerning the novelties of the Damages Directive adds a lot of value to this book.

We can be sure that the present book will not be forgotten at the libraries. The book should assist practitioners, scholars and students in understanding competition law and should help solve the challenges of private enforcement cases.

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First ‘Gaetano Filangieri’ Conference on Freedom of Commerce
‘Recent developments in EU Competition Law’ Naples, 8–9 May 2018

On 8–9 May 2018 the University of Naples ‘Federico II’ (Università degli Studi di Napoli ‘Federico II’) hosted the international conference ‘Recent developments in EU Competition Law’. The event, which gathered eleven speakers from eight different European universities and over fifty participants, marked the beginning of the ‘Gaetano Filangieri’ conference series, devoted to the late 18th Century Neapolitan jurist who, in his treatise The Science of Legislation (1780–1791), developed some pioneering ideas on monopolies, regulated professions, competition on the merits, and freedom of commerce.

The conference was opened by three representatives of the University of Naples ‘Federico II’: Professor Amedeo Arena, the convenor of the conference, Professor Roberto Mastroianni, Director of the Postgraduate Diploma in EU Law, and Riccardo Guarino, editor-in-chief of the legal periodical ‘Ius in Itinere’.

The introductory part was followed by a keynote speech delivered by Dr Arianna Andreangeli (University of Edinburgh), which focused on the possible impact of Brexit on competition law enforcement. The speaker recalled that competition policy is an exclusive competence of the European Union; hence, prima facie, the transfer of competences back to the national level appears to be significant. The scholar then moved to discuss the foreseeable implications both from a substantive and from a procedural point of view. With respect to the former, the impact of Brexit was not expected to be dramatic, as the substantive interpretation of national competition rules has become largely synchronized with their European counterparts over the past decades. At the same time, the fact that the Court of Justice would no longer be competent to provide interpretative guidance on the application of competition rules in the United Kingdom might have an impact on their further evolution. The UK’s exit from the EU was seen as an even greater challenge when it comes to procedural issues such as mutual recognition of judgments. The speech concluded with a discussion of the different forms of administrative cooperation that could compensate for the Competition and Markets Authority’s withdrawal from the European Competition Network (ECN).

After a brief discussion, Professor Arena opened the next session and invited Professor Maciej Bernatt (University of Warsaw) to present his paper on the independence of national competition authorities (hereinafter: NCAs), due process and judicial review. The speaker began with an observation that NCAs already play...
a role in enforcing EU competition law, yet the scale of their active involvement in doing so differs widely. Attention was then drawn to a proposal for a directive, which was recently submitted by the European Commission with the aim of ‘empowering the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market’.¹ According to Professor Bernatt, while the focus of the proposal remains on the effectiveness of enforcement, it could also affect the independence of NCAs as well as the procedural standing of the parties to the proceedings. In his assessment, the proposed rules on undue dismissals and the resources available to NCAs go in the right direction, but to improve their actual independence further measures are necessary. The speaker then moved to a broader discussion of the guarantees of due process in competition law proceedings, presented the findings of his comparative research devoted to this topic, once again referred to the legislative proposal which is currently on the table in the EU and expressed his views on the role the EU could take in setting standards for this domain.

The analysis of some of the issues that emerged during the first two talks of the day was further advanced by Professor Erzsébet Csatlós (University of Szeged) who assessed the different networks of cooperation between public authorities and enquired whether the ECN could serve as a model for other areas of administrative cooperation. The speaker noted that the EU currently lacks a coherent procedural framework for administrative enforcement, which has traditionally remained a domestic matter. At the same time, due to the importance of public administration in the application of EU law, multiple networks of cooperation have come to exist over time between particular authorities. The networks share several common features, such as their reliance on soft law instruments; however, they also vary substantially as to their functions and level of development. According to the speaker, the European Competition Network is currently the most developed cooperation model and can generally be assessed positively, even though some room for improvement remains. Most notably, to ensure compliance with the principle of the rule of law, networking structures should be based on a basic legal act of a binding nature. More attention should also be devoted to the impact of the instruments adopted within such networks on the individuals concerned.

In the subsequent speech Professor Monika Namysłowska (University of Łódź) presented a paper entitled ‘Unfair competition in the supply chain: the need for EU rules’. The speaker indicated that unfair trading practices in B2B relations are regulated by various legal acts, which use different notions, measures and have diverse application scopes. This raises a question whether there should be a more uniform approach towards regulating business-to-business unfair practices at the EU level. With this in mind, the speaker moved to an analysis of the two legal acts which were recently proposed by the Commission, namely, the proposal for a Directive on unfair trading practices in business-to-business relationships in the food supply chain² and a Directive on promoting fairness and transparency for business users of online

¹ COM(2017) 142 final.
intermediation services\textsuperscript{3}. Professor Namysłowska argued that the provisions on unfair practices in B2B relations are not extensive and the EU lacks comprehensive rules. The proposed Directives may be a step towards filling this gap, however not in the shape of the presented drafts.

Professor Anna Piszcz (University of Białystok) presented the issue of the derogation for small and medium-sized enterprises (hereinafter: SME) from the principle of joint and several liability under the Damages Directive\textsuperscript{4}, mainly from the perspective of CEE Member States. The speaker discussed the legal basis and background for both this principle and derogation. Professor Piszcz indicated that EU Member States approach the SME derogation differently, since the Directive does not provide extensive definitions and provisions. Hence, some requirements for the derogation are ambiguous, for instance, at what time must an undertaking have a SME status to use the defence provided for by the Directive. The scholar also pointed out that the implementing provisions on the extent of liability proved to be a challenge for national legislators. Professor Piszcz noted possible problems related to the enforcement of the Directive, such as the implication of the assessment of how long an undertaking is enjoying the SME status or whether the SME derogation may clash with the protection of a larger undertaking which received immunity.

The last paper in the senior speakers session was delivered by Professor Viktoria Robertson (University of Graz). It was dedicated to consumer welfare in the financial sector understood as banking, insurance and capital markets. The speaker discussed the special protection provided for consumers in those markets in the light of consumer protection law and EU competition law. Consumer welfare is a standard of EU competition law and can be characterized as the economic wellbeing of consumers defined broadly, that is, not on an individual, but on a structural level. Both competition law and financial consumer protection law put emphasis on external factors such as the structure of the market when assessing consumer welfare. However, they differ when it comes to approach; the former is reactive and applies when an alleged infringement already took place; the latter is proactive and includes many preventive measures to improve the market before the law is violated.

The second day of the conference offered junior speakers the possibility to present their on-going work and receive extensive feedback from discussants having expert knowledge in the field. It began with a presentation by Agnieszka Jabłonowska (University of Łódź) who investigated one of the topical issues related to EU competition law in the e-economy, namely the use of the so-called most favoured nation clauses (hereinafter: MFNs) by the operators of online platforms. The speaker first presented this issue from a competition law perspective, drawing on the examples of enforcement actions taken on the basis of Article 101 and 102 TFEU. She then moved

\footnotesize \textsuperscript{3} COM(2018) 238 final.

to assessing the attempts of addressing the issue of MFNs by regulatory measures, and discussed the provisions of the proposed regulation on promoting fairness and transparency for business users of online intermediation services devoted to this topic. The presentation was followed by advice and comments given by Professor Bernatt.

Magdalena Knapp (University of Bialystok) presented subsequently a paper analysing the issue of the liability for anticompetitive conduct of a third party under EU antitrust law. She discussed the concepts of extended liability set forth in relevant judgements and competition law doctrine. She focused on situations where an undertaking’s exposure to liability is a consequence of unlawful conduct of an independent third party which can be defined as a separate legal entity acting on its own behalf and bearing relevant financial and commercial risk in its own name. She noted that the CJEU introduced a test for the attribution of antitrust conduct of an independent service provider, which consists of rebuttable presumptions. The speaker underlined the possible actions that can be undertaken by an entrepreneur to distance himself from the competition law infringement, for instance, modification of compliance procedures. Finally, possible problems related to the discussed issue, such as the assessment of evidence or difficulties with rebutting the presumptions, were described. The presentation was commented on by Professor Victoria Robertson. The discussant pointed to issues that could be further developed.

The next paper was presented by Claudia Massa (University of Naples ‘Federico II’) and referred to punitive damages and the EU Damages Directive. She analysed the definition of punitive damages referring to relevant case law. The speaker emphasized that in most EU Member States punitive damages are considered incompatible with national rules on civil liability, since damages only have a compensatory function. Subsequently, she indicated the possible reasons for excluding punitive damages from the Damages Directive and provided arguments for their introduction into the European legal system. The speaker concluded with a proposal to modify the scope of relevant regulations, for example by allowing national courts to conduct a case-by-case assessment which could result in awarding more compensation to the victims than is possible according to current rules. Professor Piszcz made comments on the presentation and drew attention to other matters that are vital to this topic.

Gabriella Perotto (University of Turin) delivered a presentation on selectivity in fiscal aids. She indicated that fiscal benefits lie at the boundary of Member States and EU competences. The issue of selectivity is crucial since other requirements of Article 107 TFEU are usually fulfilled by Member States. The speaker defined the notion of geographical and material selectivity with a focus on the latter, more controversial type. Gabriella Perotto referred to recent developments in the case law of the Court of Justice [CJEU] and the derogation test developed therein. The test consists of three steps: identifying the correct tax reference framework, assessing the character of the measure, that is, whether it differentiates between undertakings in similar situations, and third, optional step used only if a measure was found selective. She highlighted that the CJEU and the Commission share a common approach to the notion of selectivity which is being extended. She indicated that national tax laws are getting more similar to each other, through backdoor harmonisation. The presentation was
reviewed by Professor Robertson who highlighted matters that need to be analysed in more detail.

Andrea Pezza (University of Naples ‘Federico II’) discussed the issue of the right of fair trial in EU antitrust proceedings. The speaker emphasised the importance of the principle of fair trial in the light of relevant case law and Commission proceedings as well as the binding effect of the principle. In his opinion, the current system adopted by the Commission needs a substantial enhancement. The speaker referred to two main models of proceedings – dualist and monist. It must be noted that Commission proceedings are structured as a monist model. The proposed changes referred to the system adopted in France. Many aspects from this model could be transposed, ensuring at the same time that principles of fair trial are respected. After the presentation, Professor Bernatt shared his thoughts on the issue and pointed to other important matters that the paper could include.

The conference successfully combined the presentations of senior and junior speakers and provided a platform for intense and thought-provoking discussions. At the same time, the diversity of the research topics addressed by particular scholars highlighted an enormous potential for future ‘Gaetano Filangieri’ events. Full versions of some of the papers presented at the 2018 conference are published in this volume of the YARS.

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The 7th International PhD Students’ Conference on Competition Law took place on 10 October 2017 at the Faculty of Law of the University of Bialystok (Poland). The Conference was organized by the Department of Public Economic Law at the Faculty of Law of the University of Bialystok and focused on issues related to private enforcement of competition law as well as State aid. The conference was conducted in English.

The Conference was opened by Professor Anna Piszcz (University of Bialystok) who welcomed the participants and introduced the guests including: Professor Anna Nylund (University of Tromsø The Arctic University of Norway), Professor Amedeo Arena (University of Naples ‘Federico II’) and Professor Raimundas Moisejevas (Mykolas Romeris University, Vilnius). Subsequently, Professor Anna Piszcz presented the main assumptions and scope of the Conference.

The Conference was divided into two parts. In the first one, chaired by Professor Anna Piszcz, the supervisors delivered their papers.

The first presentation entitled *Competition Law and Damages on the Outskirts of the EU: the Norwegian Perspective* was delivered by Professor Anna Nylund. In her speech, she drew attention to issues related to the adaptation of Norwegian law to that of the European Union, emphasizing the fact that Norway is not a Member of the European Union, but only a party to the Agreement on the European Economic Area (EEA Agreement). This means that the way of introducing legal solutions adopted in EU law is different in Norway and requires, each time, amendments to the EEA Agreement. Professor Anna Nylund indicated also that the implementation of substantive EU competition law to Norwegian law is not problematic, because substantive competition law is part of the EEA Agreement. By contrast, the issue of procedural standards is different, since the States that are parties to the EEA Agreement have retained their procedural autonomy. Therefore, due to the fact that 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 (the Damages Directive) contains also procedural rules, their inclusion into the Norwegian legal order is associated with certain challenges. In the last part of the presentation, Professor Anna Nylund pointed out that some of the solutions provided for in the Damages Directive, such as the disclosure of evidence procedure, were provided...
for in Norwegian law already. She indicated that the procedural rules contained in the Damages Directive are very general and do not refer to general norms of civil procedure.

Professor Anna Piszcz spoke next presenting a paper entitled *Competition Law and Damages on the Other Outskirts of the EU: The CEE Perspective*. At the beginning, Professor Anna Piszcz pointed out that despite the harmonisation made as a result of the adoption and implementation of the Damages Directive, there are still discrepancies between national legal orders. As a result, national laws of some countries of the Central and Eastern European (CCE) region provide more attractive solutions for victims who consider pursuing claims resulting from competition law infringements than solutions in force in other countries of this region. She indicated that the private enforcement of competition law in CEE Countries is ineffective. In the later part of the presentation, the speaker focused on searching for the answer to the following question: what distinguishes the legal systems of CEE Countries from States perceived as having most attractive solutions, such as Great Britain or Germany. She mainly focused on differences in the field of the disclosure of evidence, the effect of decisions, competent courts, compensatory collective redress and settlements. At the end, Professor Anna Piszcz expressed the view that the Damages Directive should strengthen the position of those affected by infringements of competition law in CEE Countries. Nevertheless, sole implementation made by way of the ‘copy-and-paste’ method will not be sufficient to increase the efficiency of private enforcement of competition law in CEE Countries. In order to increase efficiency, it is also necessary to deal with challenges left outside the Damages Directive such as institutional design, collective redress and Consumer Dispute Resolution.

Professor Amedeo Arena presented a paper entitled *The Commission’s Decisions on National Tax Rulings before the CJEU: Untangling the Legal Conundrums of a Recent Trend in Fiscal Aids*. In the presentation, he drew attention to the activities undertaken by the European Commission under the programme of combating harmful tax competition, one of which is the analysis of individual tax rulings issued by national authorities in terms of their compliance with EU State aid law. Professor Amedeo Arena focused on the decisions regarding tax rulings addressed to multinational enterprises such as Fiat, Starbucks, Amazon, etc.. In these decisions, the European Commission considered that as a result of the individual tax rulings, national authorities approved an interpretation of their legal provisions that allowed tax avoidance or a significant reduction of the taxable income, which in effect constituted State aid granted contrary to EU State aid law. Professor Amedeo Arena examined the most controversial aspects of these decisions of the European Commission and analysed the possible outcomes of the appeals pending before the Court of Justice of the European Union.

The last paper in the supervisors’ session entitled *Some Experiences with the State Aid Cases in Lithuania* was presented by Professor Raimundas Moisejevas. On the basis of cases related to State aid in Lithuania, the speaker discussed selected issues regarding State aid. Professor Raimundas Moisejevas presented first the case of State aid granted for the construction of connecting infrastructure necessary for the
natural gas transmission system, in order to reduce Lithuania’s dependence on its sole gas supplier, Gazprom (State aid to Klaipėdos Nafta). In this case, the European Commission considered that the Lithuania acted in breach of Article 108(3) TFEU by putting into effect the part of the aid measures which related to the investment. However, the European Commission has decided to consider the aid to be compatible with the internal market, pursuant to Articles 107(3)(c) as regards the investment aid, and pursuant to Article 106(2) TFEU as regards the operating aid. Professor Raimundas Moisejevas pointed out that the practice of the European Commission shows that aid measures supporting the construction of energy infrastructure may be declared compatible directly under Article 107(3)(c) TFEU. That is so if they are necessary and proportionate and if the positive effects for the objective of common interest pursued by the aid outbalance its negative effects on competition and trade. Subsequently, Professor Raimundas Moisejevas presented a case related to the planned granting of State aid to the Lithuanian Shipping Company, which was at that time in a difficult economic situation. Due to the fact that the Competition Council of Lithuania publicly expressed the opinion that this aid could constitute State aid, Lithuanian Shipping Company was ultimately not given any support and it went bankrupt. After that, the speaker discussed a case related to the energy sector in Lithuania. He explained that in accordance with Lithuanian Law on Electricity, the services provided in the energy sector by some companies are regarded as services implementing the public interest and, therefore, they are compensated by a levy, which is distributed between the recipients on the basis of certain criteria. Against this background, a dispute arose initiated by the biggest payers of such levies in Lithuania. One of the issues in this dispute was whether the fulfilment of the requirements of State aid of the entirety of a specific levy scheme should be evaluated or, should the fulfillment of every separate situation be evaluated, when a certain company is supported.

The first session of the Conference concluded with a debate and comments regarding the presentations. The discussion was followed by the second part of the Conference, the students’ session, which was moderated by Professor Anna Nylund.

Claudia Massa (University of Naples ‘Federico II’) delivered a presentation entitled The Disclosure of Evidence under the Antitrust Damages Directive 2014/104/EU. At the beginning, she described the general principles of the Damages Directive, focusing primarily on its objectives. In the following part of the presentation, she discussed in detail issues related to the legal provisions on the disclosure of evidence, as regulated in the Damages Directive. Subsequently, Claudia Massa presented selected judgments of European courts regarding the disclosure of leniency statements and settlement submissions before and after the entry into force of the Damages Directive. At the end, she emphasised that the EU competition law system is focused on public enforcement. This happened as a result not only of the actions of the EU legislator, who prefers public competition law enforcement, but also due to the case law of the Court of Justice of the European Union. The latter has always been cautious and emphasised that the assessment of the admissibility of disclosure of evidence
collected in proceedings conducted by competition authorities should be made on a case-by-case basis.

Paulina Korycińska-Rządca (University of Białystok) spoke next and presented a paper entitled \textit{Penalties for Non-compliance with a Court Order for Disclosure of Evidence: The Perspective of Poland against the Background of the Other CEE Countries}. The speaker indicated that the success of private enforcement of competition law depends on effective mechanisms of collecting evidence, in order to prove the premises of liability for damages resulting for competition law infringements. Recognizing the important role of the disclosure procedure in the development of private enforcement of competition law, the EU legislator imposed on Member States the obligation to establish effective, proportionate and dissuasive sanctions for violations of the disclosure rules. However, the Directive did not indicate the specific types of sanctions to be used. In her presentation, Paulina Korycińska-Rządca briefly spoke of sanctions for non-compliance with a court order for the disclosure of evidence provided for in Polish law; she then compared them with the solutions adopted (or planned) in this regard by other CEE Countries. The speaker concluded that sanctions for non-compliance with a court disclosure order adopted or planned in the CEE Countries differ significantly. The widest divergences exist in the rules empowering the court to introduce pecuniary penalties for non-compliance with a court order for the disclosure of evidence – some countries decided to create severe pecuniary penalties, whereas others decided not to introduce this kind of penalties at all or to set them at an insignificant level. This diversity as to pecuniary penalties leads to the conclusion that the terms ‘effective, proportionate and dissuasive’ used by the Damages Directive have not been understood uniformly in CEE Countries. Paulina Korycińska-Rządca added in conclusion that the effectiveness of the disclosure of evidence would, in the end, depend on the application of these rules by national courts.

Małgorzata Salitra (University of Szczecin) presented a paper entitled \textit{Passing-on of Overcharges: The EU Damages Directive Framework and the Polish Perspective}. In the first part of the presentation, the speaker explained the concept of the ‘passing-on of overcharges’ indicating that it may be used as a ‘sword’ (where an indirect purchaser alleges that it was harmed by an overcharge because of upstream passing-on) or as a ‘shield’ (where a defendant alleges that downstream passing-on by a claimant has reduced the size of the actual harm the latter has suffered). Discussed next were the legal regulations related to the passing-on of overcharges as set out in the Damages Directive. In the last part of the presentation, Małgorzata Salitra described the Polish legal solution regarding the passing-on of overcharges adopted as a result of the transposition of the Damages Directive. She stressed that not all of the provisions of the Damages Directive required implementation as some of them were already in force.

The last paper in this session entitled \textit{State Aid in the Football Sector in the European Union} was presented by Radosław Niwiński (University of Białystok). Radosław Niwiński indicated that sport plays an important role in the European Union, which is manifested, for example, by Article 165 TFEU. He then explained what features certain aid must have in order for it to be seen as State aid. At the same
time, he pointed out that in the sport sector a number of measures taken by Member States may not be considered State aid because the beneficiary does not carry out an economic activity or there is no effect on trade between Member States. In the following part of his speech, Radosław Niwiński described the rules on State aid as set out by Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty. He also discussed selected cases regarding State aid in the sport sector.

The second session of the Conference concluded with a debate, comments and questions addressed to the students regarding their presentations.

The Conference was subsequently closed by Professor Anna Piszcz who assured the audience that this was not the last meeting in the series of international PhD conferences on competition law.

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