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YEARBOOK OF ANTITRUST AND REGULATORY STUDIES
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Editorial foreword

It is our great pleasure to present to you the newest issue of the Yearbook of Antitrust and Regulatory Studies. We are proud that the YARS continues to attract original contributions discussing the developments in Central Europe and beyond.

The issue covers diverse topics of direct relevance for competition law, competition economics and sector-specific regulation. As usually, they concern both substantive and procedural issues. However, one needs to observe that 2019 brought controversial developments on the institutional side. Starting on 1 January 2020, Poland's competition authority (UOKiK) will be responsible for combating payment gridlocks. It will be entitled to establish proceedings and impose fines on firms that failed to pay their contractors on time. While the problems with liquidity of Polish SMEs may indeed exist, it is difficult to see any coherence between the UOKiK's core mission and its new powers. Rather, this is an example of amalgamation of competition authority's mandate, which is counter-productive to its principal role to protect competition and consumers in the public interest. Taking into account the significant scope of the new tasks, and the related increase in budget, there is a risk that the UOKiK's new competences will further weaken its prominence as an independent antitrust enforcer. On a more positive note, it is interesting to observe how the preliminary references sent by courts from Central Europe continue to shape EU competition law. Its most recent example is the Hungarian Kuria's preliminary reference in *Budapest Bank*, C-228/18, concerning the character of interchange fee agreements and the distinction between agreements prohibited by object/by effect.

The issue opens with an article by Krystyna Kowalik-Bańczyk, a judge of the General Court, on the intensity of judicial review of fines imposed by the European Commission for a violation of EU competition rules. The article, by presenting vast case-law, clearly explains what are the limitations of the review by the General Court. The General Court, while it has unlimited jurisdiction as far as fines are concerned, is not empowered to act *ultra petita* or to raise some issues on its own motion, and it does not have a competence to reform the substance of a Commission decision. Andrzej Nałęcz puts forward arguments aimed at demonstrating that freedom of expression of end-users

of Internet access services should be safeguarded when determining the rules of network neutrality in Europe. The article is based on the concept of state positive obligations in the human rights field, developed in the case-law of the European Court of Human Rights. Its analysis leads the author to an important conclusion: the state has a positive obligation to prevent private Internet Service Providers from engaging in practices that violate the freedom of expression of the end-users of their services. Artur Salbert analyses the compatibility of Polish rules regulating the use of electronic communications for direct marketing purposes with EU law. The author reaches the conclusion that Polish law, by providing for the opt-in rule as far as the use of electronic mail for direct marketing purposes of products or services similar to ones previously sold or provided, is contrary to EU regulations, which are based on the opt-out rule. Oleksandr Khlopenko addressees, primarily on the basis of Ukrainian experience, the methods of the implementation of anti-money laundering regulations. The author discusses their long-term effects in developing economies, and, in particular, the restrictive effects they produce for financial inclusion in developing economies. The EU competition rules serve as a point of reference for the author's analysis. Elias Zigah presents, from an interdisciplinary perspective, the challenges faced by West African countries as far as energy security is concerned. The principal challenge is that most of the countries studied do not have a diversified source of natural gas supply. In addition, gas storage facilities are insufficient to safeguard the continuous supply of natural gas. Therefore, disruptions in domestic gas production are likely to adversely affect the natural gas supply security.

The issue contains several contributions analysing the developments in case-law. Judit Firniksz and Borbála Dömötörfy offer a topical analysis of information exchange arrangements in the context of data-driven economy. They analyse to what extent the existing Hungarian case-law informs the competition assessment of information exchange in the digital context. The recent challenges faced by the Hungarian competition authority in successfully proving the anticompetitive character of information exchanges are scrutinized in this respect. Laura Skopowska analyses the Bundeskartellamt's Facebook decision. Her main criticism focuses on the BKA's direct application of the General Data Protection Regulation as a basis for finding a competition law violation. The author argues that assessments related to the GDPR are a task for the data protection authority and not for the competition authority. She argues that the latter should take action only after the infringement of data protection rules is established by the data protection authority. Nora Memeti fills the existing gap in the literature by describing competition law regimes of the Member States of the Gulf Cooperation Council: Qatar, Kuwait, the United Arab Emirates, Oman, Bahrain and Saudi Arabia. After analysing existing

developments, the author argues for a creation of regional competition law system and provides recommendations on how to accomplish this endeavour. Dragan Gajin describes the developments in the field of competition law in Western Balkans (Serbia, Montenegro, Bosnia and Herzegovina, and North Macedonia). The author's analysis suggests that the countries of the region are more focused on merger review than on antitrust enforcement.

The issue concludes with three book reviews and three conference reports.

We would like to thank all who contributed to this issue of YARS. Our special gratitude goes to all peer-reviewers as well as to Claudia Massa, Ewelina D. Sage and Laura Zoboli.

Enjoy reading!

Melbourne and Warsaw, 16 November 2019

Maciej Bernatt
Agata Jurkowska-Gomułka
YARS Volume editors

A R T I C L E S

Intensity of Judicial Review of Fines in EU Competition Law

by

Krystyna Kowalik-Bańczyk*

CONTENTS

Abstract

This article examines the scope of the activism of the General Court while exercising its so called unlimited jurisdiction in antitrust matters. It addresses three main questions: what is the exact scope of unlimited jurisdiction; what should the intensity of control in case of unlimited jurisdiction; and how does the functioning of control in case of unlimited jurisdiction looks in practice (how to readapt or recalculate the amount of fine and, if the court is prone to do this, how to replace the reasoning of the European Commission).

Resumé

Cet article examine l'étendue des activités du Tribunal de l'Union européenne dans le cadre de sa pleine juridiction en matière de droit de la concurrence. Il s'agit d'aborder trois questions principales: quel est la portée exacte de la pleine juridiction exercée par le Tribunal? Quelle devrait être l'intensité de son contrôle exercé dans le cadre de cette pleine juridiction? Et de quelle manière ce

* Krystyna Kowalik-Bańczyk is an Associate Professor at the Institute of Law Studies, Polish Academy of Sciences, LLM MES (Bruges), DEA (Toulouse). Since September 2016 she is a judge of the General Court of the European Union. ORCID: 0000-0001-7007-3203. Article received: 29 July 2019, accepted: 20 September 2019.

contrôle fonctionne-t-il en pratique (comment réadapter ou recalculer le montant de l'amende et, le cas échéant, remplacer le raisonnement de la Commission européenne)?

Key words: unlimited jurisdiction; scope of judicial control; antitrust sanctions; ne ultra petita; measures of public order.

JEL: K21; K42

I. Introduction

Jurisdiction of the General Court of the European Union covers different domains and has a variable character. Considering the statistics[1], the General Court is first and foremost an administrative court of the European Union, controlling, under Article 263 of the Treaty on the Functioning of the European Union (TFEU)[2], the legality of acts issued by the institutions, organs and other bodies of the European Union. The usual scope of control consists in a legality control, where the General Court analyses the pleas raised by the parties as to the legality of the measure in question[3]. There are however,

[1] Cf the numbers of cases indicated in the Annual Report of 2018 as brought for the General Court is 1009, out of which 44 concern competition, 79 concern state aids, 349 are direct actions in intellectual property matters and 311 are direct actions of all other kinds. Other types of actions are not falling into the category of administrative jurisdiction.

[2] Treaty on the Functioning of the European Union, OJ C 202, 07.06.2016.

[3] CJ judgment of 11 September 2014, Case C-67/13 P *Groupement des cartes bancaires (CB) v European Commission*, ECLI:EU:C:2014:2204, paras. 44–46: ' 44. (…) it is apparent from the EU case-law that, when an action is brought before it under Article 263 TFEU for the annulment of a decision applying Article 81(1) EC, the General Court must generally undertake, on the basis of the evidence adduced by the applicant in support of the pleas in law put forward, a full review of whether or not the conditions for applying that provision are met (see, to that effect, CJEU judgments: of 11 July 1985, Case 42/84 *Remia and Others* v *Commission*, ECLI:EU:C:1985:327, para. 34; of 8 December 2011, Case C-386/10 P *Chalkor* v *Commission* (ECLI:EU:C:2011:815), paras 54 and 62; and of 6 December 2012, Case C-199/11 *Otis and Others*, ECLI:EU:C:2012:684, para. 59). The General Court must also establish that the Commission has stated reasons for its decision (see, to that effect, judgments in Case C-386/10 P *Chalkor* v *Commission*, para. 61 and the case-law cited, and Case C-199/11 *Otis and Others*, para. 60). Para 45: "In carrying out such a review, the General Court cannot use the margin of assessment which the Commission enjoys by virtue of the role assigned to it in relation to competition policy by the EU and FEU Treaties, as a basis for dispensing with an in-depth review of the law and of the facts (see, to that effect, judgments in C-386/10 P *Chalkor* v *Commission*, para. 62, and *Otis and Others*, para. 61). 46. In particular, although the Commission has, in accordance with that role, a margin of assessment with regard to economic matters, in particular in the context of complex economic assessments, that does not mean, as is

in this administrative jurisdiction, some cases of extended scope of control. Those specific cases cover: first, the control of decisions issued by the Board of Appeal of the Office of the Intellectual Property of the European Union (EUIPO), where the Court exercises a kind of 'broader' control[4], and, second, **the control of penalties imposed by the institutions of the European Union, where the General Court has the so-called unlimited jurisdiction (Article 261 TFEU)**. According to some (Giacobbo-Peyronnel and Perillo, 2017), the third type of cases of an extended jurisdiction has emerged as a result of the jurisprudence of the Court of Justice, namely the jurisprudence on civil service, where no legal basis exists for this broader jurisdiction but the Court pronounces itself on the pecuniary obligations[5].

The notion of unlimited jurisdiction has not been defined in the treaties. Its origin gets back to French administrative law where the '*recours de pleine juridiction'* is **opposed to the narrower control of legality of administrative decisions**[6].

Without unlimited jurisdiction being defined, it still appears in the Treaty on the Functioning of the European Union. The notion of unlimited jurisdiction is used in Article 261 TFEU, which provides: 'Regulations adopted jointly by the European Parliament and the Council, and by the Council, pursuant to the provisions of the Treaties, may give the Court of Justice of the European Union unlimited jurisdiction with regard to the penalties provided for in such

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apparent from the preceding paragraph, that the General Court must refrain from reviewing the Commission's legal classification of information of an economic nature. Although the General Court must not substitute its own economic assessment for that of the Commission, which is institutionally responsible for making those assessments (see, to that effect, in particular, judgments: of 10 July 2008, Case C-413/06 P *Bertelsmann and Sony Corporation of America* v *Impala* (ECLI:EU:C:2008:392), para. 145, and of 24 January 2013, Case C-73/11 P *Frucona Košice* v *Commission*, ECLI:EU:C:2013:32, para. 89 and the case-law cited), it is apparent from now well-settled case-law that not only must the EU judicature establish, among other things, whether the evidence relied on is factually accurate, reliable and consistent but also whether that evidence contains all the relevant information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it (see, to that effect, in particular, judgments in C-386/10 P *Chalkor* v *Commission*, para. 54 and the case-law cited, and Case C-199/11 *Otis and Others*, para. 59).'

[4] Cf Art. 72, para. 3 of Regulation (EU) 2017/1001 and Art. 61, para 3 of Regulation (CE) 6/2002. But the scope of this review is interpreted in a very narrow way by the CJEU: judgment of 5 July 2011, Case C-263/09 P, *Edwin/OHMI*, ECLI:EU:C:2011:452, paras. 71 and 72 or judgment of 1 February 2018, Case T-265/17 *ExpressVPN/EUIPO (EXPRESSVPN)*, ECLI:EU:C:2018:79.

[5] ECJ judgement of 16 December 1960, Case 44/59 *Fiddelaar v European Commission*, Rec. 1077, 1093, ECLI:EU:C:1960:47; ECJ judgment of 5 June 1980, Case 24/79 *Oberthür v European Commission*, ECLI:EU:C:1981:207, paras 13 to 15.

[6] For a broad explanation cf Chapus, 2006.

regulations'[7]. When based on Article 261 TFEU, unlimited jurisdiction is exercised on the basis of the following provisions of EU Regulations:

- Article 5 of Regulation 2532/98[8] concerning the powers of the European Central Bank to impose sanctions
- Article 31 of Regulation 1/2003[9] on the implementation of the rules on competition
- Article 16 of Regulation 139/2004[10] on the control of concentrations between undertakings
- Article 84 of Regulation 2018/1139[11] on common rules in the field of civil aviation and establishing a European Aviation Safety Agency
- Article 15 of Regulation 80/2009[12] on a Code of Conduct for computerised reservation systems.

The most prominent case of unlimited jurisdiction is provided in antitrust law (Bernardeau and Christienne, Brussels 2013; Vesterdorf, 2009; Arabardijev, 2012, p. 383–402; Jaeger, 2011; Bosco, 2014)[13]. There the judicial review comprises two very distinct aspects: review of legality and review of the amount of the fines imposed by the Commission. The implications for the General Court are very different, in terms mainly of its **possible activism**. It still remains an open question if the General Court is to be very active to use its unlimited jurisdiction. In particular, it is not clear if it is to use it **towards the sanction only** or towards the whole mental process leading to the imposition of a sanction – in

[7] Similar provision is contained in Art. 144 of Euroatom Treaty, Treaty establishing the European Atomic Energy Community, OJ C 203, 07.06.2016.

[8] Council Regulation (EC) No 2532/98 of 23 November 1998 concerning the powers of the European Central Bank to impose sanctions, OJ L 318, 27.11.1998, p. 4–7.

[9] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (Text with EEA relevance), OJ L 1, 04.01.2003, p. 1–25.

[10] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) (Text with EEA relevance), OJ L 24, 29.01.2004, p. 1–22.

[11] Regulation (EU) 2018/1139 of the European Parliament and of the Council of 4 July 2018 on common rules in the field of civil aviation and establishing a European Union Aviation Safety Agency, and amending Regulations (EC) No 2111/2005, (EC) No 1008/2008, (EU) No 996/2010, (EU) No 376/2014 and Directives 2014/30/EU and 2014/53/EU of the European Parliament and of the Council, and repealing Regulations (EC) No 552/2004 and (EC) No 216/2008 of the European Parliament and of the Council and Council Regulation (EEC) No 3922/91 (Text with EEA relevance.), OJ L 212, 22.08.2018, p. 1–122.

[12] Regulation (EC) No 80/2009 of the European Parliament and of the Council of 14 January 2009 on a Code of Conduct for computerized reservation systems and repealing Council Regulation (EEC) No 2299/89 (Text with EEA relevance), OJ L 35, 04.02.2009, p. 47–55

[13] It might be explained by the level of fines imposed. In 2017 Google was imposed a landmark €4.34 billion fine, In 2014 the highest fine was of €1.69 billion, in 2013 €1.88 billion, in 2012 – €1.88 billion, in 2011 – €614 million, in 2010 – €2.87 billion.

the second scenario would it not be held to be 'over-active' and trespass the limits of its action imposed by the will of the parties? In principle, unlimited jurisdiction implies a transfer of powers, because the General Court replaces the Commission in its reasoning. It can 'step in the shoes' of the Commission in many different respects. The General Court can rely on new evidence and rely on facts post-dating the decision[14]. Despite those precisions, confirmed by the jurisprudence as to the scope of the activism of the General Court while exercising its unlimited jurisdiction, there are at least **three questions** that still raise doubts and will be addressed by this text: 1) what is the **exact scope** of unlimited jurisdiction; 2) what is the **intensity of control** in case of unlimited jurisdiction; and 3) what is the **functioning of control** in case of unlimited jurisdiction (how to readapt or recalculate the amount of fine and, is the court prone to do this, replacing the reasoning of the European Commission).

[14] This is in contrast with the jurisprudence existing in other domains than antitrust. For instance, for trade mark litigation: judgment of 13 March 2007, C-29/05 P *OHMI v Kaul*, ECLI:EU:C:2007:162, paras. 53 to 54: '53. It follows, in particular, from that provision that the Court of First Instance may annul or alter a decision against which an action has been brought only if, at the time the decision was adopted, it was vitiated by one of those grounds for annulment or alteration. The Court of First Instance may not annul or alter that decision on grounds which come into existence subsequent to its adoption (Case C-416/04 P *Sunrider* v *OHIM* [2006] ECR I-4237, paragraphs 54 and 55). 54. It is also apparent from that provision that, as found by the Court of First Instance in a correct and consistent manner, facts not submitted by the parties before the departments of OHIM cannot be submitted at the stage of the appeal brought before that Community court. The Court of First Instance is called upon to assess the legality of the decision of the Board of Appeal by reviewing the application of Community law made by that board, particularly in the light of facts which were submitted to the latter (see, to that effect, Case C-214/05 P *Rossi* v *OHIM* [2006] ECR I-7057, paragraph 50). By contrast, that Court cannot carry out such a review by taking into account matters of fact newly produced before it." But in competition law the position of the Court is more open: cf judgment of 1 July 2010, Knauf Gips c. v Commission, C-407/08 P, points 89 to 91: 89. In that regard, as the appellant correctly argues as regards the application of Articles 81 EC and 82 EC, there is no requirement under the law of the European Union that the addressee of the statement of objections must challenge its various matters of fact or law during the administrative procedure, if it is not to be barred from doing so later at the stage of judicial proceedings. 90. Although an undertaking's express or implicit acknowledgement of matters of fact or of law during the administrative procedure before the Commission may constitute additional evidence when determining whether an action is well founded, it cannot restrict the actual exercise of a natural or legal person's right to bring proceedings before the General Court under the fourth paragraph of Article 263 TFEU. 91. In the absence of a specific legal basis, such a restriction is contrary to the fundamental principles of the rule of law and of respect for the rights of the defence. Moreover, the rights to an effective remedy and of access to an impartial tribunal are guaranteed by Article 47 of the Charter of Fundamental Rights of the European Union which, under the first subparagraph of Article 6(1) TEU, has the same legal value as the Treaties. Under Article 52(1) of that charter, any limitation on the exercise of the rights and freedoms recognized by the charter must be provided for by law.'

Before dwelling on those three questions, one has to contrast the scope of this control with the requirements of the European Court of Human Rights on due process and access to court. In cases where penalties are imposed, there is a necessity **to compare the notion of unlimited jurisdiction (existing in EU law) with the notion of full jurisdiction**, used by the ECtHR. In the jurisprudence of the ECtHR, in order to guarantee full access to justice in cases where penalties are imposed by administrative bodies different than the courts[15], there is a requirement that such decisions should be subject to review by a court having 'full jurisdiction'[16]. **In this context, it is not enough that the court in question has jurisdiction to judge the merits of the case[17]. Control limited to checking the margin of appreciation is not corresponding to this requirement either[18]. Full jurisdiction means that the court should be able to adjudicate fully both on questions of facts and of law**. If it cannot assess the circumstances of the imposition of the sanction in question, or to assess its proportionality, there is no full jurisdiction in place[19].

This initial position of the ECtHR seemed not very favorable for the level of control exercised by the General Court. It has however been nuanced because of the administrative character of the matter in question[20]. The ECtHR admits that administrative courts have limited jurisdiction as to the assessment of facts stated by the administrative organs. If an administrative decision is issued by an administrative organ in 'quasi-judicial' proceedings, with guarantees stemming from Article 6 ECHR, then a limited jurisdiction of the court should be accepted[21], unless the matter in question is in fact a criminal matter[22]. The court exercising full jurisdiction has, according to the ECtHR, the right to change all statements, both as to the facts and to the law, upon which the administrative organ adjudicated, if they are covered by the pleas of the parties. In the *Menarini* case (Bombois, 2011)[23], the ECtHR has indirectly confirmed

[15] In EU law there is no problem with the fact that it is the Commission and not the Court that is imposing a sanction, cf judgment of 18 July 2013, Case C-501/11 P *Schindler Holding Ltd and Others v European Commission*, ECLI:EU:C:2013:522.

[16] *Schmautzer v Austria*, app no 15523/89, para 36; *Kyprianou v Cyprus*, paras. 43–46.

[17] *Le Compte, Van Leuven and De Meyere*, app no 6878/75; 7238/75, para. 51; *Zumtobel v Austria*, app no 12235/86, para. 29; *Umlauft v Austria*, app no 15527/89, para. 37; *Van Kück v Germany*, app no 35968/97, para. 48; *Beneficia Cappella Paolini v San Marino*, app no 40786/98, paras. 28–29.

[18] *Obermeier v Austria*, app no 11761/85, para. 70.

[19] *Le Compte, Van Leuven and De Meyere*, app no 6878/75, 7238/75, para. 51; *Silevester's Horeca Service v Belgium*, app no 47650/99, para. 28.

[20] *Potocka v Poland*, app no 33776/96, paras. 52–59.

[21] *Bryan v UK*, app no 19178/91, paras. 45–47; *Potocka v Poland*, app no 33776/96, para. 53; *Menarini Diagnostics S.R.L. v Italy*, app no 43509/08, para. 59.

[22] *Schmautzer v Austria*, app no 15523/89, para. 36.

[23] *Menarini Diagnostics S.R.L. v Italy*, app no 43509/08, para. 67.

that the level of control exercised by the General Court as to the penalties imposed by the European Commission is in line with the requirements of Article 6 ECHR.

II. Scope of unlimited jurisdiction

Unlimited jurisdiction **is, by definition, limited as to its scope**, as it only concerns the **imposition of financial sanctions** that, with some reservations, might be compared to penal sanctions[24]. However, there are at least two further reasons to consider that the notion of unlimited jurisdiction is, in fact, quite limited.

The first reason concerns the lack of autonomy of unlimited jurisdiction. Usually applicants claim to control the legality of decisions[25] and, at the same time, ask for the exercise of unlimited jurisdiction as to the sanctions imposed by such decisions. This raises the question whether Article 261 constitutes a separate legal basis for judicial control or if it can be used autonomously. According to CJEU, there is a link between Article 263 (control of legality) and Article 261, and this second provision is only additional, extending the jurisdiction of EU judges. According to case-law, there is no autonomous, separate legal basis to introduce a direct action under Article 261 TFEU (Barbier de la Serre, 2015, p. 76–77)[26]. If there is no autonomous action to invite the Court to adjudicate upon sanctions under Article 261 TFEU, the control is always linked with the legality control, exercised towards a decision that has been put in question under Article 263 TFEU. Unlimited jurisdiction can only be exercised if there is a proceeding under Article 263 TFEU. Still, once the proceeding is open under Article 263 TFEU, unlimited jurisdiction can be exercised by the Court even if no illegality is stated[27] (Clausen, 2018,

[24] Cf judgment of 10 April 2014, Cases C-231/11 P to C-233/11 P *Commission v Siemens Osterreich*, ECLI:EU:C:2014:256, para. 75, where it is stated that the competence of the Court under unlimited jurisdiction covers only the questions of sanctions.

[25] The usual judicial control of decisions issued by the institutions, bodies and offices of the UE (mainly: the European Commission) looks like the classic control of administrative decisions exercised by administrative courts. According to Art. 263 TFEU, there are four reasons for annulling an act: 1) lack of competence, 2) infringement of an essential procedural requirement, 3) infringement of the Treaties or of any rule of law relating to their application, or 4) misuse of powers.

[26] Order of 9 November 2004, Case T-252/03 *FNICGV v European Commission*, ECLI:EU:T:2004:326, para. 22.

[27] Cf judgment of 15 October 2002, Case C-238/99 P *Limburgse Vinyl Maatschappij v European* Commission, ECLI:EU:C:2002:582, para. 692; judgment of 3 September 2009, Case

Bruylant, p. 343, 344–345 ; Wahl, 2015, p. 727–740; Expert and Poullet, 2017, p. 545–592). This possibility of using Article 261 even if the decision on the merits seems legal has been confirmed by EU Courts[28].

When claims based on Article 261 are introduced together with the pleading on the legality of the measure in question, this raises the question of the scope of jurisdiction of the General Court on the pleas raised and the level of sanctions[29]. **The General Court can, under Article 261 TFEU, control every infringement leading to a sanction and every sanction itself**[30]. It can: annul the sanction as such[31], it can even increase the sanction despite the plea[32], or it can follow the suggestions of the Commission to increase the sanction[33]. According to some judgments, the control exercised by the Court under Article 261 TFEU can cover the infringement of the law, equity and the statement of facts. But in principle, the exercised control should be used **mainly to verify if the principle of proportionality** has not been **infringed**[34].

The second reason for stating that unlimited jurisdiction has its limitations is linked with the scope of the control exercised by the Court in the context of double legal basis for introducing the action in front of the General Court. If the control of Article 261 is always accompanied by the control of legality under 263, there might be a doubt if unlimited jurisdiction only covers the setting of the fine or the whole decision. In addition to the doubts of this control, in some areas, such as competition law or commercial policy, EU institutions

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C-534/07 P *Prym et Prym Consumer v European Commission*, ECLI:EU:C:2009:505, para. 89.

[28] Judgment of 8 February 2007, Case C-3/06 P, *Groupe Danone v European Commission*, ECLI:EU:C:2007:88, paras. 53–54, 60–61; jugdment of 8 July 2008, Case T-53/03 *BPB v European Commission (Plasterboard)*, ECLI:EU:T:2008:254, paras. 478–483; judgment of 8 July 2008, Case T-54/03, *Lafarge v European Commission (Plasterboard)*, ECLI:EU:T:2008:255, para. 775; judgement of 6 May 2009, Case T-122/04 *Outokumpu and Luvata v European Commission (Copper Industrial Tubes)*, ECLI:EU:T:2009:141, para. 66; jugment of 6 May 2009, Case T-127/04, *KME Germany v European Commission*, ECLI:EU:T:2009:142, para. 121; judgment of 19 May 2010, Case T-21/05 *Chalkor v European Commission*, ECLI:EU:T:2010:205, para. 113.

[29] Judgment of 8 October 2008, Case T-69/04, *Schunk v European Commission*, ECLI:EU:T:2008:415, para. 246.

[30] Judgment of 3 March 2011, Cases T-117/07 and T-121/07 *Areva v European Commission*, ECR 2011 II-00633, para. 227.

[31] Judgment of 8 February 2007, Case C-3/06 P *Groupe Danone v European Commission*, ECLI:EU:C:2007:88, para. 61; judgment of 30 September 2009, Case T-161/05 *Hoechst GmbH v European Commission*, ECLI:EU:T:2009:366, para. 101.

[32] Judgment of 8 February 2007, Case C-3/06 P *Groupe Danone v European Commission*, ECLI:EU:C:2007:88, paras. 61–62; judgment of 14 May 1998, Case T-348/94 *Enso Espanola*, ECLI:EU:T:1998:102.

[33] Case T-69/04 *Schunk v European Commission*, para. 245.

[34] Case T-348/94 *Enso Espanola*, para. 64.

enjoy a broad discretion by reason of the complexity of the economic, political and legal situations which they have to examine[35]. In those cases, judicial review (of legality) must sometimes be limited to verifying whether relevant procedural rules have been complied with, whether the facts on which the contested choice is based have been accurately stated, and whether there has been manifest error[36] in the appraisal of those facts or misuse of powers[37]. However, even in cases where the organ issuing a decision in question has a large margin of discretion with regard to complex economic matters, the General Court is not to refrain from reviewing the interpretation of information of an economic nature. The EU judicature must, among other things, not only establish whether the evidence put forward is factually accurate, reliable and consistent, but must also determine whether that evidence contains all the relevant data that must be taken into consideration in appraising a complex situation, and whether it is capable of substantiating the conclusions drawn from it[38].

In order to define the scope of judicial control under Article 261 TFEU, one has to determine whether the control should cover the elements of the sanction only, or the totality of elements exposed in the decision in question. Should it be this first scenario, eventual elements of the sanction could be those that influence the level of the sanction: gravity, duration, mitigating as well as all possible aggravating circumstances. In the case of the second scenario, the elements of the decision – the legal qualification or assessment of the infringement in question should also be controlled.

Constructing Article 263 TFEU, the Court of Justice stated, in C-295/12 P *Telefónica et Telefónica de España v. Commission*[39] that: '53. (…) it is established case-law that the review of legality provided for in Article 263 TFEU involves review by the European Union judicature, in respect of both the law and the facts, of the arguments relied on by applicants against the contested decision, which means that it has the power to assess the evidence, annul

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[35] Judgment of 11 February 2010, Case C-373/08 *Hoesch Metals and Alloys*, ECLI:EU:C:2010:68, para. 61.

[36] This notion of itself raises much critique: according to Craig, 2012: 'the repeated articulation of manifest error conceals more than it reveals', which could be interpreted in a way that sometimes there is human will to control something and sometimes not. In a similar vein, according to Castillo de la Torre and Fournier, 2017 (p. 301): 'manifest is whatever the judges consider to be manifest'.

[37] Judgment of 11 February 2010, Case C-373/08 *Hoesch Metals and Alloys*, ECLI:EU:C:2010:68, para. 62.

[38] Case C-199/11 *Otis and Others v European Commission*, para. 59; judgment of 15 February 2005, Case C-341/05 *Commission* v *Tetra Laval*, ECLI:EU:C:2005:88, para. 39; judgment of 19 May 2010, Case T-21/05 *Chalkor v European Commission*, ECLI:EU:T:2010:205, para. 54.

[39] Judgment of 10 July 2014, C-295/12 P *Telefonica et Telefonica de España*, ECLI:EU:C:2014:2062.

the decision [*and – but I will keep it aside for now] – **to alter the amount of the fine***[40]'.

In two relatively recent cases: C-389/10 P *KME Germany v Commission* and C-603/13 P *Galp Energia España* (Martinez-Lage, 2016, p. 608–610; Nikolic, 2012, p. 583–588), the Court of Justice made it clear that unlimited jurisdiction only covers the setting of the fine and not the whole assessment of the circumstances leading to the decision in question. The opinion of the Court of Justice expressed in *KME* and *Galp Energa*[41] *seems to clearly state that only the sanction as such should be considered. In the case T-455/14 of 18 July 2018 Pirelli &C v European Commission*, the General Court stated that it can not only change the level of the fine but also diversify the ways of payment and the whole discussion on the imposition of the fine[42].

Even if only the sanction is to be covered by unlimited jurisdiction, several issues remain unclear as to the scope of the exercised control. How and if should the Court consider the level of the sanction, its gravity, its duration, as well as its mitigating and aggravating circumstances? Should it take into consideration the fact that we face one or a series of infringements? Should it always be linked with the annulment of the decision in question? In *Prym*, the Court expressed an opinion that unlimited jurisdiction allows the Court to vary the measure without even annulling the decision – by taking into account all of the factual circumstances. In cases like *Arkema France* or *Telefonica*, the Commission was not active to question such factual circumstances, so the Court of Justice stated that it is not for the Court to fill this gap. The Court might be replacing the Commission in its reasoning as for the construction of the sanction, but it cannot replace its actions or omissions. Therefore, unlimited jurisdiction cannot be perceived as a case of a complete transfer of powers from the European Commission to the General Court. On the other hand, there is no prohibition of *reformationis in peius*, that we will address broader below. However, this lack of formal prohibition should not be an indication that any increase in the fine should be possible. If unlimited jurisdiction is to be perceived in light of its objectives, which include the protective function of this jurisdiction (Clausen, 2018, p. 351), a too broad interpretation of the notion of unlimited jurisdiction might introduce an element of insecurity to the parties of the proceeding taking place in front of the General Court.

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[40] Cf judgment of 18 July 2013, Case C-501/11 P *Schindler Holding Ltd and Others v European Commission*, ECLI:EU:C:2013:522, para. 38.

[41] Judgment of 16 January 2016, Case C-603/13 P *Galp Energia Espana v European Commission*, ECLI:EU:C:2016:38, para. 76; judgment of 6 May 2009, Case T-127/04 *KME Germany v European Commission*, ECLI:EU:T:2009:142, para. 120.

[42] Judgment of 18 July 2018, Case T-455/14 *Pirelli &C v European Commission*, ECLI:EU:T:2018:450, para. 147.

III. Intensity of control in case of unlimited jurisdiction

The issue of the scope of unlimited jurisdiction can also be analysed from the perspective of the question 'how far can the Court go'. Thus, the first issue that needs to be clarified is whether the exercise of unlimited jurisdiction can occur only within the plea or can it be exercised by the Court *ex officio.* This second possibility – that the Court raises the issues of unlimited jurisdiction *ex officio* – should be admissible only if we consider that it forms an element of the public order[43]. This is a very delicate question, followed by other doubts: is the question of proportionality of the fine a question of public order[44]? Should there be a special justification for the gravity of the sanction in this respect or otherwise would the Court be free to impose its vision on the parties, regardless of their opinions? It seems that as the very notion of unlimited jurisdiction is an exception to judicial deference, the additional referral to measures of public policy (or order) should be avoided (Clausen, 2018, p. 382). If we exclude the possibility of using unlimited jurisdiction *ex officio*, that would limit the court to only follow the critique expressed in this respect in the particular pleas, in a given case. So the only 'initialising factor' would be a plea, and the court can only act if it is asked, unless we admit that there might be a public order argument, in favour of broader competences for the court. Some authors are of the opinion that any control of fines could not be a control led *ex officio* (Clausen, 2018, p. 375)[45]. They draw this conclusion from the recent judgments of the Court of Justice[46], where it was stated: 'Ensuite, il résulte d'une jurisprudence constante de la Cour que la procédure suivie devant les juridictions de l'Union est contradictoire. À l'exception des moyens d'ordre public, que le juge est tenu de soulever d'office, telle l'absence de motivation de la décision attaquée, c'est à la partie requérante qu'il appartient de soulever des moyens contre cette dernière et d'apporter des éléments de

[43] Some authors argue that it seems confirmed by the following judgments: judgment of 8 December 2011, C-386/10 P *Chalkor v European Commission*, paras. 64 and 70; judgment of 8 December 2011, C-389/10 P *KME Germany v European Commission*, para. 131; judgment of 6 May 2009, Case T-127/04 *KME Germany v European Commission*, ECLI:EU:T:2009:142, para. 104. Cf Clausen, 2018, p. 336.

[44] Cf conclusions of Advocate General Bot of 22 November 2012, Case C-89/11 *E.ON Energie v European Commission*, para. 115.

[45] This author considers that the jurisprudence on this issue has fallen into desuetude.

[46] Judgment of 16 February 2017, Case C-90/15 P *Hansen & Rosenthal et H&R Wax Company Vertrieb v European Commission*, ECLI:EU:C:2017:123, para. 25; judgment of 16 February 2017, Case C-94/15 P *Tudapetrol Mineralölerzeugnisse Nils Hanssen v European Commission*, ECLI:EU:C:2017:124, para. 22; judgment of 16 February 2017, Case C-95/15 P *H&R ChemPharm v European Commission*, ECLI:EU:C:2017:125, para. 86.

preuve à l'appui de ces moyens'[47]. The only exception to this position could be, according to the same author, a situation where the Court states an illegality and raises it *ex officio* as a public policy measure (Clausen, 2018, p. 375). Still, those 'public policy measures' seem to be a 'ghost' or an 'empty shell' without any content, because they have never been invoked in a concrete case in the jurisprudence of the General Court (Clausen, 2018, p. 379)[48]. The only possible measure of public order seems a possible obligation to align (but only in a positive way) the fines of mother and daughter companies. On the other hand, the assessment of a fine by the Court is not excluded in case of the legality of the decision. The jurisprudence has admitted such examples, where the pleas based on illegality were rejected, and the fine was still subject to reassessment of the Court[49]. It is, however, subject to the free choice of the Court whether to exercise this control, and in this sense, it is different from the *ex officio* application of public policy measures (which are obligatory in nature, once the Court states the existence of such a measure) (Clausen, 2018, p. 399). In any case, the use of unlimited jurisdiction in favor of one of the parties should not constitute a problem (Barbier de la Serre, 2007, p. 85; Clausen, 2018, Bruylant, p. 403–404)[50]. It is rather the possibility to increase the sanction that causes some concerns as to the principle *ne ultra petita.* In particular, the Court should not change the fine imposed on third parties to

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[47] Judgment of 24 October 2013, Case C-510/11 P *Kone e.a. v European Commission*, ECLI:EU:C:2013:696, para. 30.

[48] F. Clausen, *Les moyens d'ordre public devant la Cour de justice de l'Union européenne*, Bruxelles 2018, Bruylant, p. 379. This author gives an example of the *Tomkins* jurisprudence – judgment of 22 January 2013, Case C-286/11 P *Commission v Tomkins*, ECLI:EU:C:2013:29, paras. 43–45, 49–50, where the Court of Justice stated that the General Court can, even *ex officio*, benefit the mother company with a reduction of the fine imposed on it if its daughter company has profited of such a reduction. Cf also: judgment of 17 September 2015, Case C-597/13 P *Total v European Commission*, ECLI:EU:C:2015:613, para. 41; judgment of 27 April 2017, Case C-516/15 P *Akzo Nobel v European Commission*, ECLI:EU:C:2017:314, para. 62.

[49] For instance, the Court was stating that the level of fine is 'appropriate', 'adequate': judgment of 14 February 1972, Case 48/69 *ICI v Commission*, ECLI:EU:C:1972:70, para. 147; judgment of 14 July 1972, Case 49/69 *BASF*, ECLI:EU:C:1972:71, para. *38;* judgment of 14 July 1972, Case 51/69 *Bayer AG v European Commission*, ECLI:EU:C:1972:72, para. 42; judgment of 14 July 1972, Case 52/69 *Geigy v European Commission*, ECLI:EU:C:1972:73, para. 53*;* or for the General Court: judgment of 17 December 2003, Case T-219/99 *British Airways v European Commission*, ECLI:EU:T:2003:343, para. 316. Cf Clausen, 2018, p. 397.

[50] Jugdment of 10 December 1957, Case 8/56 *ALMA v Haute Autorité*, ECLI:EU:C:1957:12*;* judgment of 1 April 1993, Case T-65/89 *BPB Industries et British Gypsum v European Commission*, ECLI:EU:T:1993:31, para. 162; judgment of 10 July 2010, Case T-321/05 *AstraZeneca v European Commission*, ECLI:EU:T:2010:266, para. 884; judgment of 12 July 2001, Cases T-202/98, T-204/98, T-207/98 *Tate&Lyle v European Commission*, ECLI:EU:T:2001:185, paras. 22, 163–164.

the litigation in front of it[51], if the fine is to be increased[52]. There is, however, a number of examples where the Court was using its unlimited jurisdiction only after having been asked to do this by a separate plea[53].

This contrasts strongly with different jurisprudence where the possibility to increase the sanction, even on the own motion of the Court, was admitted (Clausen, 2018, p. 407)[54]. In this respect, it seems that the principle of interdiction of *reformation in peius* is not fully operational. Despite the fact that the objective of unlimited jurisdiction is, *inter alia*, the effective judicial protection of undertakings concerned, it has to be balanced with the objective of EU antitrust law that covers also the protection of consumers (Clausen, 2018, p. 408)[55]. If, for instance, nobody noticed that the fine imposed does not stay within the limits set in Article 23(2) second and third subparagraphs of Regulation no 1/2003, should this type of error be considered as a question of illegality. It seems that probably it should, with all the consequences for unlimited jurisdiction like, for instance, whether it is a question of control of proportionality. Probably, proportionality control would be instigated by the Court on its own motion, because it seems that proportionality is not a question of public order. In latest jurisprudence, the importance of the principle of *contradictoire* is particularly visible, and this implies that the Court should not use its unlimited jurisdiction *ex officio*[56].

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[51] Judgment of 10 April 2014, Cases C-231/11 P to C-233/11 P *Commission v Siemens Őesterreich*, ECLI:EU:C:2014:256, paras. 126–130. In this case, the Court, having changed the fine imposed solidarily on three companies, of which only two instigated the proceeding, has acted *ultra petita* (Clausen, 2018, p. 405).

[52] The opposite situation – reduction of the fine in favor of a third party to the proceeding, seems admissible in the jurisprudence: judgment of 9 September 2015, Case T-82/13 *Panasonic and MT Picture Display v European Commission*, ECLI:EU:T:2015:612, para. 1 of sentence; judgment of 24 June 2015, Cases C-293/13 P and C-294/13 P *Fresh Del Monte Produce v European Commission*, ECLI:EU:C:2015:416, para. 202.

[53] Judgment of 16 January 2016, Case C-603/13 P *Galp Energia Espana v European Commission*, ECLI:EU:C:2016:38 para. 71; order of 7 July 2016, Case C-523/15 P *Wesfälische Drahindustrie v European Commission*, ECLI:EU:C:2016:541, para. 30; judgment of 15 December 2016, Case T-762/14 *Philips and Philips France v European Commission*, ECLI:EU:T:2016:738, para. 319.

[54] Judgment of 8 February 2007, Case C-3/06 P *Group Danone v European Commission*, ECLI:EU:C:2007:88, paras. 61–62; Case C-389/10 P *KME Germany v European Commission*, para. 130; judgment of 10 July 2014, Case C-295/12 P *Telefonica et Telefonica de España*, ECLI:EU:C:2014:2062, para. 198; judgment of 18 December 2014, Case C-434/13 P *Commission v Parker Hannifin Manufacturing et Parker-Hannifin*, ECLI:EU:C:2014:2456, para. 74; Case C-603/13 P *Galp Energia Espana v European Commission*, ECLI:EU:C:2016:38, para. 88.

[55] Jugdment of 30 May 2013, Case C-70/12 P *Quinn Barlo v European Commission*, ECLI:EU:C:2013:351, para. 52;.

[56] C-434/13 P *Commission v Parker Hannifin Manufacturing and Parker-Hannifin*, ECLI:EU:C:2014:2456, para. 76; judgment of 26 January 2017, Case C-626/13 P *Villeroy &*

The other important issue is a question of what should initialise the control. Should this type of unlimited control towards a sanction only be used in cases where there is an error as to the legality of the decision in question that leads to an annulment? Is any error (including a minor error, not leading to an annulment) to be taken into account? Or perhaps nothing in terms of error is necessary, but the only issue that counts is the judge's (or court's) opinion[57]. In other words, it has to be examined, if the court needs a special justification to exercise this type of control. It seems that all the above scenarios might initiate the exercise of unlimited jurisdiction, but it is not necessarily the case. For instance, in the judgment *Orange Polska*, mitigating circumstances were not taken into account in order to reduce the fine, thus leaving the parties with the impression that the Court had not used its possibilities stemming from unlimited jurisdiction.

The other question is the scope of reforming powers as far as increase or decrease of the fine is concerned[58].

If the Court considers decreasing the fine, should it indicate the reasons for it? Could it be only based on an error stated by that Court or might if also stem from an equality argument[59] or a proportionality argument[60]. If the Court decides to increase the fine, it is confirmed by the jurisprudence that the General Court might vary the measure in question[61]. It can alter the amount of the fine[62], both *ex officio*[63] and following the suggestions of the Commission[64]. In the *Galp Energia* case, the Court of Justice found that the General Court exceeded the boundaries of its unlimited jurisdiction by taking into account

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Boch Austria v European Commission, ECLI:EU:C:2017:54, para. 83; judgment of 26 September 2018, Case C-99/17 P *Infineon Technologies AG v European Commission*, ECLI:EU:C:2018:773, para. 194.

[57] In judgment of 3 September 2009, Case C-534/07 P *Prym et Prym Consumer v European* Commission, ECLI:EU:C:2009:505 – the Court of Justice stated that unlimited jurisdiction allows the General Court to vary the contested measure, even without annulling it, by taking into account all of the factual circumstances, so as to amend, for example, the amount of the fine (para. 86). The judge can in fact determine the amount of the fine – it is not dependant of prior finding of illegality and may take into account elements which were not considered in the decision.

[58] Case C-99/17 P *Infineon Technologies AG v European Commission*, para. 193; Case C-386/10 P *Chalkor v European Commission*, para. 63; C-626/13 P *Villeroy & Boch Austria v European Commission*, para. 81.

[59] Order of 7 July 2016, Case C-523/15 P *Westfällische Drahtindustrie*, ECLI:EU:C:2016:541.

[60] Judgment of 17 December 2015, Case T-486/11 *Orange Polska*, ECLI:EU:T:2015:1002.

[61] C-534/07 P *Prym et Prym Consumer v European* Commission.

[62] Case C-295/12 P *Telefonica et Telefonica de España*.

[63] Case T-348/94 *Enso Espanola;* C-3/06 P *Groupe Danone v European Commission*.

[64] Case T-69/04 *Schunk GmbH and Schunk Kohlenstoff-Technik GmbH v European Commission*.

a plea raised on its own motion and by taking into account a statement of the director of sales of bitumen of Galp, which was not in the Commission's file but was produced later, only during the judicial procedure (Martinez-Lage, 2016, p. 609). The fact that the General Court found that the appellants could have been held liable under Article 101 TFEU for being aware of the participation of the other members of the cartel in the compensation mechanism, and were able to foresee their participation in the monitoring system (elements that were not established by the Commission in its investigation), and because of this adjusted the fine – were held by the Court of Justice as inadmissible. There is no need of prior finding of illegality – as the Court can also increase the fine. There is no doubt that such an increase can occur if it is an object of one of the pleas (one of the parties raises this problem)[65]. When a court is asked to reconsider the level of the fine (usually in order to reduce it)[66], it examines the possibility of increasing the fine and the factors that might lead to it[67] – the court, basing itself on Article 31 can increase the fine. This necessarily leads to the question if this, on its own, does not constitute an infringement of the prohibition of *reformationis in peius*. According to the Court of Justice, the fine can be increased, without infringing this principle[68]. The Court admits also that there is a general power of the Courts to change the level of fines[69]. However, this might happen if an important procedural guarantee had been fulfilled, namely, only if the parties have exercised their right to be heard, if there has been a plea concerning the level of fines[70]. There is no doubt that the fine can be increased if the Commission suggests it[71]. However, the Court is not able to fill all the possible gaps that have occurred during the proceedings in front of the Commission, as there is not transfer of competences in this field. There is also no doubt that the Court might benefit, even *ex officio*, one of the parties to the infringement (if reducing the fine for a daughter company, it also can reduce it for the mother company) by

[65] Judgment of 29 March 2004, Cases T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01 and T-252/01 *Tokai Carbon v European Commission*, ECLI:EU:T:2004:118, paras. 33, 95, 98, 112, 272, 286.

[66] Judgment of 25 October 2005, Case T-38/02 *Groupe Danone v Commission*, ECLI:EU:T:2005:367; Case C-3/06 P *Group Danone v European Commission*; judgment of 12 December 2007, Cases T-101/05, T-111/05 *BASF v Commission*, ECLI:EU:T:2007:380, para. 214.

[67] Judgment of 8 July 2004, Cases T-67/00, T-68/00, T-71/00, T-78/00 *JFE Engineering v European Commission*, ECLI:EU:T:2004:221, paras. 578; judgment of 24 September 2009, Cases C-125/07 P, C-133/07P, C-135/07 P C-137/07 P *Erste Group Bank v European Commission*, ECLI:EU:C:2009:576, paras. 329–332.

[68] Case C-534/07 *Prym et Prym Consumer v European* Commission.

[69] Case C-295/12 P *Telefonica et Telefonica de España*.

[70] Case C-125/07 P *Erste Group Bank*; Case C-3/06 P *Groupe Danone v European Commission*.

[71] Case T-69/04 *Schunk*.

reducing its fine[72]. But the opposite solution might raise issues of trespassing the principle of *ne ultra petita*[73].

The Court usually and quite understandably takes a very 'cautious approach' to amending a fine using as the basis only the argument of its unlimited jurisdiction. When the Court is very restrictive in this area, it is in a sense not using the powers conferred on it. This cautionary approach is completely understandable taking into account all the existing jurisprudence that does not encourage the Court to step out of the limits of the plea. Still, it leaves an impression that the Court is not using all its powers given by unlimited jurisdiction.

IV. Functioning of control in case of unlimited jurisdiction

The last issue that remains to be discussed is how to actually apply unlimited jurisdiction, namely how to readapt or recalculate the amount of fine, and is the Court actually prone and willing to do those operations? The imposition of the sanction (fine) lies at the heart of the Commission's appreciation of what it does as far as sanctions are concerned. There is no doubt that the Commission has a margin of discretion when imposing the fine[74]. The Commission decides on the level of fines and on the methodology to impose them. Usually, the General Court does not question the method or the general level of fines[75]. When fixing the fine, regard should be both to the gravity and to the duration of the infringement[76] – this implies taking into account many factors that are controlled by the Court[77], however no fully exhaustive list of factors to be taken into consideration exists[78].

[72] Judgment of 22 January 2013, Case C-286/11 P *Commission v Tomkins*, ECLI:EU:C:2013:29.

[73] Judgment of 10 April 2014, Case C-231/11 P *Siemens Ősterreich*.

[74] Judgment of 28 June 2005, C-189/02 P *Dansk Rørindustrie*, ECLI:EU:C:2005:408; judgment of 5 December 2013, Case C-447/11 P *Caffaro*, ECLI:EU:C:2013:797, para. 101.

[75] Judgment of 15 July 2015, Case T-389/10 *SLM*, ECLI:EU:T:2015:513.

[76] Case C-434/13 P *Commission v Parker Hannifin Manufacturing et Parker-Hannifin*, ECLI:EU:C:2014:2456, para. 75; Case C-626/13 P *Villeroy & Boch Austria v European Commission*, para. 82; Case C-99/17 P *Infineon Technologies AG v European Commission*, para. 195; judgment of 11 July 2013, Case C-444/11 P *Team Relocations e.a. v European Commission*, ECLI:EU:C:2013:464, para. 10.

[77] Jugment of 6 May 2009, Case T-127/04 *KME Germany v European Commission*, ECLI:EU:T:2009:142, paras. 94, 96–97. Of course, there might be an error as to the facts (f.i. value of sales).

[78] Case C-99/17 P *Infineon Technologies AG v European Commission*, para. 198; Case C-534/07 P *Prym et Prym Consumer v European* Commission, para. 54, also judgment of 13 June 2013, Case C-511/11 P *Versalis v European Commission*, ECLI:EU:C:2013:386, para. 82.

For years it has been common practice for the Court to simply check the application of the Commission Guidelines on the method of setting fines (hereinafter: Fining Guidelines) and not to proceed to any further analysis[79]. Usually the Court does not question the level of the fine or the method of imposing it[80]. There is usually little guidance in the legislation on the level of fines. Sometimes the Court does consider if the Commission should have analysed attenuating circumstances[81]. In the *Intel* case, there was an analysis of the possibility to apply the Fining Guidelines retroactively[82]. There is hardly any analysis of the purpose of the fine – be it deterrence, punishment, offence that is not profitable. In the *Microsoft* case, the potential dissuasive effect of the sanction has been analysed, but in a rather marginal manner.

The General Court is rarely also controlling the proportionality and appropriateness of fines. This does not exclude the possibility for the General Court to state such disproportionality[83]. In the case C-99/17 P, *Infineon Technologies*, the Court of Justice stated that it is not necessary to reduce the fine for each attenuating circumstance occurring in the case, but a general analysis leading to the assessment of the proportionality of the fine in question

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[79] Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, OJ C 210, 01.09.2006 (hereinafter: Fining Guidelines); Judgment of 15 July 2015, Case T-389/10 *SLM*, ECLI:EU:T:2015:513.

[80] Judgment of 15 July 2015, Case T-389/10 *Siderurgica Latina Martin SpA (SLM) and Ori Martin SA v European Commission*, ECLI:EU:T:2015:513.

[81] Case C-447/11 P *Caffaro*, para. 104: 'C'est, dès lors, à bon droit que le Tribunal a jugé, au point 175 de l'arrêt attaqué, que, eu égard au niveau important de la réduction du montant de l'amende appliquée, dans le cadre de l'appréciation des circonstances atténuantes dans la décision litigieuse, au titre du rôle passif et mineur de Caffaro dans l'infraction, l'argumentation de cette société tirée de l'existence d'autres circonstances atténuantes, non admises par la Commission, même à la supposer fondée, n'était pas susceptible de conduire à admettre le caractère inadéquat d'une réduction, accordée par la Commission au titre de cette appréciation'. [There is no official English translation: It is, therefore, approriate that the Court has, in the point 175 of the judgment under appeal, judged that, taking into consideration the important level of the reduction of the fine applied, taking into account the attenuating circumstances indicated in the contested decision, the passive and minor role played by Caffaro in the infringement, arguments of this company as to the existence of other attenuating circumstances, not taken into account by the Commission, if they were to be found founded, it was not possible to admit the inadequate character of the reduction granted by the Commission in terms of this appreciation].

[82] Retroactive application of theFining Guidelines is possible in accordance with Art. 7 and 49 of the Charter – judgment of 12 June 2015, Case T-286/09 *Intel v European Commission*, ECLI:EU:T:2014:547, paras. 1596–1598, confirmed on those points by judgment of 6 September 2017, Case C-413/14 P *Intel Corp. v European Commission*, ECLI:EU:C:2017:632.

[83] Judgment of 15 July 2015, Case T-418/10 *Voestalpine v European Commission*, ECLI:EU:T:2015:516, para. 442.

should always be done[84]. In this case also, the Court of Justice stated that the General Court has to, in order to fulfill its powers of unlimited jurisdiction, take into account a plea raised by the applicant as to the proportionality of the fine[85]. However, in this very case it admitted that this control of proportionality might be done with regard to the Fining Guidelines of the Commission only[86].

In the case *Kone*, the question of the self-limitation of the Commission by its own Fining Guidelines, as to its margin of discretion, was broadly discussed[87]. If unlimited jurisdiction is exercise to recalculate the fine, it seems that the General Court, as in any other circumstances when it takes a decision, should state the grounds for both using unlimited jurisdiction and for explaining the way it was used. As to the 'pre-visibility' of the sanction, the Commission is free to change its practice according to the Court, as long as it explains it[88].

When exercising unlimited jurisdiction, the Court cannot impose a new sanction. It has no power to impose a fine – just a review on fines imposed by the Commission's decision. The Court has also a duty to motivate its decision to change the fine. It is clear that the Commission's Fining Guidelines are not binding on the Court, however it seems that the Court is in principle almost always simply following them. The Court seems reluctant to reduce fines – except for the situation where the Commission has committed an error: 1) not proving the infringement to the full extend found by the decision, 2) not taking into account certain elements in the setting of the fine, 3) some defect in the reasoning of the Commission's decision, which is not sufficient to justify a complete annulment. Usually, if the Court finds no error, it does not amend the fine. It is rare that the fine is found excessive and thus – reduced[89]. An increase of the fine is even rarer, barely non-existent. The main reasons for this is that it would normally be considered as adjudicating *ultra petita* and against adversarial proceedings. Nevertheless, if the Court states the case of

[84] Case C-99/17 P *Infineon Technologies AG v European Commission*, para. 212.

[85] Case C-99/17 P *Infineon Technologies AG v European Commission*, para. 206.

[86] Case C-99/17 P *Infineon Technologies AG v European Commission*, para. 210, cf also: judgment of 26 January 2017, Case C-604/13 P *Aloys F. Dornbracht v European Commission*, ECLI:EU:C:2017:45, para. 75; judgment of 16 June 2011, Case T-211/08 *Putters International*, ECLI:EU:T:2011:289.

[87] But it was stated that the possible misapplication of the Fining Guidelines is not a question of public order – cf judgment of 24 October 2013, Case C-510/11 P *Kone e.a. v European Commission*, ECLIEU:C:2013:696, paras. 70–72.

[88] Judgment of 7 June 1983, Cases 100-103/80 *Pioneer*, ECLI:EU:C:1983:158; judgment of 28 June 2005, Case C-189/02 P *Dansk Rørindustrie*, ECLI:EU:C:2005:408.

[89] Judgment of 13 December 2006, Cases T-217/03 and T-245/03 *Fédération nationale de la coopération bétail et viande (FNCBV) and Fédération nationale des syndicats d'exploitants agricoles (FNSEA) and Others v European Commission*, ECLI:EU:T:2006:391, in the judgment of 17 December 2015, Case T-486/11 *Orange Polska*, ECLI:EU:T:2015:1002 – the General Court on its own reassessed the fine once the legality of the decision was examined.

either – repetition of infringement, refusal to cooperate, or role of leader or instigator, it takes it into account[90].

V. Conclusions

It is difficult to be exhaustive about unlimited jurisdiction. The scope of judicial control in the European Union is an ever-open subject. The three questions analysed in this text reveal clearly that the notion of 'limitlessness' is posing some problems and its content is prone to be differently interpreted. As to the exact scope of the notion of unlimited jurisdiction, its intensity and the actual functioning of judicial control in case of unlimited jurisdiction, the jurisprudence presented in this article reveals rather limiting tendencies in interpretation. So while it is very tempting to broaden the scope of judicial control, the General Court is bound not to act *ultra petita* or to raise some issues on its own motion if they are not covered by public order measures (like the questions of admissibility or motivation). The General Court has neither a competence to reform decisions of the European Commission nor to lead its own investigation to gather new proofs in the matter in question. Despite, or even because of, all those limitations, the pattern of judicial review exercised by the General Court remains an ever-developing subject.

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‘A More Human Approach’. Human Rights, Obligations of the State and Network Neutrality in Europe

by

Andrzej Nałęcz*

CONTENTS

Abstract

The article explores the concept of the positive and negative obligations of the state in securing human rights, recognized in human rights literature, and in the judgments of the European Court of Human Rights. The concept is then applied to show the importance of securing freedom of expression in regulating Internet access services and enforcing pertinent regulations in EU Member States.

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The author is of the opinion that economic arguments should not overshadow the need to secure the freedom of expression of the end-users of Internet access services.

Resumé

L'article explore le concept des obligations positives et négatives de l'État en matière de défense des droits humains, reconnu dans la littérature sur les droits humains et dans les arrêts de la Cour européenne des droits de l'homme. Le concept est ensuite appliqué pour montrer l'importance de garantir la liberté d'expression dans la réglementation des services d'accès à Internet et dans l'application des réglementations pertinentes dans les États membres de l'UE. L'auteur est d'avis que les arguments économiques ne doivent pas occulter la nécessité de garantir la liberté d'expression des utilisateurs finals des services d'accès à Internet.

Key words: freedom of expression; Regulation 2015/2120; net neutrality; open Internet; Internet access service; positive obligations; negative obligations; European Convention on Human Rights; means of expression.

JEL: K20, K23, K38

I. Introduction

Network neutrality is the principle that requires Internet access service providers to treat all Internet traffic equally, without discrimination, thus letting end-users make their own choices as to what Internet content they access and distribute. The concept of network neutrality was forged by the jurisprudence of the United States of America. U.S. scholars were the first to notice the role of Internet access service providers as gatekeepers of the vast resources of the Internet, and the U.S. professor Tim Wu coined the term 'network neutrality' in his leading 2003 paper (Wu 2003). It comes as no surprise then that U.S. viewpoints and attitudes have been influencing the academic and regulatory discussions on network neutrality all over the world, also in the European Union. The U.S. proponents of network neutrality regulation seek to foster innovation among providers of Internet content, while the opponents fret about distorting competition between Internet access service providers. The whole discussion is framed in economic terms. This article challenges that approach. Europe needs its own theory of network neutrality, one representing 'a more human approach' rather than 'a more economic' one. Such a theory should be rooted in European values, and specifically

in the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: European Convention), and the European Court's of Human Rights (hereinafter: ECHR) understanding of the state's negative and positive obligations regarding the safeguarding of the fundamental rights of individuals. The EU introduced a network neutrality regime in Regulation 2015/2120 laying down measures concerning open internet access.[1] Even though the language of the EU provisions on network neutrality is close to that of the U.S., and despite the complicated relationship between the European Convention and the EU legal order, European values can and should be respected in the interpretation and enforcement of Regulation 2015/2120, and generally in regulating and offering Internet access services in all EU Member States.

The structure of the article is as follows. First, the role of the Internet as a tool to guarantee freedom of expression is presented. The Internet has become an essential means for expression, transforming the way people communicate, and share information and ideas. Second, the article discusses negative and positive obligations of the state in relation to human rights and their influence on private actors. In the author's opinion, states have an unambiguous positive obligation to ensure effective enjoyment of human rights, which may include requiring private actors to respect the rights of others, especially when such private actors are able to effectively influence the exercise of those rights. Third, the article analyses the positive obligations of states to secure freedom of expression in the context of Internet access under the European Convention. While the issue has not yet been comprehensively addressed by the ECHR, pertinent conclusions may be drawn from the ECHR's judgments in *Mouvement Raëlien Suisse* and *Aplleby*. Fourth, the article proposes how to draw on human rights in regulating Internet access services in the EU, and in applying Regulation 2015/2120. The need to not let economic arguments overshadow the state's obligation to secure human rights in the interpretation of Regulation 2015/2120 is discussed. Fifth, the article posits that in the future the ECHR may consider Regulation 2015/2120 as an indication of a European consensus on the existence of the state's positive obligations regarding regulating Internet access services.

[1] Regulation (EU) 2015/2120 of the European Parliament and of the Council of 25 November 2015 laying down measures concerning open internet access and retail charges for regulated intra-EU communications and amending Directive 2002/22/EC and Regulation (EU) No 531/2012. ELI: http://data.europa.eu/eli/reg/2015/2120/2018-12-20.

II. The Internet as a tool to guarantee freedom of expression

In the modern world, and especially in developed countries, the Internet has become one of the spheres of human existence. People use the Internet to communicate, and to acquire and disseminate ideas and information, related to their private, professional and public lives. From a legal point of view, one cannot help but recognize that a person exercises her fundamental human rights both in the physical and the digital environments, which are intertwined. Given the nature of the Internet as a medium for the spread of ideas and information, the foremost of those rights is freedom of expression. It is valued very highly in the modern society, even if there is little philosophical consensus as to why exactly that is the case (Nash, 2013, p. 444). John Stuart Mill's instrumentalist arguments refer to the importance of an unfettered debate for the discovery of truth, leading to better individual and social decisions (Barendt, 2007, 9). Alexander Meiklejohn's arguments for democracy place emphasis on political speech and the importance of the free flow of ideas for the political process and voting (Nash, 2013, p. 444). Finally, there are arguments linking freedom of expression to human dignity, personal autonomy, self-development and fulfillment. John Rawls's arguments for personal autonomy 'claim both that free speech has more than instrumental value, as an intrinsic aspect of individual autonomy, and further that such speech rights apply to all forms of speech, not solely political' (Nash, 2013, p. 444). Somewhat similarly, Ronald Dworkin argued that 'the case for free speech protection is grounded on fundamental background rights to human dignity and to equality of concern and respect' (Barendt, 2007, p. 14). The ECHR does not focus on a single axiological context of freedom of expression as a human right, affirming many, if not all of them.[2]

Even before the advent of the modern Internet, the ECHR recognized that freedom of expression 'applies not only to the content of information, but also to the means of dissemination, since any restriction imposed on the means necessarily interferes with the right to receive and impart information.'[3] Nowadays, the Internet has become one of such means of dissemination – in fact, it may be considered the most important among them. The special relationship between the Internet and freedom of expression has been noted by the ECHR. According to the Court, access to the Internet has become

[2] For example, see ECHR judgment of 28 September 1999, Case *Öztürk v. Turkey*, application no. 22479/93, ECLI: CE:ECHR:1999:0928JUD002247993, § 64.

[3] ECHR judgment of 22 May 1990, Case *Autronic v. Switzerland*, application no. 12726/87, ECLI: CE:ECHR:1990:0522JUD001272687, § 47.

an essential tool for the exercise of the freedom of expression,[4] allowing 'participation in activities and discussions concerning political issues and issues of general interest.'[5] Some aspects of the Internet as a platform for the exercise of freedom of expression – such as the potential for user-generated expressive activity – are unprecedented.[6] This transformative influence of the Internet on 'communication practices around the world' has also been noted by the United Nations Human Rights Committee (2011, para. 15). The ECHR has no doubt that '[i]n the light of its accessibility and its capacity to store and communicate vast amounts of information, the Internet plays an important role in enhancing the public's access to news and facilitating the dissemination of information in general,'[7] irrespective of its subject and potential commercial character.[8,9] The ECHR also recently noted that 'Internet access has increasingly been understood as a right, and calls have been made to develop effective policies to attain universal access to the Internet and to overcome the *digital divide* (…).' While the ECHR does not expressly support or oppose the recognition of a right to Internet access, it 'considers that these developments reflect the important role the Internet plays in people's everyday lives.'[10] Finally, the ECHR recognizes that 'an increasing amount of services and information is only available on the Internet.'[11]

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[4] ECHR decision of 11 March 2014, Case *Akdeniz v. Turkey*, application no. 20877/10, ECLI: CE:ECHR:2014:0311DEC002087710, § 24.

[5] ECHR judgment of 18 December 2012, Case *Ahmet Yildirim v. Turkey*, application no. 3111/10, ECLI:CE:ECHR:2012:1218JUD000311110, § 54.

[6] ECHR judgment of 16 June 2015, Case *Delfi AS v. Estonia*, application no. 64569/09, ECLI:CE:ECHR:2015:0616JUD006456909, § 110.

[7] ECHR judgment of 10 June 2009, Case *Times Newspapers LTD v. The United Kingdom*, applications nos. 3002/03 and 23676/03, ECLI:CE:ECHR:2009:0310JUD000300203, § 27.

[8] ECHR judgment of 10 January 2013, Case *Ashby Donald and others v. France*, application no. 36769/08, ECLI:CE:ECHR:2013:0110JUD003676908, § 34.

[9] The ECHR comprehensively reiterated its understanding of the Internet's role for enhancing the exercise of the freedom of expression in the judgment of 1 December 2015, Case *Cengiz and others v. Turkey*, applications nos. 48226/10 and 14027/11, ECLI:CE:ECHR:2015:1201JUD004822610, § 49, § 52, §55–56.

[10] ECHR judgment of 19 January 2016, Case *Kalda v. Estonia*, application no. 17429/10, ECLI:CE:ECHR:2016:0119JUD001742910, §52. It should be noted that the ECHR does not expressly support or oppose the recognition of a right to Internet access – the Court simply notes that such a right is the subject of many discussions and policy statements.

[11] 'As evidenced by the fact that in Estonia the official publication of legal acts effectively takes place via the online version of Riigi Teataja and no longer through its paper version' – *ibid*. The ECHR reiterated this stance in its judgment of 17 January 2017, Case of *Jankovskis v. Lithuania*, application no. 21575/08, ECLI:CE:ECHR:2017:0117JUD002157508, § 49, § 62.

III. Negative and positive obligations of the state in relation to human rights, and their influence on private actors

Traditionally, under the influence of early liberal philosophy of the Enlightenment (Ishay, 2004, p. 63–116), the obligations of the state relating to an individual's exercise of fundamental rights, including freedom of expression, were perceived as strictly negative. The state was simply required to refrain from unduly restricting the exercise of rights, especially in an arbitrary manner (Barendt, 2007, p. 22). Such traditional approaches still dominate in the U.S., rooted in the Constitution and its Amendments (Currie, 1986). As one American scholar put it, 'we do not have rights that positively obligate the state to do something. We do not have rights that require, rather than forbid, the state to take some action' (West, 2001, p. 1907). The last U.S. administration to embrace human rights and hint at accepting at least some positive obligations of the state was under President Jimmy Carter in the late 1970s (Hanum, 2019, p. 137–140). The refusal of the U.S. to ratify the 1966 International Covenant on Economic, Social, and Cultural Rights evidences American opposition to the concept of positive state action in relation to human rights, arising out of axiological differences between the U.S. and the international community (Alston, 1990, p. 367; Fields, 2003, p. 101). The Supremacy Clause (Article VI of the U.S. Constitution) declares international treaties, along with the Constitution and the laws of the U.S., to be the 'supreme Law of the Land.' Thus, provisions of treaties are enforceable in court, unless they are deemed to be non-self-executing, as elaborated upon by the Supreme Court in *Foster v. Neilson*.[12] A treaty is non-self-executing generally when what 'it purports to do is only doable by statute,' or when 'it imposes an obligation that requires the exercise of nonjudicial discretion' (Vázquez, 2008, p. 602). Thus, by refusing to ratify a treaty involving unambiguous positive obligations of the state, the U.S. government preserves its strictly negative approach to human rights.[13]

Outside the U.S., especially in jurisprudence related to international human rights law, different approaches to the obligations of the state have developed. As Conçado Trindade (1998, p. 513) notes, the intention of the drafters of the 1948 Universal Declaration of Human Rights, which became the authoritative

[12] Supreme Court judgment of 1829, Case *Foster v. Neilson*, 27 U.S. 253 (1829), https://supreme.justia.com/cases/federal/us/27/253/.

[13] However, it has been noted in the literature that with respect to some treaties, 'the non-self-executing doctrine has been stretched far beyond its proper application and original meaning to provide support for a theory under which treaties have no domestic legal force' (Carter, 2010, p. 389). A full discussion of the issue is beyond the scope of this article.

model for further global and regional human rights treaties, was to place all rights on the same level, stressing their indivisibility and interdependence. Such an approach was advanced by the Tehran Proclamation (United Nations, 1968) and the Vienna Declaration (U.N. General Assembly, 1993). However, in his seminal 1977 article, Karel Vasak proposed the concept of generations of human rights, stressing the differences between them. Civil and political rights constitute the first generation and are negative 'in the sense that their respect requires that the state do nothing to interfere with individual liberties'. Second generation rights require 'positive action by the state to be implemented, as is the case with most social, economic and cultural rights' (Vasak, 1977, p. 29).[14] Vasak's concept drove wedges between categories of human rights, and indicated that civil and political rights are strictly negative (Whelan, 2010, p. 211).

While it is common in international law literature to refer to the distinct 'generations' of rights (Fields, 2003, p. 40), another approach, more in line with the concept of the indivisibility and interdependence of rights, is to deny the utility, or even the possibility, of their division into various categories based on the scope of the obligations of the state necessary to secure those rights. Henry Shue noted 'that for every basic right … there are three types of duties, all of which must be performed if the basic right is to be fully honored but not all of which must necessarily be performed by the same individuals or institutions.' These duties are to avoid depriving, to protect from deprivation, and to aid the deprived (Shue, 1980, p. 52). Shue's concept, later popularized by Asbjørn Eide in his 1987 paper *The Right to Food as a Human Right* (quoted in Koch, 2005, p. 84–85),[15] requires the abandoning of the idea – which Shue considered a 'misdirected simplification' – that some rights are strictly negative while others are strictly positive. Indeed, 'it is impossible for any basic right – however "negative" it has come to seem – to be fully guaranteed unless all three types of duties are fulfilled' (Shue, 1980, p. 53).

Under the European Convention, as interpreted by the ECHR, states are subject not only to negative, but also to positive obligations with respect to human rights. This follows from Article 1 of the European Convention, which states that 'The High Contracting Parties shall secure to everyone within their

[14] Vasak also indicated the emergence of a third generation of human rights, which he called 'rights of solidarity'. They 'include the right to development, the right to a healthy and ecologically balanced environment, the right to peace, and the right to ownership of the common heritage of mankind', and 'they can only be implemented by the combined efforts of everyone: individuals, states and other bodies, as well as public and private institutions' (Vasak, 1977, p. 29).

[15] Eide fully assimilated Shue's concept, however he proposed a different nomenclature for the state's duties, calling them the obligations to respect, to protect, and to facilitate (Eide, 1996, p. 32–33).

jurisdiction the rights and freedoms defined in Section I of this Convention.' The ECHR believes it does not have to develop a general theory of positive obligations of the state.[16] It has also not provided an authoritative definition of them (Mowbray, 2004, p. 2). However, the characteristics of positive obligations may be derived from judgments in individual cases. Their prime characteristic 'is that they in practice require national authorities to take the necessary measures to safeguard a right, or, more precisely, to adopt reasonable and suitable measures to protect the rights of the individual' (Akandji-Kombe, 2007, p. 7). The stance of the ECHR on the existence of positive obligations of the state is linked to its commitment to ensure the effectiveness of the European Convention. According to the Court, 'the Convention is intended to guarantee rights that are practical and effective, not theoretical and illusory.'[17] Thus, the ECHR goes beyond pure textual interpretation in finding positive obligations in the Convention. Some positive obligations are indeed either 'expressly present in, or necessarily follow from the text of the Convention' (Harris et al., 2014, p. 22), for example, the obligation to protect the right to life by law under Article 2 (1) or to provide prison conditions and administer punishments that are not inhuman under Article 3. However, other positive obligations are the result of the ECHR's interpretation of the provisions of the European Convention (Harris et al., 2014, p. 22). The ECHR first determined that a state may have positive obligations under a provision of the European Convention utilizing a negative formulation in the so-called *Belgian Linguistic Case*.[18] Since then, positive obligations of the state have been recognized by the ECHR in relation to many European Convention rights, including the right to liberty and security (Article 5),[19] the right to respect for private and family life (Article 8),[20] the freedom of thought, conscience and religion

[16] ECHR judgment of 21 June 1988, Case *Plattform 'Ärzte für das Leben' v. Austria*, application no. 10126/82, ECLI:CE:ECHR:1988:0621JUD001012682, § 31.

[17] The ECHR first used this formulation in its judgment of 9 October 1979, Case *Airey v. Ireland*, application no. 6289/73, ECLI:CE:ECHR:1979:1009JUD000628973, § 24, and has since quoted and paraphrased it many times.

[18] ECHR judgment of 23 June 1968, Case *"Relating to certain aspects of the laws on the use of languages in education in Belgium" v. Belgium*, applications nos. 1474/62, 1677/62, 1691/62, 1769/63, 1994/63 and 2126/64, http://hudoc.echr.coe.int/eng?i=001-57525, part I-B, § 4.

[19] '… Article 5 § 1, first sentence, of the Convention must … be construed as laying down a positive obligation on the State to protect the liberty of its citizens. … The State is … obliged to take measures providing effective protection of vulnerable persons, including reasonable steps to prevent a deprivation of liberty of which the authorities have or ought to have knowledge' – ECHR judgment of 16 June 2005, Case *Storck v. Germany*, application no. 61603/00, ECLI:CE:ECHR:2005:0616JUD006160300, § 102.

[20] 'The Court reiterates that the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities. However, this provision does not merely compel the State to abstain from such interference: in addition to this primarily

(Article 9),[21] the freedom of expression (Article 10),[22] and the freedom of assembly and association (Article 11).[23] The textual formulation of none of these rights in the European Convention directly indicates the existence of positive obligations of the state.

What is especially interesting is the fact that the ECHR does not attempt to draw a clear line between rights that require negative and positive state action. In fact, the Court does not even consider it necessary to specify what type of obligations follow from the requirement to secure a specific right under the Convention. Be it positive or negative obligations, 'the applicable principles are broadly similar. In both contexts regard must be had to the fair balance that has to be struck between competing interests of the individual and the community as a whole; and in both contexts the state enjoys a certain margin of appreciation in determining the steps to be taken to ensure compliance with the Convention.'[24] Thus, the distinction between negative and positive obligations under the European Convention is blurred (Koch, 2005, p. 100).

Another important issue is the influence of human rights on relations between private actors. In general, human rights law does not impose horizontal duties – horizontal 'in the sense that they run between actors on the same legal plane', for example between two individuals (Knox 2008, 2).[25] Specifically, it is generally accepted that the obligations under the European Convention

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negative undertaking, there are positive obligations inherent in an effective respect for private or family life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves' – ECHR judgment of 12 November 2013, Case *Söderman v. Sweden*, application no. 5786/08, ECLI:CE:ECHR:2013:1112JUD000578608, § 78.

[21] '…through their inactivity, the relevant authorities failed in their duty to take the necessary measures to ensure that the group of Orthodox extremists led by Father Basil tolerated the existence of the applicants' religious community and enabled them to exercise freely their rights to freedom of religion' – ECHR judgment of 3 May 2007, Case *97 members of the Gldani Congregation of Jehovah's Witnesses and 4 others v. Georgia*, application no. 71156/01, ECLI:CE:ECHR:2007:0503JUD007115601, § 134.

[22] The Court considers that the positive obligations imply, inter alia, that States are obliged to create, while establishing an effective system of protection of authors and journalists, an environment conducive to the participation in public debates of all persons concerned, allowing them to express without fear their opinions and ideas – ECHR judgment of 14 September 2010, Case *Dink v. Turkey*, applications nos. 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09, ECLI:CE:ECHR:2010:0914JUD000266807, § 137 (judgment in French, translation by the author).

[23] *Plattform 'Ärzte für das Leben' v. Austria* judgment, *supra* note 16 above.

[24] ECHR judgment of 21 February 1990, Case *Powell and Rayner v. the United Kingdom*, application no. 9310/81, ECLI:CE:ECHR:1990:0221JUD000931081, § 41.

[25] It is beyond the scope of this article to analyze the proposals to give a more direct horizontal dimension to international human rights law. For insight into the topic see Knox (2008). For an overview of the concept of third-party horizontal effect of fundamental rights, often called *Drittwirkung* in jurisprudence, see Engle (2009).

itself 'are not imposed upon individuals' (Schabas, 2015, p. 105),[26] since under Article 1 it is only the state parties that shall secure the rights prescribed by the Convention, and since 'applications complaining of violations can only be made against Contracting Parties to the Convention, that is, against States.'[27] However, that does not rule out the conclusion that the positive obligations of the state arising under the Convention may lead, and in some cases even need to lead, to the state imposing obligations on an individual, or more generally on a private actor, to respect the human rights of another individual. As Andrew Clapham noted, 'the privatization of functions such as law enforcement, health care, education, telecommunications, and broadcasting has meant in some cases the evaporation of controls which were placed on these sectors to ensure respect for civil and political rights' (Clapham, 2006, p. 8), and it 'has forced us to think again about the applicability of human rights law in the private sector' (Clapham, 2006, p. 3). Even if one rejects a direct horizontal effect of human rights, one may still agree that the more a horizontal relationship between two parties resembles a vertical one, the more it is justified for the state to intervene in order to secure the human rights of the weaker party of such a relationship (Florczak-Wątor, 2014, p. 60–61). Such an approach is compatible with the concept of the indivisibility and interdependence of human rights, as noted by Conçado Trindade (1998, p. 518 and 521), who stressed that '[i]t is necessary to continue defending all human rights against abuses of public power as well as any other type of power and domination', and that 'the State remains responsible for those violations that it fails to prevent.' While a full discussion of the United Nation's position on this issue is beyond the scope of this article, it should be mentioned that according to General comment No. 34 (United Nations Human Rights Committee 2011, para. 7), relating to freedom of expression under Article 19 of the International Covenant on Civil and Political Rights, states should 'ensure that persons are protected from any acts by private persons or entities that would impair the enjoyment of the freedoms of opinion and expression to the extent that these Covenant rights are amenable to application between private persons or entities.'

Many commentators of the European Convention agree on the growing extent to which positive obligations of the state rely on the duty to protect the rights of individuals from infringements by non-state actors (Clapham, 2006, p. 351). Indeed, Alastair Mowbray (2004, p. 225) pointed out that '[o] ne of the most prevalent types of positive obligations is the duty upon states to take reasonable measures to protect individuals from infringement of their

[26] For a discussion of this issue see Clapham (2006), p. 349–350.

[27] Van Dijk, P., and G.J.H. van Hoof (1998). *Theory and Practice of the European Convention on Human Rights*. The Hague: Kluwer (quoted in Clapham 2006, 350).

Convention rights by other private persons'. In the same vein, Jane Wright (2017, p. 70) noted that 'human rights obligations bind states in international law and … those obligations may require states to control the acts of non-state actors so that they in turn respect the rights of others'. However, 'the human rights obligation remains that of the state' (Wright 2017, 24). Similarly, according to William Schabas (2015, p. 90) there is 'a duty to ensure that third parties do not infringe the rights of individuals'. Even though the ECHR 'does not consider it desirable, let alone necessary, to elaborate a general theory concerning the extent to which the Convention guarantees should be extended to relations between private individuals *inter se*',[28] the conclusions of the cited authors are the natural result of the analysis of the judgments of the ECHR in individual cases. The Court requires states to take measures designed to protect people for example: from violent death under Article 2,[29] from ill-treatment under Article 3,[30] from violations of the respect for private life under Article 8[31] – all at the hands not only of state actors, but also of private individuals.

IV. Positive obligations of the state in securing freedom of expression related to regulating Internet access services under the European Convention

While the ECHR has recognized, firstly, the existence of at least some positive obligations of the state related to freedom of expression, and secondly, the importance of the Internet for its exercise,[32] it has not yet comprehensively addressed the issue of the state securing this right through positive action in an Internet context. So far, the only judgment of the ECHR touching upon the matter was in the case of *Editorial Board of Pravoye Delo and Shtekel v. Ukraine*. The Court stated 'that the absence of a sufficient legal framework at the domestic level allowing journalists to use information obtained from the Internet without fear of incurring sanctions seriously hinders the exercise

[28] ECHR judgment of 28 September 2001, Case *VgT Verein gegen Tierfabriken v. Switzerland*, application no 24699/94, ECLI:CE:ECHR:2001:0628JUD002469994, § 46.

[29] ECHR judgment of 30 November 2004, Case *Öneryıldız v. Turkey*, application no. 48939/99, ECLI:CE:ECHR:2004:1130JUD004893999, § 71 and 101.

[30] ECHR judgment of 10 May 2001, Case *Z and others v. The United Kingdom*, application no. 29392/95, ECLI:CE:ECHR:2001:0510JUD002939295, § 73.

[31] ECHR judgment of 26 March 1985, Case *X and Y v. the Netherlands*, application no. 8978/80, ECLI:CE:ECHR:1985:0326JUD000897880, § 23.

[32] As summarized in Part II above.

of the vital function of the press as a *public watchdog*.'[33] Be that as it may, there certainly are grounds in the European Convention for a 'more human approach' to regulating Internet access services, based on positive obligations of the state.

When the ECHR considers what obligations the state should comply with to secure freedom of expression, and whether they are negative, positive, or both, the Court takes 'into account the nature of the freedom in question, its contribution to the public debate, the nature and scope of restrictions on freedom of expression, the existence of alternatives, and the weight to be given to the rights of others' (Schabas, 2015, p. 454).

Any reasonable determination of the state's obligations in securing freedom of expression should address the unique nature of the Internet as a means of communication, in particular its role as an essential tool for the exercise of freedom of expression,[34] and its unprecedented potential for user-generated expressive activity.[35] While the Internet indeed provides a place for the exercise of freedom of expression when other means are unavailable, as indicated by the ECHR in *Mouvement Raëlien Suisse v. Switzerland*,[36] those other means may not be considered proper substitutes for the Internet, given its unique scope and reach. If one were denied access to the local press, or the possibility to distribute leaflets, or indeed the ability to display posters (as was the case in *Mouvement Raëlien Suisse*), one could still reach an audience on the Internet, and a much bigger audience at that. This would not be the case if the situation were reversed, that is if one sought to reach as big an audience through traditional media as on the Internet. This may simply not be ignored. The idea that the European Convention 'is a living instrument that must be interpreted according to present-day conditions has been a central feature of Strasbourg's case law from its very early days' (Letsas, 2013, p. 108). To deny the Internet's unique importance for the exercise of freedom of expression,

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[33] ECHR judgment of 5 May 2011, Case *Editorial Board of Pravoye Delo and Shtekel v. Ukraine*, application no. 33014/05, ECLI:CE:ECHR:2011:0505JUD003301405, §64. The ECHR considers the freedom of the press – not separately regulated in the European Convention – to be an integral element of the freedom of expression.

[34] *Akdeniz v. Turkey* judgment, *supra* note 4 above.

[35] *Delfi AS v. Estonia* judgment, *supra* note 6 above.

[36] ECHR judgment of 13 July 2012, Case *Mouvement Raëlien Suisse v. Switzerland*, application no. 16354/06, ECLI:CE:ECHR:2012:0713JUD001635406. In the judgment, the ECHR addressed the refusal by police administration of authorization for the display of posters by an association. The Court ruled that the administration's actions did not constitute a violation of Article 10 of the European Convention. The ECHR stated that '[i]n view of the fact that the applicant association is able to continue to disseminate its ideas through its website, and through other means at its disposal such as the distribution of leaflets in the street or in letter-boxes, the impugned measure cannot be said to be disproportionate' (§ 75).

and its irreplaceability by other means of communication, would be to deny the reality of the world we live in.

In *Appleby v. The United Kingdom*,[37] the ECHR addressed the issue of balancing freedom of expression and property rights. In the Court's opinion, 'the automatic creation of rights of entry to private property' does not necessarily follow from the recognition that 'demographic, social, economic and technological developments are changing the ways in which people move around and come into contact with each other.' However, if 'the bar on access to property has the effect of preventing any effective exercise of freedom of expression or it can be said that the essence of the right has been destroyed, the Court would not exclude that a positive obligation could arise for the State to protect the enjoyment of the Convention rights by regulating property rights.' To exemplify a situation where positive state action would be justified, the ECHR referenced the U.S. Supreme Court judgment in *Marsh v. Alabama*, which involved a corporate town, that is, a municipality wholly controlled by a private actor.[38] This example is particularly interesting since it allows conclusions to be drawn pertinent to an Internet context. The Internet is a network of connected networks spanning the entire world, and built, owned and maintained mostly by private actors. Obviously, no single entity, private or public, controls the whole thing. However, an individual person's provider of Internet access services (usually called an Internet service provider, or ISP, in the literature) enjoys practically complete technical control over this person's service and its utility. Internet traffic travelling to and from the end-user may be blocked, slowed down, redirected or otherwise influenced through traffic management measures implemented in the network infrastructure.[39] The end-user herself may not even know that traffic is being manipulated by the ISP (Van Schewick, 2010, p. 260), and so she may not realize the need to seek another ISP which does not infringe her rights. Thus, if ISPs were not obligated by the state to refrain from interfering with Internet traffic in at least some most intrusive ways, such as blocking, the end-user might be hindered in the exercise of her freedom of expression, or even prevented from it, and thus the essence of the right might be destroyed, given the Internet's unprecedented and essential role as a means of expression, mentioned above.

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[37] ECHR judgment of 6 May 2003, Case *Appleby and others v. The United Kingdom*, application no. 44306/98, ECLI:CE:ECHR:2003:0506JUD004430698, § 47.

[38] Supreme Court judgment of 7 January 1946, Case *Marsh v. Alabama*, 326 U.S. 501 (1946), https://supreme.justia.com/cases/federal/us/326/501/.

[39] A full discussion of internet traffic management and its technical implementation is beyond the scope of this article. For a concise overview of the issue see Belli (2016), especially 99–102.

Commenting on *Appleby*, Jasper Sluijs argued by analogy that the state would only have an express positive obligation to intervene if an ISP were to block all expression on its network, effectively shutting down its operations, making impossible any use of the Internet (Sluijs, 2012, p. 105–106). While such a conclusion seems to be justified by directly applying the ECHR's *Appleby* reasoning – very firmly rooted in a brick-and-mortar environment – to an Internet context, it very obviously ignores the pertinent and undeniable differences between expression in the material and digital worlds. Indeed, if one encountered a privately enforced obstacle to expressing oneself in the material world, one would simply have to travel outside the domain of the infringer to enjoy unfettered speech, as was the case in *Appleby*. However, in a digital environment, one may not leave the 'domain' of one's ISP, since the ISP is the gatekeeper of Internet access, a necessary intermediary between a person and her online expression. It may be possible to change one's ISP, however only on at least two conditions. Firstly, if one realizes the need to do so, which one may not if Internet traffic interference is clandestine, and secondly, if there is competition on the relevant market, which is not always the case. Still, that would only solve the problem if the other ISP did not interfere with the exercise of freedom of expression. The only way of absolutely guaranteeing this, would be for the state to obligate ISPs not to hinder expression.

V. Negative and positive obligations of EU Member States to secure freedom of expression by regulating Internet access services and enforcing pertinent regulations

The relationship between the European Convention, the EU and its Member States has always been complex, and has become even more so after the Charter of Fundamental Rights of the European Union (hereinafter: the Charter) acquired binding force in December 2009.[40] All EU Member States are also Contracting Parties of the European Convention. Article 6 (2) TEU, as amended by the Treaty of Lisbon, obliges the EU to accede to the European Convention. This obligation harmonizes with Article 59 (2) of the European Convention, as amended by Protocol 14, under which the EU may accede to the Convention. The EU's accession 'would enhance the protection of human rights in Europe', firstly, by preventing divergences between the case

[40] While the issue itself had to be mentioned here, a detailed discussion of the interaction of EU law and the European Convention system is beyond the scope of this article. For further clarification see Gragl (2013), Kuijer (2018), and Callewaert (2018).

laws of the ECHR and the CJEU, secondly, by subjecting the EU and its institutions to external judicial supervision where human rights are concerned, and finally, by giving EU citizens the right to bring complaints against EU institutions directly before the ECHR (Gragl, 2013, p. 7). However, for now EU's accession has been put on hold, complicating the interaction between the European Convention and the EU legal order with its binding Charter (Kuijer, 2018).There are provisions both in the TEU and in the Charter that seek to resolve potential conflicts. Under Article 6 (3) TEU, '[f]undamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.' Under Article 52 (3) of the Charter, '[i]n so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.' After the Charter acquired binding force, whenever the Court of Justice was dealing with cases involving human rights claims, it relied on the Charter significantly more often than on the European Convention, while the reverse was the case before, in the period from 2000 to 2009 (De Búrca, 2013, p. 175). However, for the issues discussed in this article, the most important observation relating to the interplay of the various legal systems is that EU Member States are legally bound by the European Convention when applying EU law (Callewaert, 2018, p. 1710). The ECHR stated in *Bosphorus* that '[t]he Convention does not … prohibit Contracting Parties from transferring sovereign power to an international (including a supranational) organization in order to pursue cooperation in certain fields of activity,' and 'it has also been accepted that a Contracting Party is responsible under Article 1 of the Convention for all acts and omissions of its organs regardless whether the act or omission in question was a consequence of domestic law or of the necessity to comply with international legal obligations.'[41] Thus, the fact that Internet access services are regulated not by national legislation, but that of the EU, does not preclude the obligation of EU Member States to secure freedom of expression in the application of Regulation 2015/2120.

Internet access has been regulated in EU law, specifically by Regulation 2015/2120. After several years of preparation and discussion, not without controversies (Marsden, 2017, 95–101), it introduced a network neutrality regime in the EU, not using the term itself, but rather opting for the

[41] ECHR judgment of 30 June 2005, Case *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi v. Ireland*, application no. 45036/98, ECLI: CE:ECHR:2005:0630JUD004503698, § 152–153.

designation of 'open Internet access.' Article 2 (2) defines an 'Internet access service' as a publicly available electronic communications service that provides access to the Internet, and thereby connectivity to virtually all end points of the Internet, irrespective of the network technology and terminal equipment used. Under Article 3 (1), end-users of Internet access services shall have the right to access and distribute information and content, use and provide applications and services, and use terminal equipment of their choice. The obligations of ISPs correspond to the rights of end-users, and involve, for example, the equal treatment of Internet traffic under Article 3 (3) first subparagraph. The provisions of Regulation 2015/2120 capture the essence of network neutrality, indicating the general-purpose functionality of Internet access services, prohibiting ISPs from arbitrarily interfering with Internet traffic, and allowing all end-users to access and distribute Internet content of their own choice. However, the language of Regulation 2015/2120, while referencing concepts within the scope of freedom of expression, such as the right to access and distribute information, does not specifically indicate that the aim of the Regulation was to secure the fundamental rights of Internet users in the EU. Recital (1) states that the Regulation 'aims to establish common rules to safeguard equal and non-discriminatory treatment of traffic in the provision of internet access services and related end-users' rights. It aims to protect end-users and simultaneously to guarantee the continued functioning of the internet ecosystem as an engine of innovation.' The fixation on innovation in the ecosystem clearly references the U.S. discussions on network neutrality, generally framed in economic terms, as exemplified by Wu and Yoo (2007). The Body of European Regulators for Electronic Communications (hereinafter: BEREC) acknowledges that Regulation 2015/2120 'observes the fundamental rights of, and the principles recognized in the Charter, notably … the freedom of expression…' (BEREC, 2016, para. 20). BEREC also indicates that an infringement of end-user rights may occur if commercial or technical measures implemented by an ISP reduce the range and diversity of content and applications available to end-users, which 'may also concern the effect on freedom of expression and information, including media pluralism' (BEREC 2016, *supra* note 12 to para. 46). The lack of reference to fundamental rights in Regulation 2015/2120 itself, and their mention only as an obvious afterthought, and in fact as a literal footnote in the BEREC Guidelines, demonstrate an axiological deficit of the Regulation which may adversely affect its application.

In line with the uncontroversial concept of negative obligations of the state in ensuring the enjoyment of human rights, it is beyond any doubt that states are obligated not to violate human rights protected under the European Convention by the actions of their own organs (be they legislative,

executive or judiciary),[42] governmental organizations (which refers not only to 'central organs of the state, but also to decentralized authorities that exercise "public functions", regardless of their autonomy *vis-á-vis* the central organs'; this includes 'local and regional authorities'),[43] and other bodies associated with the state, such as state-owned companies, unless they enjoy 'sufficient institutional and operational independence from the State.'[44] Thus, if an Internet access service is provided by the state itself, freedom of expression of all end-users of the service must be respected for the state to meet its simple, negative obligation. Any arbitrary restrictions on the accessibility of Internet content through such a service would be incompatible with the European Convention. It is quite common in EU Member States for public bodies, such as municipalities, to provide wireless Internet access in public spaces.[45] States also provide Internet access to households of some categories of end-users, specifically those threatened by digital exclusion. Such services sometimes come with restrictions related to the types of Internet content that may be distributed or accessed.[46] It is the opinion of the author of this article that restrictions of this kind violate Article 10 of the European Convention, unless they may be justified under Article 10 (2). This position holds even if a given service falls outside the scope of Regulation 2015/2120, which may occur when the service is not publicly available, and thus does not constitute an Internet access service as defined in Article 2 (2) of Regulation 2015/2120. This applies, for example, to services offered exclusively to digitally excluded households after a vetting procedure (Nałęcz, 2017, p. 677–678).

As argued in Part IV above, in addition to negative obligations, states party to the European Convention also have a positive obligation to ensure the exercise of freedom of expression of everyone using Internet access services. This applies to services offered by private actors. The provisions of Regulation 2015/2120 requiring all ISPs to treat all Internet traffic equally, and to generally refrain from blocking Internet traffic and otherwise disrupting access to and distribution of Internet content, when indeed enforced by states allow for compliance with this positive obligation. However, the language of Regulation 2015/2120 is ambiguous, and thus the practical effect of the Regulation

[42] ECHR judgment of 18 February 2009, Case *Andrejeva v. Latvia*, application no. 55707/00, ECLI:CE:ECHR:2009:0218JUD005570700, § 56.

[43] ECHR decision of 23 September 2003, Case *Radio France and others v. France*, application no. 53984/00, ECLI:CE:ECHR:2003:0923DEC005398400, § 26.

[44] ECHR judgment of 30 November 2004, Case *Mykhaylenky and others v. Ukraine*, applications nos. 35091/02, 35196/02, 35201/02, 35204/02, 35945/02, 35949/02, 35953/02, 36800/02, 38296/02, and 42814/02, ECLI: CE:ECHR:2004:1130JUD003509102, § 44.

[45] Providing wireless Internet access in public spaces is part of the EU's electronic communications policy, under the WiFi4EU initiative.

[46] For examples of such restrictions see Nałęcz (2017).

depends to a great extent on how its provisions are interpreted by state organs, including national regulatory agencies and the courts (Piątek, 2017, p. 8). The need to secure freedom of expression of the end-users of Internet access services under Article 10 of the European Convention should be considered when performing purposive interpretation of Regulation 2015/2120.

States have a positive obligation to establish and enforce effective measures to monitor the practices of all ISPs. For example, if a private actor ISP introduces a traffic management measure that blocks certain categories of traffic, resulting in an individual's inability to exercise freedom of expression, and the competent state authority, typically the national regulatory agency for electronic communications, fails to intervene, an infringement of the state's positive obligation may be identified.

One of the complex and controversial issues which may be clarified by reference to the need to secure freedom of expression is the practice of zero-rating.[47] It involves exempting traffic generated by some Internet content – typically specific services or applications, rather than types thereof – from monthly data caps, which nowadays are common in mobile Internet access services, but may also apply to services offered in a fixed network (Marsden, 2016).[48] Regulation 2015/2120 does not expressly address zero-rating. BEREC (2016, paras. 40–43) and commentators (Piątek, 2017, p. 171–72) consider zero-rating to be one of the commercial practices which under Article 3 (2) of Regulation 2015/2120 'shall not limit the rights of end-users' set out in Article 3 (1). In BEREC's opinion, '[a] zero-rating offer where all applications are blocked (or slowed down) once the data cap is reached except for the zero-rated application(s) would infringe Article 3 (3) first (and third) subparagraph [of Regulation 2015/2120]' (BEREC, 2016, para. 41). This is a sound interpretation, supported by the literal formulation of the provisions mentioned, and compatible with the human rights requirement that lawful traffic not be blocked. However, BEREC further indicates (2016, para. 43) that when assessing the compatibility of zero-rating and other agreements and commercial practices with Regulation 2015/2120, and their effect on end-user rights, national regulatory agencies should consider *inter alia* the scale of the practice. This is a reference to Recital (7), which proposes that the market position of the provider of Internet access services be taken into account when assessing whether its practices undermine the essence of end-user rights. This position is unacceptable from a human rights perspective. If the exercise of a human right is effectively prevented by a private actor, the economic position

[47] For a theoretical discussion of zero-rating and a summary of the positions of the supporters and opponents of its admissibility in a network neutrality regime see Belli (2016).

[48] The name 'zero-rating' refers to the effectively zero price of the data traffic of content subject to a zero-rating offer.

of this entity vis-á-vis its competitors is completely immaterial. What matters is its position in relation to the person whose right has been infringed. If it is a position of effective power and domination, mentioned by Conçado Trindade and quoted in Part III above, the state should intervene. This analysis shows how excessive reliance on economic arguments may lead to the state failing in its obligation to secure human rights.

VI. Regulation 2015/2120 as a sign of European consensus – chance for a positive feedback loop between the EU and the ECHR legal systems

There may in fact be a positive feedback loop effect between Regulation 2015/2120 and enforcing European Convention rights. When the ECHR reasons and decides on the outcome of a case, it often considers whether there is a European consensus on the matter at issue (Dzehtsiarou, 2018, p. 101). The court utilizes comparative legal studies through an analysis of the domestic laws and practices of the Contracting Parties (Dzehtsiarou, 2018, p. 105). It also takes into account international law, its application by regional courts other than the ECHR, reports of various organizations, and the laws and practices of states outside the Council of Europe (Dzehtsiarou, 2018, p. 106–107). Finally, and most importantly in the context of this article, the ECHR's judgments indicate that 'when the EU rules on a particular issue, such a ruling effectively forms a European consensus' (Dzehtsiarou, 2018, p. 119). Even though Regulation 2015/2120 does not explicitly mention the protection of freedom of expression as one of the aims of regulating Internet access services, its coming into force in all EU Member States is an unambiguous indication of a European consensus in denying ISPs the right to manage Internet traffic however they see fit. If the ECHR were to consider whether there exist positive obligations of the state in securing freedom of expression by regulating Internet access services, Regulation 2015/2120 would confirm their existence. Thus, the Regulation would strengthen the protection of freedom of expression in all parties of the European Convention, even those outside the EU, while at the same time EU Member States enforcing Regulation 2015/2120 would benefit from a strong axiological basis for their actions, represented by the stance of the ECHR.

VII. Conclusions

An analysis of human rights literature, and of the case law of the ECHR proved that, outside the U.S., it is quite common to admit that states not only need to refrain from infringing human rights, but they also should secure them through their own positive actions. Under the European Convention, the ECHR has long recognized both the negative and positive obligations of states, often without drawing a distinction between them. What matters is if people can effectively enjoy their fundamental rights. This may even involve the state obligating private actors to respect the human rights of others. In developed countries, the Internet has become an essential tool for the exercise of freedom of expression, with unprecedented potential for user-generated expressive activity. While the Internet is indeed 'an engine of innovation', as Recital (1) of Regulation 2015/2120 declares, much more importantly it is an engine of expression, which the Recitals do not mention.

Internet access is usually provided by private actors, who have the technical ability to restrict freedom of expression online. While the ECHR has not elaborated on the positive obligations of the state in securing freedom of expression by regulating Internet access services, this article aimed to show that such obligations exist under the European Convention. If the Convention is indeed to be a living instrument allowing the effective enjoyment of human rights, not only should states be subject to a negative obligation not to hinder expression in offering and regulating Internet access services, but they should also have a positive obligation to prevent private actor ISPs from engaging in practices that infringe on the freedom of expression of the end-users of their services. Internet access services have been regulated in the EU by Regulation 2015/2120. Even though the relationship between the legal systems of the European Convention and of the EU is nowadays complicated, EU Member States are bound by the European Convention when applying EU law. Thus, when enforcing Regulation 2015/2120 and interpreting its ambiguous provisions, specifically for the purpose of the assessment of the legality of agreements, commercial practices and traffic management measures, the need to secure the freedom of expression of everyone under Article 10 of the European Convention should be considered. There certainly is ample ground for a more human approach to the state's role in regulating the relations between private actors, and specifically between ISPs and end-users of Internet access services. While the economics of network neutrality may not be ignored in public policy, the economic issues should not overshadow the need to secure human rights.

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Compatibility of Polish Law with EU Law Concerning the Use of Electronic Communications Means for Direct Marketing Purposes

by

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CONTENTS

Abstract

EU law sets out some requirements in respect of data processing for direct marketing purposes. These requirements are included in particular in Regulation 2016/679[1] and Directive 2002/58/EC[2]. The use of electronic communications means

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[1] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ L 119, 04.05.2016, p. 1–88.

[2] Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications), OJ L 201, 31.07.2002, p. 37–47.

for direct marketing purposes has an impact on both the entrepreneurs and their clients' rights, therefore, accurate interpretation of EU law in this respect and an appropriate implementation of EU law into national law in Member States as well as its appropriate application in practice, are essential.
This article provides an analysis of the conformity of Polish law with EU law in respect of the use of electronic means of communication for the direct marketing of products or services similar to products or services previously sold or provided by the same entity. There are a lot of doubts in this regard. The correct evaluation of Polish law with the use of pro-EU rules interpretation is crucial, because Polish law provides severe sanctions for the infringement of provisions concerning the use of electronic means of communications for direct marketing purposes.

Resumé

La législation de l'UE fixe certaines exigences en ce qui concerne le traitement des données à des fins de commercialisation directe. Ces exigences figurent notamment dans le règlement 2016/679 et la directive 2002/58/CE. L'utilisation des moyens de communications électroniques à des fins de commercialisation directe a une influence tant sur les droits des entrepreneurs que sur ceux de leurs clients; il est donc essentiel d'interpréter correctement le droit communautaire en la matière, de le transposer correctement en droit national et de le faire appliquer correctement dans les États membres. Le présent article analyse la conformité du droit polonais avec le droit communautaire en ce qui concerne l'utilisation de moyens de communication électroniques pour la commercialisation directe de produits ou de services similaires à des produits ou services précédemment vendus ou fournis par la même entité. Il y a beaucoup de doutes à cet égard. L'évaluation correcte de la législation polonaise à travers l'interprétation des règles pro-UE est cruciale car la législation polonaise prévoit des sanctions sévères en cas de violation des dispositions concernant l'utilisation des moyens de communication électroniques à des fins de la commercialisation directe.

Key words: direct marketing; unsolicited communications; right to privacy; opt-in and opt out rules; personal data; legal persons data.

JEL: K24

I. Introduction

There is no legal definition of 'direct marketing' in European Law. In addition, apart from the term 'direct marketing', other equivalent or similar expressions are used in European Law. There is a reference to direct marketing in Regulation 679/2016 (recital 47) and Directive 2002/58/EC

(Article 13). Another legal act, that is Directive 2000/31/EC[3], relevant to the assessment of the problem presented in this article, refers to 'commercial information' (Article 7). Due to the lack of a legal definition of 'direct marketing', referring to the meaning of this concept in economic sciences is justified. It is accepted that the main feature of marketing is to manage profitable customer relationships. The twofold goal of marketing is to attract new customers by promising superior value, and to keep and grow current customer base by delivering satisfaction (Armstrong et al., 2009, p. 6). Direct marketing is a special type of marketing. Direct marketing covers all market activities which use single level (more direct) communication and/or direct distribution or dispatching to address particular target groups individually. Direct marketing also covers those market-oriented activities which use multi-level communication to ensure direct individual contact (Dallmer, 1997, p. 3).

The importance of direct marketing has increased with the development of technology. Currently, direct marketing carried out with the use of traditional means, namely using traditional mail or distributing leaflets and flyers, has become significantly less important. In the digital age, direct marketing, carried out with the use of new ways of reaching the customer, is of fundamental importance. Promoting products and the image of entrepreneurs by means of e-mail, telephone calls (in particular in mobile networks) or cookies is more effective. Due to the fact the currently direct marketing carried out with the use of traditional means is used very rarely, sometimes this term is understood only in the respect of the use of electronic means (Denley, Foulsham and Hitchen, 2019, sec. 12).

The essence of direct marketing leads to the creation of a specific relationship between entrepreneurs, using electronic means for direct marketing purposes, and the recipients of marketing information. This method of communication causes a conflict between two values. On the one hand, entrepreneurs have an interest in reaching out to as many clients as possible with their offer. Thus, they can expect their sales volume to increase. As a result of such activities, they can gain a competitive advantage. On the other hand, sending messages to clients intrudes on their sphere of privacy. There is a risk that clients would not want to receive such information. Of particular importance are situations when the transmission of information involves the processing of personal data. EU law tries to reconcile all those values and balance the interests of both parties (Piątek, 2003, p. 299). Therefore, appropriate regulations have been adopted in the European Union. Some of these regulations have the form of directives and require implementation into national law. The correct

[3] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce), OJ L 178, 17.07.2000, p. 1–16.

implementation of EU directives, and the interpretation of national law in light of the pro-EU interpretation, determines whether the objectives set out in EU law are obtained in particular Member States. There are serious doubts whether regulations in force in Poland regarding the use of electronic communications means for direct marketing purposes are compatible with EU law. Further in this article, an assessment of the compliance of Polish legislation with EU law in this respect will be carried out.

II. EU law on direct marketing

One of the basic acts of EU law regulating issues related to direct marketing is Regulation 2016/679. However, the material scope of this legal act is limited. With regard to direct marketing, this legal act relates only to the rules of personal data processing, including the admissibility of their processing. Sending marketing messages to entities which are not identified with the use of personal data (for example: capital companies, the names of which do not include data of natural persons) is outside of the scope of Regulation 2016/679. Recital 47 of Regulation 2016/679 refers directly to direct marketing. It states that the processing of personal data for direct marketing purposes may be regarded as carried out for a legitimate interest. From the above, however, it should not be inferred that in each case it is acceptable to process personal data for direct marketing purposes. In this case, the basis for the processing of personal data is the legitimate interest of the controller or a third party. Such legal basis for personal data processing is set out in Article 6 point 1 letter f) of Regulation 2016/679. However, this provision requires an assessment of whether in a given case the legitimate interest pursued by the controller or by a third party is not overridden by the interests or fundamental rights and freedoms of the data subject. The problem of balancing the legitimate interest of the data controller and the rights and freedoms of the data subject has been analysed by the Working Party on the Protection of Individuals with regard to the Processing of Personal Data (the so-called Article 29 Data Protection Working Party).[4] This evaluation was carried out under Article 7 letter f) of Directive 95/46/EC,[5] that is, on the basis of the EU legal act that has been repealed by Regulation 2016/679. Yet, the basis for personal data processing specified in Article 7 letter f) of Directive 95/46/EC is equivalent to the basis

[4] Article 29 Data Protection Working Party was set under Article 29 of Directive 95/46/EC.

[5] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ L 281, 23.11.1995, p. 31–50.

of personal data processing specified in Article 6 point 1 letter f) of Regulation 2016/679 and as a consequence, the opinion of the Data Protection Working Party is useful for the interpretation of Article 6 point 1 letter f) of Regulation 2016/679. In one of its opinions,[6] the Article 29 Data Protection Working Party tried to assess the conditions on which processing personal data for direct marketing purposes is allowed. In this opinion, the Article 29 Data Protection Working Party considered that the legitimate interest of the controller could justify conventional marketing (in particular traditional, postal mailing),[7] as well as direct marketing of similar products.[8] In this regard, the opinion referred to Directive 2002/58/EC, which will be described later in this article. It was highlighted in this opinion however, that it is not possible to establish one rule for the assessment whether the legitimate interest of the controller is more valuable than the interest or fundamental rights and freedoms of the data subject. Article 29 Data Protection Working Party stated that, in order to be relevant under Article 7 letter f), a 'legitimate interest' must therefore: (1) be lawful (that is, in accordance with applicable EU and national law), (2) be sufficiently clearly articulated to allow the balancing test to be carried out against the interests and fundamental rights of the data subject (that is, sufficiently specific), and (3) represent a real and present interest (that is, it cannot be speculative).[9] By referring to another of its opinions, the Article 29 Data Protection Working Party clarified that compliance with the law has a broader sense and means that it is also necessary to ensure compliance with areas of law other than data protection law (this includes other applicable laws, such as employment, contract, or consumer protection law).[10] It is also emphasised that the results of the balancing of interests might be especially in favour of the controller in the case where the data subject could foresee the use of its personal data for marketing purposes based on its relationship with the controller (Voight and von dem Bussche, 2017, p. 104).

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[6] Opinion of Article 29 Data Protection Working Party No. 06/2014 on the notion of legitimate interests of the data controller under Article 7 of Directive 95/46/EC adopted on 9 April 2014.

[7] Opinion of Article 29 Data Protection Working Party No. 06/2014 on the notion of legitimate interests of the data controller under Article 7 of Directive 95/46/EC adopted on 9 April 2014, p. 24–25.

[8] Opinion of Article 29 Data Protection Working Party No. 06/2014 on the notion of legitimate interests of the data controller under Article 7 of Directive 95/46/EC adopted on 9 April 2014, p. 46.

[9] Opinion of Article 29 Data Protection Working Party No. 06/2014 on the notion of legitimate interests of the data controller under Article 7 of Directive 95/46/EC adopted on 9 April 2014, p. 25.

[10] Opinion of Article 29 Data Protection Working Party No. 03/2013 on purpose limitation adopted on 2 April 2013, p. 19–20.

Another act of EU law setting out the conditions for data processing for direct marketing purposes is Directive 2002/58/EC. This Directive was drafted to tackle some of the deficiencies of earlier instruments and to deal specifically with problems from the perspective of electronic communications (Savin, 2013, p. 253). Detailed requirements regarding the use of electronic communication means for direct marketing purposes are set out in Article 13 of Directive 2002/58/EC. This provision applies to unsolicited communications. Article 13 paragraph 1 of Directive 2002/58/EC provides that the use of automated calling and communication systems without human intervention (automatic calling machines), facsimile machines (fax) or electronic mail for the purposes of direct marketing may be allowed only in respect of subscribers or users who have given their prior consent. A valid consent cannot be obtained via a general message sent to prospective recipients of unsolicited communications for direct marketing, requesting their consent to receive such communications.[11] It goes without saying that the arbitrary collection of information that falls under the scope of Article 13 paragraph 1 of Directive 2002/58/EC by way of automatic means that do not involve the consent of the person concerned, such as the automatic harvesting of personal data from public internet places via software programmes, and their use for unsolicited communications for direct marketing, is not permitted (Asscher and Hoogcarspel, 2006, p. 69).

To determine the full scope of the application of Article 13 paragraph 1 of Directive 2002/58/EC, it is required to refer to the definition of electronic mail. Article 2 letter h) of Directive 2002/58/EC provides that electronic mail means any text, voice, sound or image message sent over a public communications network, which can be stored in the network or in the recipient's terminal equipment until it is collected by the recipient. The definition of electronic mail is broad and intended to be technology neutral.[12] Recital 40 of Directive 2002/58/EC confirms explicitly that electronic mail covers not only e-mail but also SMS messages. When Directive 2002/58/EC was adopted, it was assumed that the concept of electronic mail covers not only classical e-mail (SMTP[13] based mail) and SMS messages but also MMS-based mail, messages left on answering machines, voice mail service systems including on mobile services

[11] Opinion of Article 29 Data Protection Working Party No. 5/2004 on unsolicited communications for marketing purposes under Article 13 of Directive 2002/58/EC adopted on 27 February 2004, p. 5.

[12] Opinion of Article 29 Data Protection Working Party No. 5/2004 on unsolicited communications for marketing purposes under Article 13 of Directive 2002/58/EC adopted on 27 February 2004, p. 4.

[13] Simple Mail Transport Protocol.

and 'net send' communications addressed directly to an IP address.[14] Since the definition of electronic mail is technologically neutral, as a result of the introduction of new technological solutions, currently the list of services falling under the concept of electronic mail is broader. Such services will also include messages sent using instant messengers, if messages are sent to fixed or mobile numbers covered by a national numbering plan.[15]

For all the ways of using direct marketing mentioned in Article 13 paragraph 1 of Directive 2002/58/EC, it is required to obtain the consent of the addressee before sending marketing information. It means that Article 13 paragraph 1 of Directive 2002/58/EC calls for an opt-in solution (Koenig and others, 2009, p. 540). However, other paragraphs of Article 13 of Directive 2002/58/EC specify certain limitations in terms of the application of the opt-in rule. First, the requirements set out in Article 13 paragraph 1 of Directive 2002/58/EC apply only to addressees who are natural persons. Member States, however, retained the freedom to determine the use of electronic communication means for marketing purposes when messages are sent to entities other than natural persons. The above rule is set out in Article 13 paragraph 5 of Directive 2002/58/EC. Second, paragraph 2 of Article 13 of Directive 2002/58/EC provides an exception to the opt-in rule, which applies to a specific type of addressees provided that certain conditions are met. Article 13 paragraph 2 states that where a natural or legal person obtains from its customers their electronic contact details for electronic mail, in the context of the sale of a product or a service, in accordance with Directive 95/46/EC (currently in accordance with Regulation 2016/679[16]), the same natural or legal person may use these electronic contact details for direct marketing of its own similar products or services provided that customers clearly and distinctly are given the opportunity to object, free of charge and in an easy manner, to such use of electronic contact details at the time of their collection and on the occasion of each message in case the customer has not initially refused such use. Recital 41 provides additional essential explanation helpful to interpret Article 13 paragraph 2 of Directive 2002/58/EC. It explains that within the context of an existing customer relationship, it is reasonable to allow the use of electronic contact details for the offering of similar products or services, but

[14] Opinion of Article 29 Data Protection Working Party No. 5/2004 on unsolicited communications for marketing purposes under Article 13 of Directive 2002/58/EC adopted on 27 February 2004, p. 4.

15 Conclusion resulting from CJ judgment of 5 June 2019, case C-142/18, Skype Communications Sàrl v. Institut belge des services postaux et des télécommunications (IBPT), ECLI:EU:C:2019:460.

16 Pursuant to Article 94 point 2 Regulation 2016/679 references to Directive 95/46/EC shall be construed as references to Regulation 2016/679.

only by the same company that has obtained the electronic contact details in accordance with Directive 95/46/EC (currently in accordance with Regulation 2016/679). When electronic contact details are obtained, the customer should be informed about their further use for direct marketing in a clear and distinct manner, and be given the opportunity to refuse such usage. This opportunity should continue to be offered with each subsequent direct marketing message, free of charge, except for any costs for the transmission of this refusal.

Article 13 paragraph 3 of Directive 2002/58/EC provides freedom for Member States to choose between the opt-in and the opt-out rule in case of unsolicited communications for direct marketing purposes other than those specified, inter alia, in Article 13 paragraph 2 of Directive 2002/58/EC. It results from the above provision that Member States are not entitled to apply a solution other than the opt-out rule in case of the use of electronic communications means for direct marketing of a company's similar products or services. It leads to the conclusion that a full harmonization principle was adopted in Article 13 paragraph 2 of Directive 2002/58/EC.

This means that Directive 2002/58/EC provides the opt-out model for sending marketing messages to existing clients by means of electronic communications devices, provided that direct marketing relates to a company's own products or services that are similar to those sold or provided to their existing clients. Member States are not entitled to introduce a different solution.

Due to the fact that two EU legal acts – Regulation 2016/679 and Directive 2002/58/EC – define the rules of admissibility for direct marketing and that the principles set out in these legal acts are not the same, the relationship between these legal acts should be determined. First, Regulation 2016/679 applies only to the processing of personal data. Pursuant to Article 4 point 1 of Regulation 2016/679, personal data means any information relating to an identified or identifiable natural person. An identifiable natural person is a person who can be directly or indirectly identified, in particular by reference to an identifier such as name, an identification number, location data, an online identifier, or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person. In contrast, Directive 2002/58/EC protects not only the right to privacy of individuals. The object of protection extends to legal persons as well as entities without legal personality.

Second, Regulation 2016/679 is of a general nature, that is, it determines any type of personal data processing, unless specific legislation excludes its use, whereas Directive 2002/58/EC deals with data processing as part of a specific activity. Article 3 of Directive 2002/58/EC provides that it applies to the processing of personal data in connection with the provision of publicly available electronic communications services in public communications networks in

the Community, including public communications networks supporting data collection and identification devices. Directive 2002/58/EC applies if three conditions are met, namely: (1) there is an electronic communications service, (2) the service is offered over an electronic communications network, (3) the service and network are publicly available[17]. Particular provisions of Directive 2002/58/EC may have a complementary or exclusive nature in relation to the provisions of Regulation 2016/679.[18]

Article 13 paragraph 2 of Directive 2002/58/EC has such a specific nature. Primarily, apart from the processing of personal data, it also defines rules for the use of legal persons' data for direct marketing purposes. In addition, it allows the use of electronic communications means for direct marketing of its own similar products or services without the consent of the data subject. The provision of Article 13 paragraph 2 of Directive 2002/58/EC, contrary to Article 6 paragraph 1 letter f) of Regulation 2016/679, does not require the carrying out of an assessment of the controller's interests and the data subject's interests, fundamental rights and freedoms in order to determine whether the data can be processed without the consent of the data subject. With regard to clients who initially did not object to direct marketing, Article 13 paragraph 2 of Directive 2002/58/EC requires clients to be clearly and distinctly informed about the opportunity to object to the use of electronic contact data at the time of its collection and at every opportunity when receiving messages, in a simple and free of charge manner.

III. Polish law applicable to direct marketing

Solutions adopted in Article 13 of Directive 2002/58/EC were introduced to the Polish legal system in two legal acts: Act on rendering electronic services[19] and Telecommunications Law[20] (Piątek, 2019).

Article 10 point 1 of the Act on rendering electronic services provides that it is prohibited to send unsolicited commercial information addressed

[17] Opinion 5/2019 of European Protection Data Board on the interplay between the ePrivacy Directive and the GDPR, in particular regarding the competence, tasks and powers of data protection authorities adopted on 12 March 2019, p. 10.

[18] Opinion 5/2019 of European Protection Data Board on the interplay between the ePrivacy Directive and the GDPR, in particular regarding the competence, tasks and powers of data protection authorities adopted on 12 March 2019, p. 13–14.

[19] Act on rendering electronic services dated 18 July 2002 (Journal of Laws of Republic of Poland from 2002, No. 144, item 1204).

[20] Telecommunications Law of 16 July 2004 (Journal of Laws of Republic of Poland from 2004, No. 171, item 1800).

to a designated recipient who is a natural person by means of electronic communication, in particular electronic mail. Article 2 point 2 of the Act on rendering electronic services defines commercial information as any information intended, directly or indirectly, to promote the goods, services or image of the entrepreneur or professional, whose right to practice depends on the fulfilment of the requirements set out in separate laws, excluding information that enables communication by means of electronic communication with a specific person and information about goods and services that do not achieve the commercial effect desired by the entity that orders it to be distributed, in particular without remuneration or other benefits from producers, sellers and service providers. In accordance with Article 10 point 2 of the Act on rendering electronic services, commercial information is considered as ordered in case the recipient gave consent to receive such information, in particular, he made available an electronic address identifying him. Sending unsolicited commercial information via electronic means of communication constitutes an act of unfair competition and a misdemeanour. Regulations regarding unsolicited commercial information set out in Article 10 of the Act on rendering electronic services include messages sent by means of electronic communication, that is, in particular electronic mail, SMS and MMS (Chałubińska-Jentkiewicz and Taczkowska-Olszewska, 2019; du Val and Nowińska, 2013).

The other legal act regulating the issue of direct marketing by electronic communications means in Poland is the Telecommunications Law. Article 172 point 1 of the Telecommunications Law states that the use of telecommunications terminal equipment and automated calling systems for direct marketing shall be forbidden, unless a subscriber or an end user has given his prior consent. Article 172 point 2 of the Telecommunications Law provides that the regulations included in Article 172 point 1 of the Telecommunications Law do not violate the prohibitions and limitations concerning the transfer of unsolicited commercial information resulting from other legal acts. A question arises about the relationship between Article 10 of the Act on rendering electronic services and Article 172 of the Telecommunications Law. There are a lot of doubts relating to this relation (Gumularz and Kozik, 2009). It appears that there are two main causes of ambiguity.

The first cause stems from the fact that the Act on rendering electronic services was adopted in 2002, that is, before Poland joined the European Union and before the date of the implementation of Directive 2002/58/EC.[21] It should

[21] Pursuant to Article 17 point 1 of Directive 2002/58/EC, this Directive was to be implemented into national law in Member States by 31 October 2003. Due to the fact that Poland joined the European Union on 1 May 2004, Poland was obliged to implement Directive 2002/58/EC on 1 May 2004.

be emphasized however, that despite the Act on rendering electronic services being adopted before Poland's accession to the European Union, the purpose of this law was to ensure harmonization between Polish and Community law. Poland was obliged to undertake such activities under the Association Agreement between Poland and the European Union.[22] It was explained in the written justification to the draft of the Act on rendering electronic services,[23] that in respect of direct marketing (unsolicited commercial information) the objective of this Act was to adjust Polish law to Directive 2000/31/EC. However, this directive did not determine which rule – the opt-in or the opt-out – Member States were obliged to use. In this respect, Directive 2000/31/EC referred to other EU directives, namely Directives 97/7/EC[24] and 97/66/EC,[25] as explained in recital 30 of Directive 2000/31/EC.

Directive 97/7/EC and Directive 97/66/EC provided restrictions regarding the use of automatic calling systems (that is, systems operating without human intervention (Rogalski, 2010) and facsimile machines (fax). It should be added that in Polish literature a view is presented that only voice systems should be regarded as automatic calling systems (Litwiński, 2015, p. 404). It would lead to the position that automatic calling systems do not refer to e-mails, SMS, MMS and other text messages. Such position is rightfully not accepted in jurisprudence.[26] Article 12 paragraph 1 of Directive 97/66/EC provided that the use of automated calling systems without human intervention (automatic calling machine) or facsimile machines (fax) for the purposes of direct marketing may only be allowed in respect of subscribers who have given their prior consent. Paragraph 3 of this Article limited the application of the above rule to subscribers who are natural persons. Article 12 paragraph 2 of Directive 97/66/EC stated that Member States shall take appropriate measures to ensure that, free of charge, unsolicited calls for purposes of direct marketing, by other means, are not allowed either without the consent of the subscribers concerned or in respect of subscribers who do not wish to receive these calls. In this regard, the above provision stipulated that the choice between these options shall be determined by national legislation. Article 10 paragraph 1 of

[22] The Europe Agreement establishing an Association between Poland and the European Communities and their Member States signed on 16 December 1991.

[23] The draft of the Act on rendering electronic services http://orka.sejm.gov.pl/Druki4ka.nsf/($vAllByUnid)/2C59267728F47C60C1256BA00038A017/$file/409.pdf.

[24] Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts, OJ L 144, 04.6.1997, p. 19–27.

[25] Directive 97/66/EC of the European Parliament and of the Council of 15 December 1997 concerning the processing of personal data and the protection of privacy in the telecommunications sector, OJ L 24, 30.01.1998, p. 1–8.

[26] Court of Competition and Consumer Protection judgement of 11 September 2014, XVII AmT 41/12.

Directive 97/7/EC provided that the use of automated calling system without human intervention (automatic calling machine) and facsimile machine (fax) requires the prior consent of the consumer. Article 10 paragraph 2 of Directive 97/7/EC required that Member States shall ensure that means of distance communications, other than the above, which allow individual communications, may be used only where there is no clear objection from the consumer. Although the above Acts required prior consent only in case of using automated calling systems or facsimile machines when the information was directed to a subscriber who is a natural person (Directive 97/66/EC) or a consumer (Directive 97/7/EC), the Act on rendering electronic services required prior consent for sending any commercial information addressed to the designated recipient.

To conclude, the Act on rendering electronic services did not implement Directive 2002/58/EC, but primarily adjusted Polish law to other European directives, namely Directive 2000/31/EC, Directive 97/7/EC and Directive 97/66/EC. Poland's accession to the European Union, which involved the need to adapt Polish law to Directive 2002/58/EC, resulted in another change of Polish legislation. Article 172 of the Telecommunications Law was adopted. This provision defines rules for the use of electronic communications means for direct marketing purposes. This Article came into force on 3 September 2004[27] and stipulated the prohibition of the use of automated calling systems for direct marketing, unless a subscriber or an end user has given his prior consent.

A joint interpretation of Article 10 of the Act on rendering electronic services and Article 172 of Telecommunications Law in their original versions leads to the following conclusions. First of all, it was prohibited to send commercial information without the prior consent of the addressee (for direct marketing purposes), if it was addressed to the designated recipient. This prohibition concerned sending commercial information by means of electronic communication (including electronic mail, SMS, MMS). Furthermore, it was not allowed to use automated calling systems for direct marketing purposes without prior consent of the addressee. This meant that in the case of using automated calling systems, the consent of the addressee was required, although the information was not addressed to the designated recipient. The above regulation was supplemented by solutions stipulated in Article 6 paragraph 3 of the Act of 2 March 2000 on the protection of certain consumer rights and the liability for damage caused by a dangerous product.[28] This provision

[27] Despite the obligation to implement Directive 2002/58 /EC on 1 May 2004, Poland implemented this directive on 3 September 2004.

[28] Act of 2 March 2000 on the protection of certain consumer rights and on the liability for damage caused by a dangerous product (Journal of Laws of Republic of Poland 2000, No. 22, item 271).

provided that the use of a telephone, a videophone, a fax, an electronic mail, an automatic calling device or other means of electronic communication in order to submit a proposal to conclude a contract might only take place with the prior consent of the consumer.

The legal status described above was changed on 24 December 2014. Primarily, the Act of 2 March 2000 on the protection of certain consumer rights and the liability for damage caused by a dangerous product was repealed. It means that currently the regulation concerning direct marketing with the use of electronic communication means is included in two legal acts, namely the Act on rendering electronic services and the Telecommunications Law. After amendments, the prohibition of directing commercial information addressed to a designated recipient without prior consent stipulated in Article 10 of the Act on rendering electronic services is limited to natural persons. On the other hand, in addition to the original prohibition of the use of automated calling systems for direct marketing purposes without the prior consent of the addressee, Article 172 of Telecommunications Law stipulates also the prohibition of the use of telecommunications terminal equipment for these purposes. The amendment to Article 172 of Telecommunications Law leads to the conclusion that this provision requires consent of the addressee in each case of using electronic means of communication for direct marketing purposes. A view is presented in literature that the amendments to Article 172 of Telecommunications Law did not change the meaning of this provision (Krasuski, 2015). Such opinion seems unjustified however. It appears that the joint interpretation of Article 10 of the Act on rendering electronic services leads to the conclusion that the use of electronic communication means for direct marketing purposes requires in each case the prior consent of the addressee (Reszczyk-Król, 2017). Such position is presented by the President of the Office of Competition and Consumer Protection.[29]

IV. The evaluation of compatibility of Polish law with EU law

1. Linguistic interpretation

The linguistic interpretation of Polish regulations leads to the conclusion that they provide the opt-in rule (they require consent of the addressee) in all cases of direct marketing by means of electronic communications. Polish regulations do not contains different legal requirements depending on the

[29] https://www.senat.gov.pl/gfx/senat/userfiles/_public/k8/dokumenty/stenogram/oswiadczenia/muchacki/7201o.pdf (20.07.2019).

addressee of the messages (a natural person or a non-natural person) or the purpose of sending of marketing messages.

The solutions adopted in Polish regulations are different than the solutions specified in Article 13 of Directive 2002/58/EC. In this provision, the opt-in rule is obligatory for the use of automated calling systems and communications systems without human intervention (automatic calling devices), facsimile machines and e-mails (including SMS and MMS) for direct marketing purposes, when the information is directed to a subscriber who is a natural person. However, Member States have the choice between introducing the opt-in or opt-out rule in case of the use of electronic means for direct marketing purposes when information is addressed to entities other than natural persons. It is also crucial that the opt-in rule cannot apply to marketing messages sent via electronic mail (including SMS, MMS and other similar means of sending messages) to clients, if the clients' contact details were obtained in connection with the sale of similar products or services. In this case, Article 13 paragraph 2 of Directive 2002/58/EC requires the application of the opt-out rule.

The above comparison indicates the lack of coherence between Polish and EU regulations. Polish regulations allow the usage of the opt-in rule only. In contrast, Directive 2002/58/EC defines the opt-out rule for sending messages by electronic mail for direct marketing of its own similar products or services. The above inconsistency between Polish and EU regulations is confirmed by the practice of the Polish authority competent to ensure the appropriate fulfilment of the obligations set out in Article 172 of the Telecommunications Law, namely the President of the Office of Electronic Communications (hereinafter: President of UKE). This authority issued a decision imposing a fine of PLN 9.1 million on a company which was sending SMS marketing messages to its own clients without their prior consent. The disclosed description of the questioned practice shows that the SMS contained information about the possibility of using services similar to other services previously offered by this company. Only Article 172 paragraph 1 of Telecommunications Law was indicated as the basis for the imposition of a fine; the decision did not refer to EU regulations.[30] The sole use of a linguistic interpretation leads to the conclusion that the Polish regulations on direct marketing of its own similar products or services are contrary to Directive 2002/58/EC. They require the application of the opt-in rule for any type of use of electronic communications for direct marketing purposes, while Directive 2002/58/EC requires the opt-out rule for sending messages by electronic mail for direct marketing of its own similar products or services.

[30] Retrieved from: https://www.uke.gov.pl/akt/prezes-uke-nalozyl-kary-na-orange-polska-s-a-za-wysylanie-smsow-marketingowych-bez-posiadania-zgod-klientow,139.html (20.07.2019).

It should be emphasised that the solution adopted in the Polish legal system significantly differs from the solutions adopted in other Member States. The model from Article 13 section 2 of Directive 2002/58/EC is copied into national regulations of most Member States.[31] Poland's different attitude in terms of direct marketing drew the attention of the European authorities. The European Commission underlined in one of its documents that Polish regulations do not lead to results consistent with Directive 2002/58/EC and therefore should be interpreted taking into account other legal acts.[32]

2. Teleological (purpose-driven) interpretation

It is required to verify whether the application of the principles of teleological interpretation would ensure coherence between Polish law and EU law. The teleological interpretation of EU law refers to the treaties objectives or the purposes of secondary legislation (Kalisz, 2007). In the present case it is appropriate to refer to the objectives set out in Article 13 of Directive 2002/58/EC. However, the teleological interpretation method cannot leave aside the legal text, because such action would not be considered as an interpretation of the law (Smolak, 2012). Due to the unambiguous wording of Polish law, in particular due to Article 172 of the Telecommunications Law which stipulates the opt-in rule for any use of electronic communication means for direct marketing purposes, it seems impossible to claim that the opt-out rule could be allowed for direct marketing of company's own similar products or services.

Theoretically, the purpose of amending Article 172 of the Telecommunications Law could support the view that the use of a teleological interpretation leads to different results. The written justification of the draft of the act amending the above provision[33] indicated that the objective of the amendment was to implement Article 10 of Directive 2002/65/EC[34]. The directive in question

[31] Examples: § 7 of Gesetz gegen den unlauteren Wettbewerb (UWG) in Germany, § 107 of Bundesgesetz, mit dem ein Telekommunikationsgesetz erlassen wird in Austria, Article L34-5 of Code des postes et des communications électroniques in France, Regulation 13 of S.I. No. 336/2011 – European Communities (Electronic Communications Networks and Services) (Privacy and Electronic Communications) Regulations 2011 in Ireland.

[32] European Commission study: 'ePrivacy Directive: assessment of transposition, effectiveness and compatibility with proposed Data Protection Regulation' 2015, p. 101.

[33] http://www.sejm.gov.pl/Sejm7.nsf/druk.xsp?nr=2076 (20.07.2019).

[34] Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC, OJ L 271, 09.10.2002, p. 16–24.

concerns distance sale of financial services to consumers[35]. In result, an attempt may be made to argue that the requirement to apply the opt-in rule for direct marketing of company's own similar products or services specified in Article 172 of the Telecommunications Law is limited only to financial services offered to consumers. However, it should be taken into consideration that the Polish legislator explained that, in addition to the implementation of the solution from Directive 2002/65/EC, the amendment to Article 172 of the Telecommunications Law also complements the transposition of Article 13 of Directive 2002/58/EC.[36] This means that the introduction of the opt-in rule for all cases of direct marketing by means of electronic communications was not a mistake of the Polish legislator as a result of inappropriate implementation of Directive 2002/65/EC. On the contrary, the introduction of such a solution was intended and it referred to the completion of the implementation of Directive 2002/58/EC. Therefore, the use of a teleological interpretation also does not allow the bringing of Polish law in conformity with EU law.

3. The right to invoke the direct effect of Article 13 of Directive 2002/58/EC

The incompatibility of Polish law with EU law would be eliminated if it could be possible to omit the application of Polish law and apply Article 13 of Directive 2002/58/EC directly. In other words, there is a question of the right of a refusal to apply Polish law and the direct application of the EU Directive. The Court of Justice established the concept of direct effect of the provisions of EU directives. It is accepted that if the provisions of an EU directive conferring rights on individuals are unconditional, sufficiently precise and clear, individuals may invoke them directly against a Member State, provided that a Member State has failed to implement the directive into national law by the end of the period prescribed or where it has failed to implement the directive correctly (Kornobis-Romanowska, 2007). The provision is clear and precise when it is possible to specify the identity of the addressee of the right, the content of the right and the entity responsible for the implementation of this right. The provision is unconditional if its effectiveness does not depend on the call for additional measures, either national or European (Brodecki et al., 2006). It seems that all of the aforementioned conditions are met in the present case. Article 13 of Directive 2002/58/EC, in particular paragraph

[35] Article 10 of Directive 2002/65/WE was previously implemented by the Act of 2 March 2000 on the protection of certain consumer rights and the liability for damage caused by a dangerous product.

[36] Sejm (lower chamber of Polish Parliament) print No. 2076, http://www.sejm.gov.pl/Sejm7.nsf/druk.xsp?nr=2076 (20.07.2019).

2 of this Article providing for the opt-out rule for the use of electronic mail for the direct marketing of the products or services similar to the products or services previously sold or provided, is unambiguous and precise.

However, according to settled case-law, an EU directive cannot by itself impose obligations on an individual, but can only confer rights. Consequently, an individual may not rely on a directive against a Member State where it is a matter of a State obligation directly linked to the performance of another obligation falling, pursuant to that directive, on a third party.[37] As the case-law of the European Court of Justice emphasises, a directive cannot impose an obligations on individuals and therefore even a clear, precise and unconditional provision of a directive cannot apply in proceedings exclusively between private parties.[38] This means that the principle of direct effect of a directive has significant limitations. It is not allowed to refer to this principle in horizontal relations, that is, in disputes between individuals.[39] As a result, an entity intending to commence marketing activities of its own similar products or services will not be able to rely on the direct effect of a directive in relations with the recipients of the marketing messages (its clients). The inconsistency of Polish law with EU law does not exclude the unlawfulness of such activities. The addressee who received the message without giving his prior consent would be entitled to a claim against an entity that used the means of electronic communication for direct marketing purposes.

On the other hand, the situation will be different in relations between the entities (individuals) and state authorities, because a directive may have a vertical direct effect. In such case, entities that used electronic mail for direct marketing purposes of their own similar products or services without prior consent of their clients will have the right to invoke the direct effect of Article 13 paragraph 2 of Directive 2002/58/EC before competent authorities, that is, in particular before the President of UKE and courts controlling the decisions of the President of UKE. Competent authorities should refrain from

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[37] *Inter alia* CJ judgement of 7 January 2004, Case C-201/02 *Delena Wells v. Secretary of State for Transport, Local Government and the Regions*, ECLI:EU:C:2004:12, para. 56; CJ judgement of 17 July 2008, in joined Cases from C-152/07 to C-154/07 *Arcor AG & Co*., *KGCommunication Services TELE2 GmbH*, *Firma 01051 Telekom v. GmbHBundesrepublik Deutschland*, ECLI:EU:C:2008:426, para. 35.

[38] *Inter alia* CJ judgement of 5 October 2004, in Joined Cases from C-397/01 to C-403/01 *Bernhard Pfeiffer* (C-397/01), *Wilhelm Roith* (C-398/01), *Albert Süß* (C-399/01), *Michael Winter* (C-400/01), *Klaus Nestvogel* (C-401/01), *Roswitha Zeller* (C-402/01) i *Matthias Döbele v. Deutsches Rotes Kreuz*, *Kreisverband Waldshut eV.* (C-403/01), ECLI:EU:C:2004:584, para. 109 and CJ judgement of 7 June 2007, Case C-80/06 *Carp Snc di L. Moleri e V. Corsi v. Ecorad Srl*, ECLI:EU:C:2007:327, para. 20.

[39] *Inter alia* CJ judgement of 5 April 1979, Case 148/78 *Pubblico Ministero v. Tullio Ratti*. ECLI:EU:C:1979:110.

actions aimed at forcing entities to obtain the consent of their clients for the purposes of direct marketing of their own similar products or services. As a consequence, the authorities should not apply sanctions (including imposing fines) for the use of electronic mail for direct marketing purposes of their own similar products or services in the absence of the consent of their clients. If such actions are taken, courts supervising the activity of these authorities should refer to the principle of vertical direct effect of Article 13 paragraph 2 of Directive 2002/58/EC and take appropriate measures to eliminate decisions which are not in line with the above provision.

V. Legislative amendments

Due to the lack of a possibility to ensure consistency between Polish law and EU law, and the limitations relating to the direct effect of Directive 2002/58/EC, by way of using a teleological interpretation, it is required to amend Polish regulations to ensure the compatibility between Polish law and EU law. However, currently in Poland there are no plans to amend regulations in this respect.

It is probable that the inconsistency between Polish and EU law will be eliminated as a result of changes of EU regulations. Currently, works relating to an EU regulation concerning respect for private life and the protection of personal data in electronic communications[40] are underway. If a new EU regulation is adopted, Directive 2002/58/EC will be automatically repealed. In respect of direct marketing, the draft of the regulation provides for a solution similar to the one stipulated in Article 13 paragraph of Directive 2002/58/EC. Pursuant to Article 288 of the Treaty on the Functioning of the European Union, a regulation has a general application, is binding in its entirety and directly applicable in all Member States, that is, it does not require transposition into national law. This means that once the regulation comes into force, the provisions of this regulation will automatically apply. Thus, Polish rules regarding the use of electronic communication means for direct marketing purposes will not be used, even if they are not formally repealed. Consequently, the inconsistency between Polish law and EU law will be eliminated from the date of the application of the new EU regulation.

[40] Proposal for a Regulation of the European Parliament and of the Council concerning the respect for private life and the protection of personal data in electronic communications and repealing Directive 2002/58/EC (Regulation on Privacy and Electronic Communications), https://eur-lex.europa.eu/procedure/EN/2017_3?qid=1540897892574&rid=5 (20.07.2019).

VI. Conclusions

Current Polish regulations in force, that is, Article 10 of the Act on rendering electronic services and Article 172 of the Telecommunications Law, concerning the use of electronic mail for direct marketing purposes of products or services similar to the products or services previously sold or provided, are contrary to EU regulations. Polish law provides for the opt-in rule in this respect. Failure to comply with the opt-in rule is subjected to a fine of up to 3% of a company's annual revenue. EU regulations, that is, Article 13 paragraph 2 of Directive 2002/58/EC, provides for the opt-out rule in case of using electronic mail for direct marketing purposes of products or services similar to the products or services previously sold or provided. Member States are not entitled to apply a solution other than that set out in Article 13 paragraph 2 of Directive 2002/58/EC. Therefore, in this respect, a full harmonization approach was adopted in Article 13 paragraph 2 of Directive 2002/58/EC. Requirements needed to invoke the direct effect of Article 13 paragraph 2 of Directive 2002/58/EC are met. This provision is precise, clear and provides for unconditional rights for individuals, namely the right to use electronic mail for direct marketing purposes of products or services similar to the products or services previously sold or provided without prior consent of the addressee. This right does not call for additional measures, either national or European. However, the principle of the direct effect of a directive does not apply to horizontal relations (relations between individuals). This means that entities using electronic mail for direct marketing purposes (communications senders) cannot invoke the direct effect of Article 13 paragraph 2 of Directive 2002/58/EC in relations with the addressees of such messages. In this relation, the inconsistency of Polish provisions with EU regulations does not exclude unlawfulness and the addressees of such messages are entitled to pursue claims against the senders. On the other hand, the principle of the direct effect of a directive applies to vertical relations (vertical direct effect of a directive). As a consequence, the senders of marketing messages are entitled to invoke the direct effect of Article 13 paragraph 2 of Directive 2002/58/EC against state authorities and the authorities should refrain from actions aimed at compelling the use of the opt-in rule in the case of using mail for the direct marketing of products or services similar to products or services previously sold or provided. If Polish authorities apply Polish regulations providing for the opt-in rule, for example by imposing a fine as a result of an activity inconsistent with the above rule, the senders may invoke the direct vertical effect of Article 13 paragraph 2 of Directive 2002/58/EC before Polish courts supervising the activity of these authorities.

Consistency of Polish and EU regulations regarding the use of electronic communications means for direct marketing purposes can be ensured by introducing amendments into Polish law. Such amendments should ensure that Article 13 paragraph 2 of Directive 2002/58/EC will be appropriately implemented. Consistency of Polish and EU regulations may also be ensured if the form of the EU legal act regulating the use of electronic communication means for direct marketing purposes is changed. Currently, European Union authorities are working on an EU regulation on privacy and electronic communications. The new legal act is to replace Directive 2002/58/EC. EU legislation in the form of a regulation is directly applicable in a Member State. It means that if the EU regulation enters into force, regardless of whether Polish provisions on the use of electronic communication means for direct marketing purposes are formally repealed, only the EU regulation shall apply in this respect.

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International Anti-Money Laundering Regulations Through the Prism of Financial Inclusion and Competition

by

Oleksandr Khlopenko*

CONTENTS

Abstract

The last three decades have been marked by a battle with money laundering, tax evasion, and even though not strictly illegal, but no less harmful, tax avoidance after the boom in those legal and accountancy services back in the 1980s. The methods that national, international, and supranational organization have used range from doctrinal soft power to outright bullying, which were supported by their apologists for the sake of the common good. Yet the policies implemented so far have somehow not addressed the lack of theoretical and practical application of 'inclusion' and 'equality' into their framework.

The same three decades have been characterized by the ever-growing wealth gap and the concentration of capital in the hands of the minority, whose prerogative, as pointed out by Gabriel Zucman in his classical work 'The Hidden Wealth of Nations' (2015), remains to preserve that wealth in their hands through whichever means necessary.

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The article researches into the implementation methods of anti-money laundering (AML) regulations, their long-term effects in developing economies, and the restrictive effects in relation to financial inclusion, the marginalized population in developing economies, and the application of the European Union's principles and laws on competition.

Resumé

Les trois dernières décennies ont été marquées par la lutte contre le blanchiment d'argent, l'évasion fiscale et, même si elle n'est pas strictement illégale, l'évasion fiscale après le boom des services juridiques et comptables dans les années 1980, qui est aussi nuisible. Les méthodes utilisées par les organisations nationales, internationales et supranationales vont de la puissance douce doctrinale à l'intimidation pure et simple, qui a été soutenue par leurs apologistes pour le bien commun. Pourtant, les politiques mises en œuvre jusqu'à présent n'ont pas, d'une manière ou d'une autre, résolu le manque d'application théorique et pratique de l'»inclusion» et de l'»égalité» dans leur cadre. Ces mêmes trois décennies ont été caractérisées par l'écart de richesse croissant et la concentration du capital entre les mains de la minorité, dont la prérogative, comme le souligne Gabriel Zucman dans son ouvrage classique «The Hidden Wealth of Nations» (Zucman, 2015), est de préserver cette richesse entre leurs mains par tous les moyens nécessaires. L'article se penche sur les méthodes de mise en œuvre de la réglementation anti-blanchiment, leurs effets à long terme dans les économies en développement et les effets restrictifs en ce qui concerne l'inclusion financière, la population marginalisée dans les économies en développement et l'application des principes et lois de l'Union européenne (UE) sur la concurrence.

Key words: international tax law; money-laundering; financial transactions tax; IMF policies; international financial policy; international financial regulation.

JEL: K33, K34, F380

I. Introduction

It might not be obvious that the development of international anti-money laundering (hereinafter: AML) regulations is stuck in a vicious cycle. Excluding the specifics of economic and socio-cultural conditions, legal and financial traditions of a particular country, the content and methods of diffusion of AML policies demonstrate absolute disregard of the concept of financial inclusion (Sharman, 2008, p. 366). This, in turn, leads to the inaccessibility of financial instruments and services of the majority of the population. Furthermore, it results in a shift in the direction of shadow economies – more businesses and

individuals unable to use financial services and instruments, are out of the scope of AML regulations (and often – out of the legal scope whatsoever). This renders AML regulations ineffective and obsolete and results in once again their 'buffing up' and making those regulations even more strict, with more pressure on financial institutions, and thus the cycle continues.

For example, the Financial Action Task Force (hereinafter: FATF), the International Monetary Fund (hereinafter: IMF), and the Organisation for Economic Co-operation and Development (hereinafter: OECD), use political and economic pressure through blacklisting (or conditionally not blacklisting) certain countries into cooperation and adoption of their standards, without the slightest mention of the influence of their policies on the accessibility of financial instruments. In the article, I point out a specific case where this was obvious. In early 2000, an intergovernmental group ordered a study of the cost-effectiveness of blacklisting Barbados, Mauritius, and Vanuatu. The study pointed against such decision and allowed these jurisdictions to house some of the infamous offshore banks, which later on lead to the blocking of the United States (US) dollar turnover in the country and damaged the economy of the respective regions. I conclude that this practice forces the US to converge on policy solutions to share the common values of modern international society, regardless of whether the policies or institutional forms are suited to local circumstances or solve problems.

Another aspect of this issue is the idiosyncrasy of anti-money laundering regulations and competition regulations, due to the lack of understanding of the reasons behind why business use certain financial instruments that might appear within the scope of AML and lead to a competition restriction due to limiting the accessibility of financial instruments.

In this article I analyze the aforementioned hypothesis and conclude that modern mechanisms of AML policy diffusion (in regard to the implementation of FATF 40+9, 4th and 5th EU AML Directives, Base Erosion and Profit Shifting Plan (hereinafter: BEPS), Know-Your-Customer and KYCC standards, i.e. CRS, and other AML standards) and their content thus limit financial inclusion in developing states, by forcing the aforementioned states to apply the same standards and practices applicable in developed states. This, in turn, leads to further growth of inequality (due to limiting access to financial institutions and instruments) and barring access to foreign markets (due to strict control of cross-border financial operations) as well as restricting competition.

II. AML policy diffusion and its influence on financial inequality and inclusion

Currently, almost 170 countries have a harmonized body of [AML] legislation, despite not having any laws regarding money laundering before 1986. Now through the colossal efforts of the international community, the framework of standards and protocols against tax evasion, tax avoidance, and money laundering has been implemented in nearly exact capacity everywhere – from Ukraine, Germany, and the UK, to Barbados, Cayman Islands, and Vanuatu.

Such a rapid development was possible due to the four constantly recurring mechanisms (or methods) used in diffusing the policies from the developed states to the developing states – learning, coercion, mimicry, and competition effects (Braun and Gilardi, 2006; Drezner, 2001; Evans and Davies, 1999), which were extensively analyzed (Weyland, 2004, 2005; Sharman, 2008, 366).

This section refutes the basic assumption that the prevalent mechanism for the policy diffusion of AML regulations is through rational learning of how to oppose money laundering and tax evasion; instead it takes place through deliberate and aggressive coercion in the form of baiting with foreign aid and other incentives and blacklisting to elicit the compliance from the states. Based on the examples of Ukraine, Somalia, Vanuatu, and the Baltic states, this section further argues that this has led to a disregard of the principles of financial inclusion in the policies themselves, due to the disregard of the local specifics of the implementing countries and to address the latest developments with the Baltic banks – their further influence on competition and financial inclusion within the framework of EU's regulation of competition.

1. Classification of methods of policy diffusion and their application

The article uses the classification and definitions of power and policy diffusion established in sociology and international relations (Boli and Thomas, 1999; Braun and Gilardi, 2006; Drezner, 2001; Evans and Davies, 1999; Guler, Guillen, and Macpherson, 2002*)* for the sake of uniformity of the argument that the AML policy diffusion is based on coercion as described in the aforementioned works. The central coercive elements in the system of policy diffusion are blacklisting and international financial aid. The three cases provided hereof try to shed the light on what mechanism was used to implement different international AML standards.

In case of Ukrainian implementation of the BEPS and complementary laws, it was the use of financial aid from the IMF and the prospect of association with

the EU that was used by an international organization to push the Ukrainian government into coercion and ultimate adoption of international AML standards. This led to very short negotiations, non-existent deliberations in the parliamentary committees and parliament, and rushed implementation. This resulted in restricted, verbatim adoption of the minimal package of the BEPS Actions (5, 6, 13, 14) and the ineffective application of anticorruption and anti-tax evasion/avoidance measures. The latter was ultimately overturned by the Constitutional court of Ukraine in a lawsuit filed by the deputies that were themselves under investigation for tax evasion/avoidance and money laundering. The distinct cultural, economic, and political features and issues of the Ukrainian society and governmental structure were disregarded and resulted in a blind coercion with international standards that ended up useless in the long-term. The socio-economic effect of disregard for financial inclusion due to rushed and aggressive policy diffusion will be discussed in the next subsection.

In case of the Baltic states and their financial sectors, particularly the ABLV bank, Verso Bank, DanskeBank, Nordea, and Rietumu Bank, got into the political spotlight due to machinations undertaken by the Deutsche Bank in connection with the Russian oligarchs.[1] The EU and the US regulators have applied coercion, the tactics described by Sharman in *Power and Discourse in Policy Diffusion* as 'American hegemony' (Sharman, 2008, p. 368) – the ability of the United States to provide global public goods, either benevolently or coercively (Sharman, 2008, p. 367). But there is yet very little evidence that the AML policy constitutes such a public good. Nor is there much evidence that the United States or any other country profit from the global propagation of AML standards (Sharman, 2008, p. 370). There hasn't been any research to find a correlation between the implementation and strictness of anti-money laundering regulations and the number of retrieved assets or the number of indictments. On the contrary, the United States have not been part of the majority of the regulations that they are helping to impose on other countries and are still leading in the number of successful cases and criminal sentences for money-laundering and tax evasion.

The same mechanism of coercion – the closing of correspondent accounts, blocking dollar transactions and blacklisting banks – was used to force the Baltic banks to either cleanse their client portfolios or implement Draconian Know-Your-Customer standards (Author's observations, 2016–2018). This results in bank closures, portfolio cleansing and limiting access of the general

[1] See: When the United States Scold the Switzerland-of-the-Baltics. Retrievied from: https://www.euractiv.com/section/economy-jobs/news/latvia-when-the-united-states-scold-the-switzerland-of-the-baltic-states/ (3.09.2019); Rietumu Bana hit with a heavy fine. Retrievied from: https://www.baltictimes.com/rietumu_banka_hit_with_heavy_fine_over_laundering_scheme_in_france/ (3.09.2019).

population, and particularly that of the marginalized population such as students and pensioners, to basic financial instruments and their own funds. Peter Putnins, head of the Latvia banking regulator, admitted that Latvia was under 'immense' pressure after the US effectively closed one of its banks for what it alleged was 'institutionalized money laundering' and an international body urged it to make urgent changes to avoid being blacklisted.[2]

In Pacific states like Vanuatu and Nauru, these measures led to extreme and long-lasting results. In 2001, the Pacific island republic of Nauru had refused to accept the FATF's ultimatum unless it was compensated to the tune of $10 million. The effect of the FATF blacklist led to a *de facto* financial blockade by private institutions and the complete collapse of the country's financial system (FATF, 2004).

In a discussion with financial regulators in the Pacific and Caribbean states, the head of one Financial Intelligence Unit put it most directly in stating that the blacklist was equivalent to 'a gun to the head' for developing countries, and felt that the presence of blacklists meant that developing countries simply had no choice but to reform. Either the country would do whatever was required in the area of AML policy to avoid the wrath of the FATF, or the country would be blacklisted and its international financial sector destroyed (Sharman's Interviews, 2006, p. 99). The same was repeated for Vanuatu, Fiji and Marshal Islands in 2017 by the EU blacklisting them in the light of the implementation of the AMLD4.[3]

The above shows the aggressive and unapologetic methodology of policy diffusion through coercion that has more to do with showing power and nothing to do with equality, inclusion, or battling money laundering. International regulators have often shown the tendency to miss their mark by aiming at the intermediaries, the institutions that show no motive for perpetrating the crimes, instead of aiming at the perpetrators themselves. This leads to collateral damage from the sanctions that includes mostly the marginalized.

2. Disregard for principles of financial inclusion in AML policies

The above cases of Ukraine, the Baltic States, and Vanuatu have shown that in pursuit of the implementation of international standards and later, compliance with them, international and regional bodies often disregard the anthropological specifics of the recipient countries.

[2] See Baltic regulators fret that scandal could drive Nordic banks awayhttps://www.ft.com/content/89152afe-46fc-11e9-b168-96a37d002cd3 (3.09.2019).

[3] See more https://www.rnz.co.nz/international/pacific-news/384636/fiji-vanuatu-marshall-islands-added-to-eu-tax-blacklist (3.09.2019).

In Ukraine's case, the major issue of corruption, wealth gap, and the demographics of the users of the financial instruments were not taken into consideration by the international community as early as 2000 (Hopf, 2002, p. 412). Interviews with the clients and lawyers of tax optimization law firms have shown that they are generally small and medium-sized enterprises (hereinafter: SMEs), using the international corporate structures and bank accounts for the protection and stability of their businesses.

Before describing Ukraine's case of coercion into the BEPS, it should be duly noted that even though the creators of the BEPS have prided themselves on the inclusivness of the process, it is an undisputed fact that major OECD countries dominated the formulation of the BEPS package in the process of discussions and negotiations. As OECD members are all developed countries, it is inevitable that the BEPS project is mainly a result of compromise between rich countries. For instance, weak measures on the CFCs, interest deductibility and innovation box schemes are favored particularly by the United Kingdom (UK). Ukraine didn't take part in the drafting or negotiation of the package (Avi-Yonah, 2016, p. 32).

Another detail worth mentioning is the prevalence of the the ultra-rich ruling class in using the tax minimization tools as was made clear by the Panama and Paradise Papers (two Ukrainian prime ministers and one president) and the declaration of the current Ukrainian president[4] who has offshore companies in Cyprus in order to minimize the tax burden on his intellectual property. This presents a balancing act that is the implementation of any AML legislation in Ukraine that has been disregarded – with the people in power protecting their financial interests while passing the liability onto the common people.

There is also a lack of academic consesnsus on the implementation of the BEPS in Ukraine, those few who addressed it simply agree on its necessity, since the base erosion, profit shifting, transfer pricing, and other means of aggressive tax minimization and money-laundering are either inadequate or non-existent in the Ukrainian Tax Code (Marchenko, 2017, p. 302) and that it needs to be adapted, not simply implemented (Brekhov, 2016, p. 6). Thus the government has ignored the Ukrainian scholars in the issue of AML standards' implementation.

Naturally, coerced by the EU and the IMF into international AML standards that favor big capital by adoption without adaptation, this has led to a prolonged political struggle against the new measures. The necessity to simultaneously continue receiving financial aid from the IMF and protecting the foreign assets of the Ukrainian rich, led to very short negotiations and an agreement for restricted, verbatim adoption of the minimal package of

[4] See President Volodymyr Zelenskii's financial declaration for 2018. Retrievied from: https://public.nazk.gov.ua/declaration/dbfd6951-3d06-4720-bc4a-fd9cf94042d0 (3.09.2019).

the BEPS Actions (5, 6, 13, 14) that should've tackled harmful tax practices, tax treaty abuse, and establish reporting standards. The final law No. 1210[5] is to be voted by the new parliament by the end of 2019. The Minister of Finance of Ukraine has reiterated multiple times since 2018 that Ukraine had to implement the BEPS and amend its national legislation under EU's threat of being added to the blacklist of offshore countries and rejection of foreign aid from the IMF that could destabilize the Ukrainian economy.[6]

To overcome the new AML measures without angering its international partners, in January of 2019, the Ukrainian parliament (through the legislative initiative of fourty MPs) used the Constitutional court of Ukraine to decriminalize[7] illegal enrichment and overturn the entire legal framework aimed at tackling the corruption and money laundering schemes in Ukraine. The norm required governmental officials to report their annual earning through electronic declarations with a legitimate explanation of the origin of their earings, as well as how, when, and why they were transferred. Article 368-2 of the Penal Code of Ukraine was used to monitor and persecute attempts to hide wealth of ultra-rich officials, their business partners, family members, and associates. The court established in its opinion that the article disregards and violates the presumption of innocence, restricts freedom of business activities, and discriminates local legislation.

This led to the closure of sixty-five high-profile money laundering and corruption cases against Ukrainian and Russian politicians. That, ironically enough, led to the IMF sanctioning and limiting financial aid and negatively influencing currency exchange rates, which significantly lowered the population's purchasing power and further marginalized it. Mykola Havroniuk, top Ukrainian criminal law scholar, commented on the decriminalization as 'forgiveness for any official who didn't declare, laundered, or transferred illegal funds outside of Ukraine up until that point.'[8] The topic has been largely ignored by the academic community and professional literature so far.

Small Ukrainian banks that didn't fulfill the new capitalization and reporting criteria were the collateral damage here as they were hit with fines and thus closed or were acquired by bigger banks, which led to market concentration,

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[5] See: Law on the changes to the Tax Legislation to Implement BEPS standards. Retrievied from: http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=66520 (3.09.2019).

[6] See: https://www.kmu.gov.ua/ua/news/ukrayina-maye-vikonati-minimalnij-standart-beps-shob-ne-potrapiti-v-ofshornij-spisok-yes-oleksandr-danilyuk (3.09.2019).

[7] Case No. 1-p/2019 ч. 3. Retrieved from: http://www.ccu.gov.ua/sites/default/files/docs/1_p_2019.pdf (3.09.2019).

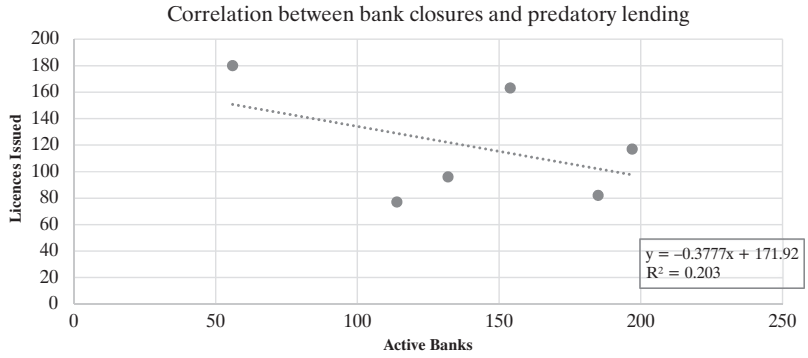
[8] See – https://www.bbc.com/ukrainian/features-47385331.

limiting competition, and thus less access to financial tools for the general population.[9]

In the same time frame (2015–2019) when many Ukrainian banks closed, a significant growth in predatory (676% annual interest rate median) lending companies can be seen. Since access of the general population to financial instruments has been limited due to governmental policies, companies that provide high-risk, high-interest loans without proper oversight have flooded the market. The legal frameworks for microcrediting and for banks are incomparable in terms of reporting standards and supervision, thus the origin and the use (or abuse) of money is outsite the proper oversight.

The correlation between the closure of banks in Ukraine in the last five years and the growth of microcreditings companies can be seen in the fllowing chart:

Chart 1. Correlation between the closure of banks in Ukraine in the last five years and the growth of microcreditings companies



	Years					
	2014	**2015**	**2016**	**2017**	**2018**	**2019**
Microcrediting licenses issued[1]	56	154	197	132	185	114
Active banks in Ukraine[2]	180	163	117	96	82	77

[1] Official National Microfinancing Companies Registry Data as of 13 October 2019.

[2] National Bank of Ukraine official Statistics as of 13 October 2019.

Source: Own research on the basis of national statistics.

The analysis of the data shows that there is a negative correlation between the number of banks and the number of microcrediting institutions. In other words, the fewer the banks, the more predatory lending companies on the market. Thus, due to the high-ranking official's policy on evading AML standards, non-existent,

[9] See general overview of the bank liquidation and debt handling in Ukrainian banking system – https://www.ukrinform.ua/rubric-economy/2603235-v-ukraini-planuut-zaversiti-likvidaciu-ponad-40-bankiv.html.

forced negations of those standards, and the coercion of Ukrainian government into their acceptance led to the limitation of access to banking institutions due to their closure, that led to the influx of predatory lending companies that filled the empty niche of financial institutions. Predatory lending not only hurts the longterm purchasing ability of the general population, but also hurts their access to other financial institutions through damage to their credit rating. Yet, the methods and style of policy diffusion and power balance between Ukraine and the international institutions that established the AML standards do not change and have still no real regard for financial inclusivity or longterm stability.

The same disregard for financial inclusion and 'empty' adaptation of international norms can be seen in the governments and international institutions transfering responsibilities to private financial institutions in the form of strict Know-Your-Customer (hereinafter: KYC) and Know-Your-Customer's-Customers (hereinafter: KYCC) obligations. Entire countries have fallen victim to prejudice and a lazy risk aversion on the part of the banks. Many small countries in the Caribbean, the Pacific and Africa are almost entirely locked out of the global payments system.

An entire country, Somalia, began to starve because UK banks decided it was not worth to bother with bank remittance services. Forty percent of the country's population relied on these remittances – people sending their hard-earned savings home to feed their families. The UK banks' excuse: payments to Somalia were 'high-risk'.[10]

This also has a more devastating and long-term effect on developing countries that lack the chance of international support as mentioned earlier in the case of Nauru and Vanuatu. As of 2018, Nauru does not have a single functioning bank and the country has so successfully been stigmatized that now, even after complying with the FATF's demands, no bank is willing to take the reputational risk of opening a branch in the country. Nauru has been a cash economy for the last seventeen years. That is why the direct implementation, as opposed to the careful adaptation of the standards, hurts the communities in the countries of implementation and not the perpetrators of actions that the AML policies are designed to oppose.

3. Inclusion and effectiveness of anti-money laundering regulations

Poorly designed rules or an inappropriate application of AML/CFT controls can, from a demand perspective, be a barrier to accessing financial services. For instance, although national regulations may allow the discretionary use of

[10] See generally: https://www.theguardian.com/global-development-professionals-network/2015/jun/18/life-after-losing-remittances-somalis-share-their-stories-somalia (3.09.2019).

alternative documents to verify customers, institutions tend to limit discretion and the types of documents accepted. There is evidence suggesting that over-reliance on government ID has been a problem in many developing societies (Shehu, 2012, p. 307). On the other hand, the unbanked populations (to use the US FDIC terminology), due to various arbitrary reasons – from ID requirements to being considered high-risk by financial institutions – are being completely excluded from financial markets by bigger players. They do not have access to financial instruments or are limited in their purchase power, restricted in their use of international goods and services, limited in their ability to start an enterprise and contribute to the economy of their country and region, and are thus pushed closer toward poverty.

Other evidence suggests that the more of the population has access to a wide range of financial instruments, without arbitrary restrictions, the more of the population's income would be transparently reported (Shehu, 2012, p. 312). Naturally, it would lead to two simultaneous results – a growing internal revenue for the state and to a healthier market and thus healthier competition in the financial sector. The latter part would in return result in growing access of the general public to financial instruments and thus in greater amount of transparency. The circular nature of the phenomena would ensure the stability of the system.

The US federal taxation model of putting the reporting burden on the end-users – to report the income, its sources and uses, by the people and not the financial institutions and government – as opposed to putting the burden on the institutions and government that are prone to error, results in corruption, power play and colossal inefficiency [this fragment seems somewhat unclear and in contradiction to the second point of the conclusions which suggests the uptake of the US model] (Johnson, Hulme, 2005, p. 278).

It is necessary to show that the level of disregard for financial inclusion as a concept has manifested itself in the fact that the term itself is only mentioned in Annex II to 4th EU AML Directive and the FATF Recommendation 10 as a second-rate criteria for potentially lowering risk when assessing money-laundering risks. Nowhere else. The result of it is discussed at length in all sections of the article.

III. Influence on corporate governance and competition

As pointed out earlier, the methods of policy diffusion that surround the AML legislation and international standards completely disregard the effects of financial exclusion and restrict access of marginalized populations, SMEs,

and entire economies to basic financial instruments. In discussions during numerous conferences, client interviews, and policy presentations, Ukrainian, Estonian, Polish, and Russian businesspeople have continuously established that their reasons for using complicated tax optimization structures, foreign bank accounts and shell companies are asset protection and preserving the competition in the Central and Eastern European region (hereinafter: CEE) (author's interviews in 2016–2018).

Those legitimate accounting and legal practices are often mixed up with tax evasion, tax avoidance, and money laundering, and become the first victims of the extremely risk-averse atmosphere among financial institution, which deem CEE a high-risk market, use of shell companies – a red flag for money-laundering monitoring institutions. As a result, small and medium enterprises and financial institutions are pushed from the market, leaving only the 'big players', who are too big to fail (for exmaple Deutsche Bank, with its ability to pay hundreds of millions in fines and still continue operating, while a smaller bank or a company would go bankrupt at the same conditions). This can create a potential for monopolization and abuse of a dominant position on the market, which, in turn, leads to a further restriction of competition, hindrance of investments, price hikes of financial and other services as well as growing economic inequality in these regions.

Since the majority of the attention in the last couple of years has been on the banks and financial institutions inside the European Union, it is essential to understand the influence of the discussed politics. The fundamental principles of the functioning of the European Union forbid practices like that, if only in regard to the companies operating in the EU. The Treaty on the Functioning of the European Union (hereinafter: TFEU) in its Article 101 forbids applying dissimilar conditions to equivalent transactions with other trading parties, and thereby placing them at a competitive disadvantage and disrupting competition on the free market.

Both modern approaches to the interpretation of Article 101 of TFEU – 1) that only consumer welfare considerations are relevant to this article, 2) that Member States' and European Union's public policy goals (such as public health and the environment) should also be considered in interpreting Article 101 TFEU (Tonwley, 2009, p.11) show that restrictive and discriminatory AML standards, disregard for financial inclusion and potential repercussions for the marginalized populations, and the way those standards are forced upon countries, are contrary to the basic principles on which the European community was built (Odudu, 2006, p. 603).

It can be argued that the Member States themselves and the EU institutions are not directly mentioned by Article 101 TFEU, yet they are bound by Article 4(3) TFEU not to legislate, regulate or reinforce policies

that are contrary to Article 101 TFEU (Geiger, 2015, p. 493). The modern interpretation of this article and the spirit of European Lawshould include the legislation and standards created and applicable on the territory of the European Union, even by international organizations. More so, when it's implementation and application may have such a destructive long-term effect on the ecnomies of the Members States.

IV. Conclusions

Our conclusions lead us to several propositions on how to break the cycle, ranging from purely theoretical to outright practical recommendations. We agree with the current approach to the issues like the one at hand, that countries and the international community should evolve their policies that facilitate the implementation of controls based on a context-sensitive approach (Shehu, 2012, p. 309).

First of all, in case of regulatory disregard for financial inclusion, our recommendation is to develop a policy that would allow research, drafting, and implementation of current and future AML regulations regarding specifics of developing states, including, but not limited, to purchasing power and minimal income in such countries, access to financial instruments, investment climate in the region, as well as historical and cultural context. It is to dissuade international organizations from abusing their political power for the interest of big capital. The FATF has recognized the above argument in their recommendations in 2011, but is yet to make any significant changes in its methodology (FATF, 2011). This principle must be implemented, first philosophically, into the thought process of the regulators to consider it as the fundamental principle thought the scope of which to consider any new policies, and thus the methods of their implementation as well as formally, into the framework of the regulations to reinforce its legal standing and make it enforceable on all levels.

Secondly, shifting the burden of enforcement and control from the level of financial institutions to the level of financial instruments users (the US-model), to make them accessible to a wider range of population and enhance the effectiveness of AML regulations. The more people have access to financial instruments, both for personal and business purposes, the more of their income will be reported and their assets protected. I conclude that it would lead to two likely results – a growing internal revenue for the state and to a healthier market and thus healthier competition in the financial sector. The latter part, in return, would result in growing access of the general public to financial

instruments and thus a greater amount of transparency. The circular nature of the phenomena would ensure the stability of the system. Putting trust in the people instead of institutions and capital structures goes a long way.

And lastly, a global change requires a bit of a more general advice – to adopt taxation and AML regulations that are aimed at the prevention and dissuasion from illegal activity as opposed to a retroactive, pro-punishment approach that leads to collateral damage among the non-perpetrators of the money laundering, tax avoidance and tax evasion crimes. It requires a deep understanding of the root of the problem – the philosophical and economical reasons for such actions, and enormous will from the politicians, who themselves (as in Ukraine's case described in the article) are the perpetrators of such practices

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Energy Security of West Africa: the Case of Natural Gas

by

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CONTENTS

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Abstract

The Gas Supply Security Index (GSSI) is used to assess the security of natural gas supply of four gas producing countries in West Africa using five indicators: Gas Intensity, Net Gas Import Dependency, Ratio of Domestic Gas Production to Imports, Gross Inland Consumption and Geopolitical Risk. This study identified that security of natural gas supply in West Africa is a major challenge as some of the major natural gas producers within the region are highly vulnerable to supply disruptions. Most of the countries studied rely solely on domestic production for supply security. Lack of diversification of supply source and the absence of natural gas storage facilities to safeguard the security of supply were identified as the major factors accounting for the high vulnerability among the natural gas producers within the region.

Resumé

L'Indice de sécurité d'approvisionnement en gaz sert à évaluer la sécurité d'approvisionnement en gaz naturel de quatre pays producteurs de gaz en Afrique de l'Ouest à l'aide de cinq indicateurs: Intensité gazière, dépendance à l'égard des importations nettes de gaz, ratio de la production gazière nationale aux importations, consommation intérieure brute et risque géopolitique. Cette étude a montré que la sécurité de l'approvisionnement en gaz naturel en Afrique de l'Ouest constitue un enjeu essentiel car certains des principaux producteurs de gaz naturel de la région sont des plus exposés aux perturbations de l'approvisionnement. La plupart des pays étudiés comptent uniquement sur la production nationale pour garantir leur sécurité d'approvisionnement. Le manque de diversification des sources d'approvisionnement et l'absence de stockages de gaz naturel pour garantir la sécurité de l'approvisionnement sont les principaux déterminants de la forte vulnérabilité des producteurs de gaz naturel dans la région.

Key words: energy security; natural gas; Gas Supply Security Index; West Africa.

JEL: Q3, L71

I. Introduction

1. Background

Africa remains vulnerable to energy security despite efforts from many African governments to tackle key political, economic and regulatory barriers to improving the security of energy supply within the region (IEA, 2011). The International Energy Agency (hereinafter: IEA) in its recent publication

estimated the energy demand in Africa to grow at a compounded annual growth rate of 2% between 2016 and 2040 (Fulwood and Bros, 2018). However, the security of the energy supply, along with the reliability and affordability of energy, in Africa to meet its growing demand is still a major challenge even though the continent is rich in energy resources (IEA, 2014).

This paper aims to identify the factors that influence the natural gas supply security of a nation and use them to measure the gas supply security of Ghana, Nigeria, Cote d'Ivoire and Cameroon and rank them according to their supply vulnerabilities. The paper seeks to answer the question:

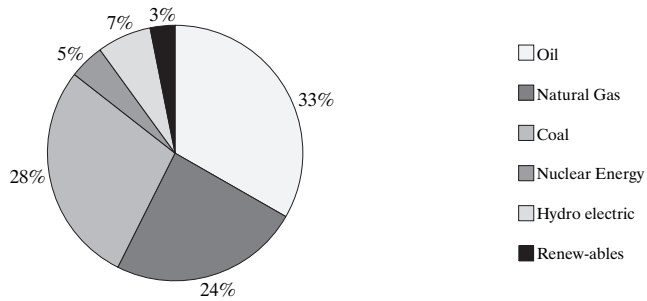
How vulnerable is Ghana, Nigeria, Cote d'Ivoire and Cameroon to disruptions in natural gas supply security?

2. Importance of natural gas

Natural gas has been trending globally, and it is becoming increasingly popular in developing countries as the world's quest for cleaner and cheaper energy increases. As the world transitions towards less carbon-intensive sources of electricity, the demand for natural gas as a fuel of choice is gaining high momentum in the global energy mix (Capece, 2014). 'Natural gas is the second largest energy source in power generation, representing 22% of generated power globally and the only fossil fuel whose share of primary energy consumption is projected to grow' (World Energy Council, 2016).

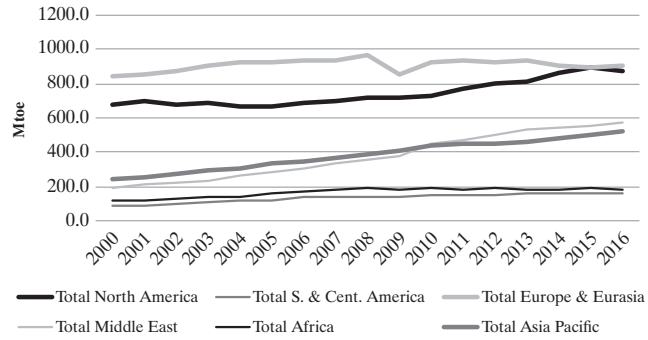
Natural gas consumption level has increased from 2181.7 Mtoe in 2000 to 3204.1 Mtoe by the end of 2016 (BP, 2017), making natural gas the third most consumed fuel, accounting for 24% of global energy consumption. This is exhibited in Figure 1 below. Figure 2 and 3 present the main contributors to the increase in global natural gas production and consumption, respectively.

Figure 1. 2016 Primary Energy Consumption in Mtoe



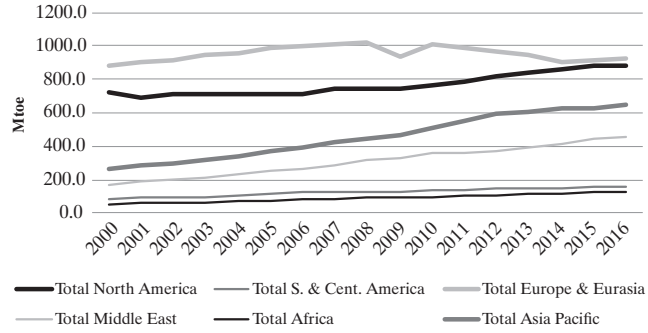
Source: (BP, 2017).

Figure 2. Global Natural Gas Production in Mtoe



Source: BP, 2017.

Figure 3. Global Natural Gas Consumption in Mtoe



Source: (BP, 2017).

Uninterrupted power supply in West Africa, especially in Ghana and Nigeria, has been undermined by limited access to reliable and economical fuel sources for the past few decades.

According to a study conducted by the Center for Global Development, the power crisis in Ghana during the past decades cost the nation on average of US $2.1 million in loss of production daily (Kumi, 2017). Similarly, the lack of access to reliable grid electricity in Nigeria forced some companies to spend about 50% of their income on fueling generators (Somorin and Kolios, 2017). Therefore, securing natural gas as a reliable replacement fuel for expensive oil-based fuels for power generation in West Africa is crucial.

The rest of this paper is organized as follows: Chapter two presents a review of related literature on energy security, particularly focusing on the methodological framework and indicators for measuring energy security. Chapter three discusses the composite gas supply security index methodology

adopted by this paper to measure the natural gas security of West Africa, while chapter four derives and discusses the composite gas supply security index of the selected countries. Conclusions and recommendations are presented in chapter five.

II. Literature review

Estimating the degree of energy security, using various indicators to develop quantitative models, has been widely explored in the literature. However, Cherp and Jewell argued that there is no one fit for all method for measuring energy security, rather, energy security should be measured through the application of an assessment framework sufficiently systematic to ensure scientific rigor and sufficiently flexible to account for specific circumstances and perspectives (Cherp and Jewell, 2010). Also, Ang et al. (2014) claimed that measuring energy security using a simple indicator can be very challenging.

Instead, it is more suitable to evaluate energy security using a basket of indicators (or metrics) that represent the various dimensions it encompasses based on a specific framework. According to them, each of the indicators is given a certain weight according to its perceived importance, and an appropriate aggregation technique is used to combine them to give an index. The energy security indexes derived in this way are termed as composite indexes (Ang et al., 2014). However, Mohsin et al. argued that obtaining an expert opinion in estimating the weights of these indicators is a critical issue, which could pose a difficulty in the aggregation of the Composite index (Mohsin et al., 2018).

Cabalu 2010 and Reymond 2012 used the four GSSI indicators: Gas intensity, Net gas import dependency, Ratio of domestic gas production to total domestic gas consumption and Geopolitical risk, to model a composite index – gas supply security index (GSSI) to compute the gas supply security in Asia and South America respectively (Cabalu, 2010), (Reymond, 2012). Also, D. Pavlović et al. employed the GSSI model to measure the energy security of the Croatian gas market using the following indicators: Energy Import Dependency Index, Energy Intensity, Gross Inland Consumption, Index of National Economy Dependence on Natural Gas, Herfindahl-Hirschman Index, and Shannon-Wiener Index (Pavlović et al., 2017).

Other researchers, such as Mohsin et al. (2018) and Geng and Ji (2013) have also used the composite index model to assess the oil supply security of South Asia and China respectively. The following indicators were used to measure the supply security: Supply risk, which comprises liquidity,

and geopolitical indicators which were used to assess the risk of physical disruptions to availability and accessibility of oil supply. The infrastructure risk indicator takes into account refinery capacity, while market risk indicators account for oil price volatility, cost, GDP per Capita, US dollar index volatility. The transportation risk indicator looks at the risk of oil transportation and dependency risk indicators measure the ratio of net import over net consumption, diversification of supply and alternative energy uses. Also included among the indicators are energy technologies and efficiency and energy resource reserves indexes.

Chung et al. have developed a similar conceptual framework for evaluating the energy security of South Korea by using four energy security indicators: supply reliability, economy, environment and technology dimensions (Chung et al., 2017). Other comprehensive evaluation indicator systems have also been established by Gupta, 2008; Sovacool and Mukherjee, 2011; MOSES by IEA, 2011; Cherp et al., 2012; Kanchana and Unesaki, 2015; Biresselioglu et al., 2014; Li et al., 2016; Zhang et al., 2015; Franki and Alfredo, 2015; Kisel et al., 2016; Global Energy Institute, 2017.

According to Franki and Alfredo, in general, the appropriate means to measure the degree of energy security is the use of a security indicator (index). However, despite the popularity of composite index models in research literature, some aggregated indicators published in the past years do not record performance during time bands and are, therefore, unable to show trends in energy security performance (Franki and Višković, 2015).

III. Methodology

1. Introduction

This paper uses the composite Gas Supply Security Index (GSSI) to measure the Gas security of five West African Countries: Nigeria, Ghana, Cote d'Ivoire and Cameroon. Five supply security indicators are selected and used to evaluate the gas security based on previous studies (Cabalu, 2010; Reymond, 2012; Pavlović et al., 2017). The study adopts the composite index GSSI because it is easier to interpret than trying to find a trend in many separate indicators. It also facilitates the task of ranking countries on complex issues in a benchmarking exercise and summarizes complex or multi-dimensional issues, supporting decision-makers. However, if the GSSI is poorly constructed or misinterpreted (if the various stages, for example selection of indicators, choice of model, weights are not transparent and based on sound statistical or

conceptual principles.), they may send misleading policy messages (Centoni, 2016; Mohsin et al., 2018).

2. Gas Supply Security Index (GSSI)

Cabalu (2010) states 'it is preferable to express indicators in the same unit to simplify their aggregation'. Based on a previous study (Reymond, 2012), a value between 0 and 1 is assigned to each of the energy indicators derived below. The gas supply security index (GSSI) is estimated from the quadratic average of the five indicators in each country: Gas Intensity (G_1), Net Gas Import Dependency (G_2), Ratio of Domestic Gas Production (G_3), Gross Inland Consumption (G_4), and the Geopolitical Risk (G_5).

The Gas Supply Security Index (GSSI) is expressed as:

Equation 1: Gas Supply Security Index (GSSI)

$$GSSI_j = \sqrt{\frac{\sum_i^5 1\varphi_{ij}^2}{5}}$$

Where φ^2_{ij} corresponds to indicator i of country j. Here the GSSI considers the interactions between the different indicators and highlights countries' sensitivity to the developments in the international gas market. Building on (Cabalu, 2010; Reymond, 2012), this study constructs the GSSI model by adopting a fifth indicator – Gross Inland Consumption (G_5) from (Pavlović et al., 2017) composite index indicators.

2.1. Gas Intensity (G_1)

G_1 measures gas consumption in the economy to the gross domestic product (GDP). It is a ratio of the amount of natural gas required to produce a dollar's worth of goods and services expressed in cubic meter per GDP (m^3/GDP). It also demonstrates how efficient the economy is in the use of gas to produce goods and services. Inflation-adjusted GDP is used as the measure of the product of goods and services in the various economies.

Equation 2: Gas Intensity (G_1)

$$G_1 = \frac{GC_j}{GDP_j}$$

Where GC is the total gas consumption the relative indicator φ_1 associated with G_1 is estimated as:

Equation 3: Relative indicator φ_1

$$\varphi_1 = \frac{G_1 - \min(G_1)}{\max G_1 - \min(G_1)}$$

2.2. Net Gas Import Dependency (G_2)

This is a measure of the total natural import (GM) into country *j* compared to the total primary energy consumption (TPEC) of country *j* expressed in a percentage.

Equation 4: Net Gas Import Dependency G_2

$$G_{2j} = \frac{GM_j}{TPEC_j}$$

Also, the relative indicator φ_{2j} associated with G_2 is estimated as:

Equation 5: Relative indicator φ_{2j}

$$\varphi_{2j} = \frac{G_2 - \min(G_2)}{\max G_2 - \min(G_2)}$$

2.3. The Ratio of Domestic Gas Production (G_{3j})

This is measured as the ratio of domestic gas production to the total domestic gas consumption. Domestic production is a better indicator of the country's capacity to cope with short-term supply disruptions than domestic reserves, as production excludes gas from stranded reserves which cannot be tapped immediately.

Equation 6: Ratio of Domestic Gas Production (G_{3j})

$$G_{3j} = \frac{GP_j}{GC_j}$$

Where GP_j is the total domestic production in country j and GC_j is the total consumption in country j. This indicator has a negative correlation with gas supply vulnerability. A high G_{3j} means country j is highly exposed to the risk of supply disruptions compared with other countries in the study.

The relative indicator φ_{3j} associated with G_{3j} is expressed as:

Equation 7: Relative indicator φ_{3j}

$$\varphi_{3j} = \frac{G_3 - \min(G_3)}{\max G_3 - \min(G_3)}$$

2.4. Geopolitical Risk (G_4)

This supply security indicator is determined by the degree of diversification of gas imports and the associated political stability of these sources. Adjusted Shannon diversity index methodology is used for quantifying such risks by reducing the index from unstable countries.

Equation 8: Geopolitical Risk ($G4$)

$$G_4 = S_j = \sum(h_i m_i lnm_i)$$

The limitation of this index is that it does not take account of natural gas production within the country; therefore, for this study, the Shannon-Wiener-Neumann index has been adjusted to cater for indigenous production.

Equation 9: Adj. Shannon-Wiener-Neumann index

$$ADj\ G_4 = ADj\ S_j = -gclnc - \sum(h_i m_i lnm_i)$$

Where:

S_{ij} = Shannon diversity index of import flow of gas adjusted for political stability in both the exporting and indigenous country.

h_i is the degree of political stability in exporting country i.

g is the degree of political stability of the indigenous country. (Both h_i and g_i are expressed in the interval of (0, 1) where 0 denotes extremely unstable and 1 denoting extremely stable.

m_1 is the share of gas imports from country i in total gas import.

C is the share of consumption from domestic sources.

The relative indicator φ_{4j} for country j associated with G_4 is expressed as:

Equation 10: Relative indicator φ_{4j}

$$\varphi_{4j} = \frac{G_4 - \min(G_4)}{\max G_4 - \min(G_4)}$$

Similarly, this indicator also has an inverse relationship with gas supply vulnerability. This means that a low political stability rating (G_4) suggests high vulnerability to supply disruptions.

2.5. Gross Inland Consumption (G_5)

The Gross Inland Consumption is the ratio of total gas consumption in country j (TGC_j) and the total population of country j (P_j). A high G_{4j} means the country is highly exposed to supply disruptions and a low G_{4j} means the country is less vulnerable supply disruptions.

Equation 11: 3.15 Gross Inland Consumption (G_5)

$$G_{5j} = \frac{TGC_j}{P_j}$$

The adjustment below transforms the indicator to an interval of (0, 1) with the value of 0 assigned to the highest value of the selected security of supply indicator, and less risky to supply disruptions, while the value of 1 is assigned to the country with the lowest value of the selected indicator, hence most vulnerable.

Equation 12: Relative indicator φ_{5j}

$$\varphi_{5j} = \frac{G_5 - \min(G_5)}{\max G_5 - \min(G_5)}$$

To ensure the sanity of the calculation, a value of 0 is assigned to countries which do not import natural gas.

IV. Empirical results and discussion

1. Empirical results

This chapter presents the gas supply security index (GSSI) of the four countries studied in this paper: Ghana, Nigeria, Cote d'Ivoire and Cameroon. The estimated GSSI for the individual countries is presented in Table 1 below, while the results of the relative indicators and indicators of gas supply security are presented in Table 2 and Table 3, respectively. A high GSSI score indicates a country's rate of vulnerabilities to natural gas supply disruptions.

Table 1. Gas Supply Security Index (GSSI)

Indicators	Ghana	Nigeria	Cote d'Ivoire	Cameroon
GSSI	0.68	0.67	0.62	0.18

Source: Based on the author's calculation.

Table 2. Relative Indicators of Gas Supply Security

Indicators	Ghana	Nigeria	Cote d'Ivoire	Cameroon
φ_1	0.45	0.52	1.00	0.00
φ_2	1.00	0.00	0.00	0.00
φ_3	0.00	1.00	0.41	0.41
φ_4	1.00	0.00	0.00	0.00
φ_5	0.37	1.00	0.87	0.00

Source: Based on the author's calculation.

Table 3. Indicators of Gas Supply Security

Indicators	Ghana	Nigeria	Cote d'Ivoire	Cameroon
$G_{1\ (mtoe/\$bn)}$	0.03	0.03	0.06	0.01
$G_{2\ (\%)}$	6.83	0.00	0.00	0.00
$G_{3\ (\%)}$	0.04	2.39	1.00	1.00
G_4	0.08	0.00	0.00	0.00
$G_{5\ (per\ capita)}$	42.86	91.41	81.10	14.36

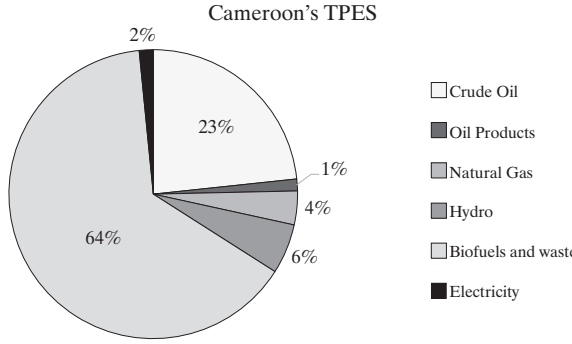
Source: Based on the author's calculation.

2. Discussion

2.1. Cameroon

Based on the results of the GSSI calculation, Cameroon appeared to be the least vulnerable to disruption in natural gas supply among the countries sampled for this study. Cameroon has a gas intensity of 0.01mtoe/$bn, which implies that the country's economy is not heavily dependent on natural gas. Figure 4 below demonstrates that the share of natural gas in Cameroon's energy mix sources is approximately 4%. Also, Cameroon does not import natural gas, and its ratio of domestic gas production to consumption is 100 per cent, therefore, scoring a Shannon-Wiener-Neumann index of zero (0) which means that Cameroon is not exposed to the risk of supply disruptions from natural gas exporting countries which could be politically unstable. Although Cameroon has a political stability rating of 15%, any domestic disruptions to natural gas production may not have a huge impact on the country since the economy has only 4% dependence on natural gas to produce goods and services.

Figure 4. Cameroon Primary Energy Sources

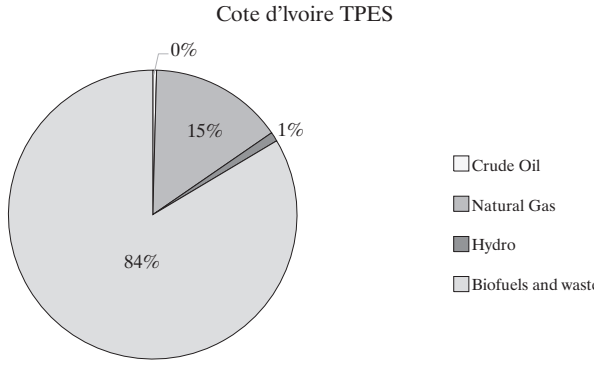


Source: IEA, 2015.

2.2. Cote d'Ivoire

Cote d'Ivoire is ranked the second less vulnerable country among the sampled countries for this study. The country has the highest gas intensity among the four countries studied. This implies that Cote d'Ivoire's economy relies heavily on natural gas, and this is evidenced by its high gas intensity and high gas per capita ratios. Also, as illustrated in Figure 5 below, approximately 44% of Cote d'Ivoire primary energy source is accounted for by natural gas. Despite the heavy reliance on natural gas, Cote d'Ivoire does not import gas but rather relies on its domestic production. Thus, making it less vulnerable to

Figure 5. Cote d'Ivoire Primary Energy Sources



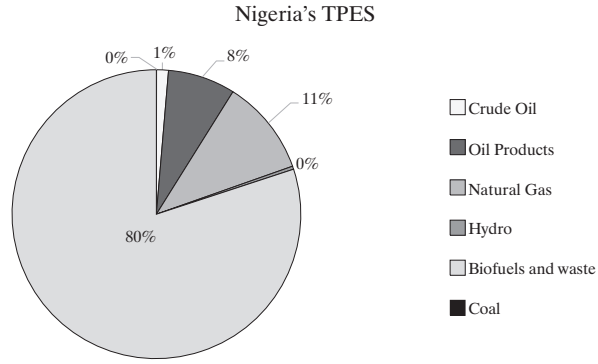
Source: EIA, 2015.

supply shocks. However, Cote d'Ivoire has a political stability rating of 20%. Therefore, any disruption to domestic gas supply would make the country highly vulnerable to gas supply security.

2.3. Nigeria

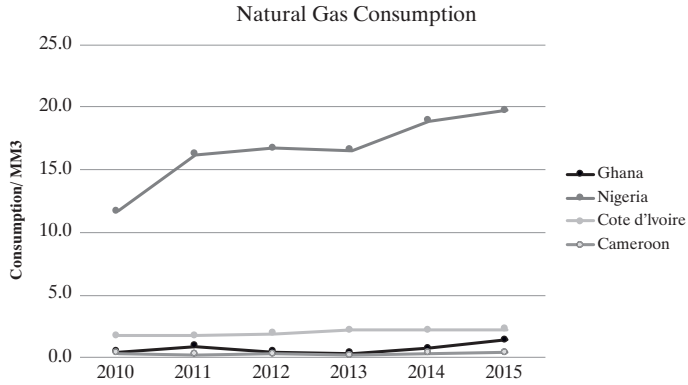
Nigeria has the largest proven natural gas reserve in Africa and yet it is more vulnerable to natural gas supply disruption based on the figures obtained from the GSSI calculation. In 2015, Nigeria produced 39.65mtoe of natural gas, flared 11.65% of the total production, exported 23.09mtoe and consumed 16.65mtoe (IEA, 2015). The natural gas intensity of Nigeria is 0.03mtoe/$bn and gross inland consumption of 91.41 per capita, which is an indication that despite being the largest producer of natural gas in Africa, Nigeria's economy does not revolve around natural gas. As shown in Figure 6 below, natural

Figure 6. Nigeria's Primary Energy Sources



Source: IEA, 2015.

Figure 7. Natural Gas Consumption



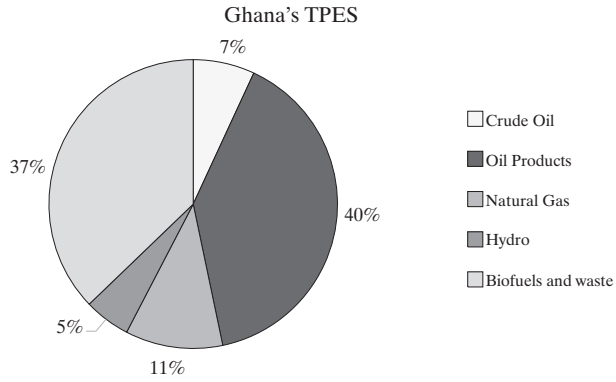
Source: IEA, 2015.

gas usage in Nigeria accounts for only 11% of Nigeria's total primary energy sources (TPES). The major energy source in Nigeria's energy mix is biofuel, which accounts for 84% of the TPES.

2.4. Ghana

Ghana is most vulnerable to natural gas supply disruptions among the sampled countries with a GSSI of 0.68. Ghana is weak on all the supply security indicators, especially G_2, G_3, and $G_{4,}$ where the country performed poorly. The country is a net importer of natural gas from Nigeria, which has a very low political stability ranking of 6%. This means that Ghana faces a high risk of supply disruption from Nigeria. For instance, from 2014 to 2016, Ghana experienced power crisis because of disruptions in gas supply from Nigeria,

Figure 8. Primary Energy Sources in Ghana



Source: IEA, 2015.

which according to the World Bank estimates costs the country about 1% lost growth in GDP per year.

Natural gas constitutes 11% of the total primary energy mix in Ghana (this is illustrated in Figure 8 below) with an intensity of 0.03mtoe/$bn. This implies that Ghana's economy does not rely heavily on natural gas to produce goods and services.

V. Conclusion and recommendation

Based on the information gathered from the literature review and the GSSI calculation, one of the major findings identified by this study is the fact that most of the countries studied do not have a diversified source of natural gas supply. Instead, these countries mainly rely on domestic production for their security of supply, amidst very low political stability ratings, as indicated in Table 3 above. In addition, the study has not learned of any gas storage facility in any of the countries studied to safeguard the continuous supply of natural gas. Therefore, any disruptions in domestic gas production are likely to adversely impact on the natural gas supply security.

The study has, therefore, identified the followings as factors that may influence the vulnerability of natural gas supply security in the countries studied: Gas Intensity; Net Gas Import Dependency; the ratio of Domestic Gas Production to Imports; Gross Inland Consumption; Geopolitical Risk, diversity of supply, dependency on the largest supplier.

The above factors were used as indicators to estimate the GSSI of the countries studied and found out that Ghana, Nigeria and Cote d'Ivoire scored 68%, 67% and 62% of vulnerability to supply security respectively. Cameroon, on the other hand, emerged as the least vulnerable with a rate of 18%. This implied that the above three countries are highly vulnerable to disruptions in natural gas supply security. Therefore, governments' interventions are recommended to develop policies to address the individual countries' weaknesses concerning the indicators used in this study.

The followings are, therefore, recommended by this paper to address the above challenge:

First, natural gas supply source must be diversified to include gas supplied from very high political stability countries. Second, investment in natural gas storage facilities to secure supply in case of any disruptions to domestic production.

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Appendix

Global Primary Energy Consumption

Primary Energy Consumption						
Oil	**Natural Gas**	**Coal**	**Nuclear Energy**	**Hydro electric**	**Renew-ables**	**Total**
4418.2	3204.1	3732.0	592.1	910.3	419.6	13276.3

Global Natural Gas Consumption

Natural Gas Consumption						
Year	**Total North America**	**Total S. & Cent. America**	**Total Europe & Eurasia**	**Total Middle East**	**Total Africa**	**Total Asia Pacific**
2000	720.5	86.6	886.1	171.4	51.8	265.3
2001	691.3	91.1	906.9	188.4	59.1	281.8
2002	715.4	92.3	913.4	201.5	62.4	295.1
2003	709.4	96.2	940.4	211.3	66.6	320.3
2004	712.1	106.6	961.3	234.3	73.2	340.7
2005	711.5	111.1	982.9	251.3	76.5	365.9
2006	707.6	121.9	1003.3	266.7	80.6	392.9
2007	739.9	128.4	1011.4	289.6	87.0	421.8
2008	747.0	129.1	1018.9	312.5	90.6	449.8
2009	740.5	123.0	937.2	323.2	89.6	462.0
2010	770.0	135.2	1006.5	356.9	95.8	509.8
2011	788.6	135.4	983.5	363.0	101.9	553.8
2012	819.5	143.6	966.6	373.5	108.6	598.6
2013	843.9	148.7	949.0	396.3	110.9	605.6
2014	862.0	152.0	905.0	414.7	114.3	624.9
2015	881.2	158.3	909.2	444.3	122.2	631.6
2016	886.8	154.7	926.9	461.1	124.3	650.3

Global Natural Gas Production

	Natural Gas Production					
Year	**Total North America**	**Total S. & Cent. America**	**Total Europe & Eurasia**	**Total Middle East**	**Total Africa**	**Total Asia Pacific**
2000	681.0	91.6	841.4	189.6	119.4	249.2
2001	697.0	95.8	848.4	211.7	123.1	256.8
2002	679.2	99.2	867.9	227.4	128.4	273.8
2003	682.0	108.4	898.2	239.4	138.8	292.2
2004	670.4	121.1	921.3	266.5	145.5	311.8
2005	668.3	126.5	924.1	289.0	159.3	337.0
2006	685.4	138.7	938.0	309.2	173.3	352.2
2007	695.7	145.9	934.0	334.7	183.1	367.0
2008	713.2	146.7	960.0	360.6	190.8	385.5
2009	718.9	142.0	853.1	380.0	179.7	405.3
2010	731.4	149.6	919.0	445.8	191.9	441.5
2011	772.2	150.2	929.2	475.9	188.4	451.2
2012	798.7	156.1	923.0	499.2	192.9	454.9
2013	806.1	158.1	929.4	528.5	185.7	465.3
2014	857.1	159.2	902.9	542.4	186.3	484.9
2015	890.0	160.2	895.9	554.3	189.0	505.7
2016	870.1	159.3	900.1	574.0	187.5	521.9

2015 Data on GSSI Indictors

2015 Country Data								
Country	**Population**	**GDP ($Bn)**	**Political Stability**	**TPES**	**Production (mtoe)**	**Export (mtoe)**	**Import (mtoe)**	**Consumption (mtoe)**
Nigeria	181.18	481.07	0.06	139.37	39.65	23.09	0.00	16.56
Ghana	27.58	37.54	0.44	9.70	0.05	0.00	0.66	1.18
Cote d'Ivoire	23.11	33.15	0.20	12.98	1.87	0.00	0.00	1.87
Cameroon	22.83	30.92	0.15	7.79	0.33	0.00	0.00	0.33

Data on Total Primary Energy Sources (TPES)

TPES	Ghana	Nigeria	Cote d'Ivoire	Cameroon
Energy Sources	%			
Coal	0.00	29.00	0.00	0.00
Crude Oil	673.00	1855	48	1818
Oil Products	3868.00	10529.00	–1377	103
Natural Gas	1064.00	14901.00	1686	295
Nuclear	0.00	0.00	0	0
Hydro	503.00	492.00	116.00	436.00
Geothermal, Solar, etc	0.00	0.00	0.00	0.00
Biofuels and waste	3617.00	111566.00	9,395.00	5,020.00
Electricity	–28	0	–78.00	122.00

CASE COMMENTS AND LEGISLATION REVIEWS

Information Exchange Going Digital – Challenges to Hungarian Competition Law Enforcement

by

Judit Firniksz and Borbála Dömötörfy*

CONTENTS

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Abstract

The aim of the paper is to present an insight into the challenges raised by digitalized and data-driven markets to competition policy and enforcement in the Big Data era. Focusing on the assessment of information exchange in the digitalized environment, traditional risk factors are analyzed and it is argued that new risk factors can be identified. The paper provides an overview of relevant recent Hungarian case-law to examine the role of information exchange, taking place in a data environment that offers an increased amount of up-to-date and relevant market information for analysis. Further, the paper summarizes the enforcement responses to the demand-side challenges raised by online platforms, user interfaces applying new approaches and practices that can directly influence consumer behavior. The consequence is drawn that the extended economic and IT-related argumentation may affect the nature of proceedings and some new phenomena, as the role of secondary intermediaries, integration of online and offline market segments open new fields for assessment.

Resumé

L'objectif de cet article est de donner un aperçu des défis posés par les marchés de la numérisation et des données à la politique de la concurrence et à son application à l'ère des grandes données. En se concentrant sur l'évaluation de l'échange d'information dans l'environnement numérique, les facteurs de risque traditionnels sont analysés et on fait valoir que de nouveaux facteurs de risque peuvent être identifiés. Le texte donne un aperçu de la jurisprudence hongroise récente en la matière afin d'examiner le rôle de l'échange d'informations dans un environnement de données qui offre une quantité accrue d'informations actualisées et pertinentes sur le marché à analyser. En outre, l'article résume les mesures d'application de la loi prises pour relever les défis posés par les plateformes en ligne, dont les interfaces utilisateur appliquent de nouvelles approches et pratiques qui peuvent influencer directement le comportement des consommateurs. La conséquence en est que l'argumentation économique et informatique peut affecter la nature des procédures et certains phénomènes nouveaux, comme le rôle des intermédiaires secondaires, l'intégration des segments de marché en ligne et hors ligne ouvrant de nouveaux domaines d'évaluation.

Key words: competition law; information exchange; algorithms; big data; digital markets; Hungarian Competition Authority, enforcement

JEL: K21

I. Introduction

Datafication, digitalization, data-driven markets, online platforms, digital economy; practically, these expressions are used in every segment of the economy, signalling that data defines the rapidly changing economic landscape, digital technologies are diffused in business processes. As a result, use of data-driven toolsets has a deep impact on the performance of firms. Digitalization of the value chain is reshaping the processes from the development of products through production, logistics and sales systems to their acquisition by end users. Product digitalization is creating new markets and is fundamentally changing data-driven business models, which are simultaneously generating new organizational structures, working methods. These parallel processes result in new channels and context in the communication with buyers, consumers, customers, clients, users and employees (Preta and Maggiolino, 2018). Some digital tools, such as software-based algorithms[1], enormous structured and unstructured databases, and access to Big Data play a key role in improving pricing models, providing products and services tailored to consumers, and predicting market tendencies. Data-driven markets may offer benefits both on the supply side by increasing transparency and enhancing the number and quality of the products available, and on the demand side by assisting consumers with sorting out the relevant information. Digitalization has obvious benefits affecting each sector of the economy, however, new methods of collecting and analyzing data also raise competition law concerns on the grounds that data acts in the digitalized markets as a new factor determining market power and market transparency. Algorithms can be displayed and implemented in a variety of ways, with human and machine execution, but a new peak was reached with computer science. Software-based algorithms have prepared the ground for highly complex data processing and data evaluation processes, with whose efficiency the human mind cannot compete. Developments in artificial

[1] In accordance with the set of definitions and concepts adopted by OECD (2017) we also accept the formal and precise definition of algorithm formulated by Wilson, R.A. and Keil, F.C. in 1999 (The MIT Encyclopedia of the Cognitive Sciences, MIT Press): 'An algorithm is an unambigous, precise, list of simple operations applied mechanically and systematically to a set of tokens or objects. The initial state of the token is the input; the final state is the output.'

intelligence and machine-learning have also led to algorithms for decision-making and prediction (OECD, 2017).

Wide availability and analyses of data have always increased market transparency, and transparency may entail positive effects to consumers by improving the comparability of products and services. By this, information asymmetry is reduced and as a result, competition may intensify. As a novel phenomenon in online economic processes, consumers (for various purposes and on a wide variety of online platforms) provide a wide range of data, and (i) Big Data analysis methods make it possible to track consumer habits and interests, enabling personalised direct access to consumers; (ii) user data as input becomes an important asset of platform operators. Direct access to consumers and transparency of information about consumer behavior may increase the chances of new entrants, while at the same time expose consumers to new market practices, enhancing their vulnerability to some extent.

Competition law meets challenges in many fields, recent Hungarian case-law and policy-making have been also faced with the changes in the information environment of decisions taken by companies and consumers. In our paper, through the legal prism of Hungarian competition law enforcement, we will look at two key characteristics of digital economy from the practitioners'perspective: (i) information exchange taking place in a data environment that offers an amount of fresh and relevant market information for analysis, which would have been unimaginable in the past; (ii) online platforms, user interfaces applying new approaches and practices (for example, algorithm-based decision-making) that can directly influence consumer behavior.

II. Information exchange

Big Data is not only a significantly increased amount of accessable data made available in the online world via digital technologies; the concept of Big Data cannot be examined independently from data analysis tools used to process such data. How data is used, collected, and the difference between modern and traditional ways of processing are key elements of the definition of Big Data, just as the three V's – velocity, variety and volume – are. ICO lists the use of algorithms, the opacity of the processing, the tendency to collect 'all the data', the repurposing of data, and the use of new data types as distinctive aspects of data analytics (ICO, 2017).

Indeed, the increased amount of data available on the market is not sufficient to reach a high degree of market transparency, its combination with the ability to collect and process data provided by the algorithms allows market players to compare online information.

Market transparency, however, is not the only factor to be taken into account when evaluating the market environment of information exchange. Beyond transparency, in terms of market characteristics, concentration, stability, symmetry, complexity and balance of the relevant market are also traditional risk factors. Before analyzing such market characteristics, we must, however, first integrate information exchange into the nomenclature of behaviors relevant from a competition law point of view.

III. Assessment of information exchange

Any information exchange that enables a company to become aware of the future market strategy of its competitor may eliminate the uncertainty that is an inevitable element of competitive behavior. As a consequence, coordination may replace competition.

The economic theory behind the rules of competition law builds on game theory to a significant extent. The basic model which could be used to explain the prohibition of information exchange between competitors is the general form of the Prisoner's Dilemma. Two suspects, A and B, are arrested for a crime, but here is little evidence supporting their accusation, so the prosecutor decides to separate the two suspects and privately proposes to each of them the following: the suspect confessing the crime will get a reduced sentence of 1 year, provided that the other suspect stays silent; while in this case the other suspect will get 10 years. If they both confess, each will get 3–3 years. Finally, if both suspects stay silent, each will get 2–2 years.

Table 1. General model of the prisoner's dilemma

		A	
		Confess	**Silent**
B	**Confess**	3 / 3	10 / 1
	Silent	1 / 10	2 / 2

Source: Authors' own work based on general models (see e.g. Nicholson and Snyder, 2010, p. 180).

In the case of this basic model of the Prisoner's Dilemma, the dominant strategy – the best response to any strategy played by the other suspect – of each suspect is to confess, however, a better outcome would arise for each of them if both stay silent. For an outcome to be a Nash equilibrium, both players must be playing a best response to each other; therefore, both suspects

confessing is the Nash equilibrium of the game. Obviously, there would be a better outcome for both suspects than the Nash equilibrium of the game by both staying silent – but it is not stable, each suspect would prefer to deviate spending one year in prison against two (Nicholson and Snyder, 2010).

But how does the Prisoner's Dilemma relate to information exchange? Since the prosecutor approaches the suspects separately, they cannot communicate; in the general form of the Prisoner's Dilemma, it is a prerequisite that no communication takes place between the suspects. Communication between the suspects would influence the outcome of the game by increasing the likelihood of cooperation, especially if communication relates to future actions, the exchange of information is repetitive[2] and credible (Rosenfield, Carlton and Gartner, 1997). The above listed three characteristics of communication or signalling are enhanced in the Big Data environment by its very nature. Ezrachi highlights that information exchange on digital markets is likely to take place even tacitly, that is, without active communication (Ezrachi, 2018). Therefore, digitalization and the Big Data environment diminish at least one important prerequisite of the simple form of Prisoner's Dilemma, and increases the likelihood of the cooperative outcome. Since competition destroys profit (Thiel, 2014), it is a rational company's interest to use digitalization and Big Data in a way to reach the cooperative outcome.

The Hungarian Competition Act[3] (in accordance with Article 101 of TFEU) does not include information exchange performed by competitors in the examples listed as restrictive agreements or concerted practices, therefore, such behaviors must be assessed by applying the general rules. The interpretation of the term 'information exchange' depends on the context and information exchange systems that can be divided into the following major categories: (i) information exchanges that constitute part of 'classical' (for example, horizontal price fixing) cartel agreements[4]; (ii) information exchanges that are linked to legitimate cooperation agreeements or mergers, (iii) 'stand alone' information exchanges without any underlying (anti-competitive or legitimate) agreements (Fejes, 2016).

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[2] The number of repetitions of the game and repetitions of comumnication are different features. The number of repetitions of the game also has significant impact on the outcome of the game – if the game is repeated indefinite times, the number of repetitions increases the likelihood of cooperation by definition (Nicholson and Snyder, 2010), the article refers here to repetition of communication.

[3] A tisztességtelen piaci magatartás és a versenykorlátozás tilalmáról szól 1996. évi LVII. törvény – Act LVII of 1996 on the Prohibition of Unfair and Restrictive Market Practices. Rretrieved from http://www.gvh.hu/en/data/cms1033354/Hungarian_Competition_Act_20150901_.pdf (30.07.2019).

[4] An information exchange that is necessary for the implementation or monitoring of an existing cartel is, as a principle, to be assessed together with and in the context of the underlying agreement.

As standard consecutive logical steps of the general rules, both under Hungarian and under EU jurisprudence, the following questions must be assessed: (i) is there any agreement between undertakings, decision taken by an association of undertakings or concerted practice; (ii) is the information exchange considered a restriction by object or a restriction by effect/ potential effect; (iii) does any exemption apply.

The existence of an agreement can be proved in most organized data exchanges, the participating companies usually enter into a contract with at least the intermediary (market researcher, consultant) and thus know which other companies participate in the information exchange, that is, which companies can access the data after some processing (Fejes, 2016).

By its very nature, a concerted practice does not contain every element of an agreement. Usually, it is performed in an ad-hoc manner, but it may be apt to coordinate the participants' behavior and by this, it may exclude or significantly reduce competitive risks. The participation of an undertaking in a meeting where the participating undertakings communicate information about their future market behavior is considered a concerted practice, since the information communicated to competitors is presumed to be necessarily taken into account when defining their market behavior. In addition, when shaping their own market behavior, the participants are also assumed to take (directly or indirectly) the information provided by the competitors into account (so-called 'Anic presumption'[5]). In the case of behaviors that may be included in the conceptual framework of concerted practices, the intent of the undertakings and the existence or possibility of the deliberate restriction of competition has a decisive role.

Depending on the intent of the participants and market conditions, coordination can take multiple forms, it can be explicit, tacit or a combination of the two. Tacit collusion can arise when firms repeatedly take part in market interactions and their behavior is characterized by a conscious parallelism that enables the participants to reach a non-competitive equilibrium on the market. In tacit collusion, there is no need for an explicit expression of intent, if the competitors can recognise their mutual interdependence and maintain their coordination solely on the basis of information available on the market.[6] Tacit collusion traditionally has rather been assessed in collective dominance cases. The underlying feature in the case of tacit collusion is oligopolistic interdependence, rather that agreement (Simon, 2012). Ezrachi and Stucke

[5] Judgment of 8 July 1999, Case C-49/92 P *Anic v. Commission*, ECLI:EU:C:1999:356, para 121.

[6] Tacit collusion arises typically in transparent markets with a limited number of competitors, where the firms can create a non-competitive profit-maximising equilibrium without entering into any direct relationship with each other (OECD, 2017).

(2018) recommend to apply a distinct approach towards human and algorithmic tacit collusion in the age of digitalization and Big Data. However, this type of evaluation of algorithmic tacit collusion is closer to the category of anti-competitive agreements.

Agreements can restrict competition by their object or effect. The topic of 'by object' restrictions exceeds the scope of our study but the various and complex market effects (simultaneous efficiency gains and competitive constraints) that can be achieved through information exchange limit the scope of the behaviours to which a clear 'by object' concept could be attributed. The Horizontal Guidelines[7] and the Commission's '*By Object' Guidance to the De Minimis Notice*[8] point out that an information exchange between competitors of individualized data regarding the intended future prices or quantities are considered a restriction by object.[9] Information exchange on future prices and quantities (such as planned future sales, market shares, market areas and consumer groups) may allow competitors to reach a higher price level jointly, without having to face a need to keep up with the price war, and thus, it is particularly likely to lead to collusion.

IV. Risk factors of information exchange

1. Traditional risk factors of restrictive effects

The Horizontal Guidelines describe the method by which the restrictive effects of information exchanges should traditionally be examined on a case-by-case basis, considering all the relevant facts and circumstances of the given case.

For an information exchange to have restrictive effects on competition, it must be prone to have a significant adverse impact on one (or several) of the parameters of competition such as price, output, product quality, product

[7] Communication from the Commission – Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, OJ C 11, 14.1.2011, p. 1–72.

[8] Commission Staff Working Document – Guidance on restrictions of competition 'by object' for the purpose of defining which agreements may benefit from the De Minimis Notice – C(2014) 4136 final. Retrieved from http://ec.europa.eu/competition/antitrust/legislation/de_minimis_notice_annex.pdf (30.07.2019).

[9] Where information exchange is performed as a part of the implementation or monitoring of an existing cartel, it will be assessed as a part of the concerned cartel behavior irrespecitve of whether it covers current/past or future prices or quantities. – 'By Object' Guidance to the De Minimis Notice, para. 2.6

variety or innovation. The competitive outcome of an information exchange depends (i) on the characteristics of the market in which it takes place, (ii) the nature of the products affected by the information exchange, (iii) the type of information that is exchanged, which may modify the relevant market environment in favor of those who participate in the coordination. Further, it is a key issue that the sustainability of the collusion requires advanced data processing that allow the participants to monitor and enforce the collusion (that is, to detect and retaliate deviant firms).

It is a highly obvious fact that the probability of a collusive outcome is higher in the markets of not too complex products where transparency reaches a significant degree, the number of the market players and their market shares represent a concentrated structure; market players are present on the long run and they are homogenous in terms of most of the relevant parameters (as costs, demand, product range, capacities, size, etc.)

As for the characteristics of the data subject to exchange between the competitors, the strategic nature of the information, its market coverage, its aggregate or individual nature, its age, the frequency of information exchanges, the publicity of the information and information exchanges are as follows:

Information is considered strategic if it is suitable for reducing strategic uncertainty in the market, thus strategic information is mostly based on data on prices (such as actual prices, discounts, price increases or price reductions) and quantities.

To exert an anti-competitive effect by an information exchange, the undertakings concerned should cover a sufficiently large part of the relevant market, since, in the absence of such information, non-participating undertakings would be able to prevent the behavior resulting in restrictive effects on competition. Exchanging aggregated data is less likely to lead to a restriction of competition because from such data any specific information is difficult to recognize. In fact, collection and disclosure of such information by market research firms can be of particular benefit to both suppliers and consumers, as they allow more effective strategy development by securing sectorial benchmarks.

As for data age, there is no clearcut threshold. Generally, the potiental of the data to realize deviation determines if the data can be considered a source of a collusive outcome. Historical data does not enable market players to detect deviations and perform a timely threat of retaliation. In practice, the concept of historical data primarily relates to the frequency of price (re-) negotiations within the given industry, and can be considered historical if it is several times older than the average length of price re-negotiations (and the relevant contractual relationships). The stability of a given market heavily influences the frequency necessary to facilite collusion: in less stable markets

with long-term contracts, infrequent exchanges may also be sufficient to have restrictive effects on competition.

Genuinely public information is equally accessible to all competitors and customers, not only in terms of availability but also in terms of its potential costs, and is unlikely to generate a collusive outcome. Practically, genuinely public information is not targeted by market players, in contrast to the data that is available 'in the public domain', but the collecting and processing costs of which deters competitors and consumers from intitiating data collection.

2. New risk factors and policy challenges in the assessment of information exchange

Enforcement experiences and challenges summarized by Competition and Market Authority (hereinafter: CMA) reveal that Big Data combined with advanced technologies, such as pricing algorithms, may add new risk factors, if they could have an impact on the markets: (i) by monitoring the prices available on the market and even learning to co-ordinate, an algorithm can introduce parallel behavior, (ii) by being able to identify and segment target groups of consumers who are the most likely buyers of a new entrant and allowing a form of personalized pricing, an algorithm can increase the stability of a market; (iii) by applying the same algorithm and/or the same set of data, the algorithms of the concerned firms may follow the same learning process, which may result also in parallel behaviour (CMA, 2018).

In less concentrated markets, algorithmic pricing can increase the chances of both explicit and tacit collusion, as algorithms are faster than human resources and can collect data from multiple competitors. Thus, price discrepancies can be explored more efficiently, and appropriate counter-strategies can be deployed without delay. Further, pricing algorithms enable companies to adjust their market prices to market changes without human intervention and without any time lag. The increased frequency of market interaction, including price setting, significantly reduces the competitors' willingness to reduce prices as the resulting short-term benefits are minimized. In the long run, the learning process of the algorithms can entirely eliminate price wars as well (CMA, 2018).

It should also be highlighted that the above effects of digitalization in the Big Data age are not limited to online/digital markets. Even the most offline/traditional markets cannot stay unaffected by the forth industrial revolution and its consequences.

As for the questions arising from Hungarian enforcement practice – although in the end, the problem was not tackled in the decision taken by the Hungarian

Competition Authority (Gazdasági Versenyhivatalt, hereinafter: GVH) in the *Retail Hub-and-Spoke Case*[10] – the arguments presented to the authority also reflected that market structure is heavily influenced by the issue that there are offline/traditional and online/digital segments of the market, and it is not clear to what extent these markets are interconnected and integrated. The online/digital and offline/traditional segmentation of the market was taken into account in several different cases.[11]

Spill-over effects of information made available in social media both directly by firms and indirectly by influencers, whose activity was highlighted by GVH in its *Digital Consumer Strategy*[12], may also introduce new aspects for the assessment of risk factors.

Understanding collusion requires a fact-heavy economic assessment, and both Pitruzzella (2017) and Ezrachi and Stucke (2018) point out that increasing concerns of enforcers signal that from a policy perspective the scope of antitrust law should be revised to take into consideration the impacts exposed by the new phenomena of the digitalized economy.

V. Information exchange in recent Hungarian case law

1. *The Contact Lenses* Case

1.1. Assessment of horizontal information exchange

According to the facts found by the investigation, the four participating companies had a significant market share in the contact lenses and accessories distribution market (hereinafter: contact lenses market), which jointly accounted for 80% of the relevant market.[13] The involved market leader participants concluded bilateral agreements with a market research company in 2003, according to which the market researcher was going to conduct an investigation for them with a so-called 'black box' method for more than a decade. In this type of research, market participants provide their own sales data, enabling the independent research company to present the main market trends in an aggregated and properly structured way.

[10] Case-VJ-22/2015.

[11] Vj-89/2015, Vj-103/2014, Final Report on the Online hotel booking sector inquiry – retrievable from: http://www.gvh.hu//data/cms1034253/Agazati_vizsgalat_online_szallashelyfoglalas_piacan_vegleges_jelentes_2016_06_08.pdf (30.07.2019).

[12] Középtávú digitális fogyasztóvédelmi stratégia – retrievable from http://www.gvh.hu/data/cms1039191/GVH_Stategia_Digitalis_fogyved_startegia_2018_09_27.pdf (30.07.2019).

[13] Decision of GVH Vj-96/2010/310 of 13 June 2014.

The concerned research on the contact lenses market was based on quarterly data collection focused on sales volumes and average prices in different segments and, as a result, the relevant four market participants were presented with reports that included data broken down by companies and product groups. The quarterly reports, which were provided to the participants one and a half months after the given quarter, described market trends for all product types through the aggregated and the individual data on net revenues, quantities and average prices per product and market share.[14]

In its assessment, GVH followed the principles laid down in the Horizontal Guidelines.[15] As for the market characteristics, GHV stressed that the 80% joint market coverage of the participants implied a high degree of concentration, which made the market more sensitive to the effects of the information exchange. The contact lenses market can be divided into segments, and there was specialization among the participants to supply some segments. In this way, these market segments could show a higher degree of concentration and be more vulnerable to an information exchange. In this context, GVH emphasized that the sharing of the participants' individual data broken down by segments could have implied a restriction of competition in an oligopolistic market with stable participants, where the number of participants being present in the different product segments was even more limited.

GVH identified a further risk factor, namely that market transparency had been previously low because, also due to the lack of genuine public information, the participants had had no information on their competitors' wholesale prices and sales.

GVH's assessment of the age of the exchanged data reached the conclusion that quarterly price data could not be considered historical data, given that the participants usually made their strategic business decisions (especially on marketing strategy and pricing) on an annual basis. Moreover, pursuant to the Horizontal Guidelines, data become historical only if their age is several times longer than the average length of the contracts in the concerned industry.

Further, market uncertainty can be decreased if the market players can monitor both the impact of some well-observable external market effects (such as competitors' marketing and promotion campaigns, innovation, product range changes) or exogenous shocks, and the competitors' market behavior on their own. At this point, GVH expressed its view that historical datalines for long periods might become also sources of risk: if quarterly data are available for a long period of time, it can be observed how competitors react to certain market situations and shock, and predictions can be made regarding their expected behavior in similar future market events.

[14] Decision of GVH Vj-96/2010/310 of 13 June 2014, paras. 72–74.
[15] Decision of GVH Vj-96/2010/310 of 13 June 2014, paras. 296–337.

GVH examined in detail also the nature of the information exchanged, including its strategic nature and level of detail. In this respect, GVH pointed out, in line with the Horizontal Guidelines, that data on sales and quantities are strategic because it can reduce uncertainty in the market if competitors are aware of these data. The level of detail was of particular importance in the assessment of the case, since data broken down by the individual participant undertakings were made available, and such detailed data were not necessary to follow market trends or identify new market opportunites. For such purposes, aggregated data of the market would have been sufficient, and, on the basis of the aggregated data, the participants could have formed a precise opinion on their market position. It is also important to note that even though the average product prices exchanged in the framework of the market research did not allow calculating particular product prices, this does not diminish the importance of the given information because it can serve as a benchmark in the given segment.

The fact that the participants did not disclose the results of the research in any way to the public was also evaluated; in this way, other market players and consumers could not gain access to the data. Consequently, the use of the research data increased transparency on the upstream side of the market, while consumer-side transparency remained unchanged, which could obviously be detrimental to competition.

On the basis of the data collected during the investigation, GVH attempted to explore the actual market effects of the information exchange and prepared a preliminary market analysis for this purpose. However, the preliminary market analysis did not reveal any behavior that would have clearly been identified as a result of the restrictive effects of the information exchange and that could not have been explained with alternative pro-competitive arguments. Thus, the economic analysis could not lead to clear results, but GVH considered that even if the actual impact of an information exchange agreement could not be proven, it would still be possible to establish the capability of the conduct to restrict competition (that is, its potiential anti-competitive effect), since the Horizontal Guidelines does not require the proof of restrictive effects on competition.[16]

In general, in the *Contact Lenses* case GVH did not consider it unlawful to collect and share aggregated market data or to conduct market research. Its decision was focused on the potential restrictive effects of sharing individual company data broken down by market segments in an oligopolistic market with stable participants.

[16] Decision of GVH Vj-96/2010/310 of 13 June 2014, paras. 338–341.

1.2. Role of the intermediary

GVH originally planned to establish the market research firm's involvement in the infringement on the basis of the Treuhand-liability principle[17], which allows the assessment of the joint responsibility of intermediaries involved in a cartel infringement. However, GVH continued to examine two cumulative conditions for establishing Treuhand-liability, that is, the requirements that (i) the intermediary must have contributed to the implementation of the cartel (objective criterion), and (ii) the authority must demonstrate that the intermediary has contributed to the common intention pursued by all the participants and it has been aware of the behavior planned or performed by the other participants to pursue the same objectives, or has reasonably anticipated and was prepared to accept the risk (subjective criterion).

GVH examined the applicability of the Treuhand-liability in relation to a restriction based on potential effect, but came to the conclusion that the objective condition had been unquestionably established. The subjective element could not have been proved by GVH as there was no evidence that the market research company would have organized and conducted its research in the knowledge of the restrictive nature of its behavior.

1.3. Final decision of the Hungarian Curia

The decision of GVH in the Contact Lenses Case was subject to judicial review by the Budapest Metropolitan Court. Later, as the court of second instance, the Hungarian Curia terminated the case in its final decision in January 2018[18]. In its judgement the Hungarian Curia explained that the evidence on the anti-competitive effects of the participants' conduct were insufficient, that is, GVH had failed to demonstrate any actual anti-competitive effects, while the existence of potential restrictive effects on competition had been merely assumed by the GVH, but had not been proved by supporting evidence satisfying the related legal standards on proofs.

2. *The BankData* Case

2.1. Another infringement decision based on potential effects

Following the judgement of the Hungarian Curia in the Contact Lenses Case, the general public is now looking forward to the final outcome of the

[17] CFI judgment of 8 July 2008, Case T-99/04 *AC Treuhand AG v Commission of the European Communities*, ECLI:EU:T:2008:256.

[18] Decision of the Hungarian Curia Kfv.II.37.110/2017/13 of 17 January 2018.

ongoing judicial review in the BankData Case,[19] since these cases present many similarities. On the one hand, there is a common feature that both cases include long-lasting horizontal information exchange: the Hungarian Banking Association (Magyar Bankszövetség) in collaboration with International Training Centre for Bankers Ltd. (Nemzetközi Bankárképző Központ Zrt.), as joint intermediaries, were operating a database called 'BankAdat' (BankData) for more than a decade (for 12 years). On the other hand, the GVH's assessment in the BankData Case was also based on potentially restrictive effects.

In addition to the above-mentioned intermediaries, the BankData Case involved the members of the Hungarian Banking Association (that is, 33 financial institutions), hence practically the entire Hungarian bank sector was affected by the behavior that was described by GVH as an exchange of private, confidential and strategic information[20] shared in the database by the members of the Hungarian Banking Association, enabling them to have access to up-to-date information about market tendencies and the competitors' strategies and policies. In addition, the participating banks also used the database as a source of input information to set up their strategic and product development plans. In its decision, GVH summarized the factors that entailed high likelihood of a potential restrictive effect (tab. 2)[21].

GVH attempted to verify the potential impact by a counterfactual analysis, based on an analysis of hypothetical processes that would have taken place in the market without the information access facilitated by the database. However, GVH found that the period preceding the setup of the database was not relevant, since the reformation process of the Hungarian banking system following the transition period was still in progress. For that reason, it could not have served as a proper benchmark. Therefore, it was also considered by the GVH as an option to use the three year period that has elapsed between the termination of the use of the database and the decision of GVH as a benchmark.[22] In this respect, however, GVH concluded that there had been no long-term data that could have served as a proper basis for the comparison.

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[19] Decision of GVH Vj-8/2012/1751 of 11 January 2016.

[20] The database consisted of 510 data categories, which granted the participants access to data broken down by the counties of Hungary (details of loans and deposits), transactions data, detailed portfolio data for household and corporate loans, details of individual portfolios, staff numbers, detailed breakdown of bank units, number of ATMs and POS terminals – Decision of the GVH Vj-8/2012/1751 of 11 January 2016, paras. 1221, 1251.

[21] Decision of GVH Vj-8/2012/1751 of 11 January 2016 – paras. 1204, 1234.

[22] The Hungarian Banking Association voluntarily terminated the operation of the database upon the initiation of GVH proceedings.

Table 2. Risk factors assessed in the BankData Case

	Characteristics of the Hungarian bank sector and risk factors identified in the investigation	**Conclusion regarding the likelihood of anti--competitive collusion**
Structure of the market	• moderately concentrated market • stable market • high concentration in some market segments • oligopolistic dominant group of undertakings with a competitive edge	high
Nature of the products	• homogeneous products[1] and product range	high
Dynamics of the market	• stable demand and supply • constant conditions of supply	high
Market players	• no significant change of market players • long-term presence in the market • regular connection between the market players	high
Profit available on the market	• high	high
Transparency	• the participants artificially raised transparency by the use of the database	high
Characteristics of data	• strategic information • 'key competition parameters' • business secrets	high
Market coverage	• large number of participants	high
Aggregated/individual data	• both aggregated and individual data	high
Age of data	• data regarding the previous quarter year • real-time data	high
Frequency of information exchange	• frequent exchange of data for an extended period of time	high
Public access to information	• non-public data solely accessible to the participants	high

[1] The homogeneous nature of financial products was heavily debated in the defense arguments presented by the participants – see paras. 337, 599, 654, 661, 675, 678, 681, 687, 700, 717, 726, 795 of Decision of GVH Vj-8/2012/1751 of 11 January 2016.

Source: Decision of GVH Vj-8/2012/1751 of 11 January 2016, paras. 1204, 1234.

In the summary, GVH emphasized that the potential anti-competitive effect of using the database could be established, since without sharing the information in the database, (i) the strategic uncertainty resulting from the independent behavior of the competitors would have been increased, (ii) the participants would not have been able to build up an accurate picture of the direction and extent of the expansion and target customer base of other market players and they would not have been able to adjust their market behavior to this knowledge, and finally, (iii) the participants would not have been able to stabilize the market structure, and in this way they would not have been able to maintain their market share and profitability throughout the banking market and its two main (that is, household and corporate) segments.

2.2. Liability of intermediaries

GVH did not establish the direct liability of the members of the Hungarian Banking Association for the infringement because the authority took the view that the decisions on establishing and operating the database had been taken by the Hungarian Banking Association itself. By holding the association directly liable in this way, the member banks were to bear only subsidiary liability for the enforcement, that is, they might be ordered to pay the fine imposed on the Hungarian Banking Association if such fine could not be collected from the latter. Strategic decisions regarding the database were made by the Hungarian Banking Association but the technical implementation of the information exchange (development of the software; coordination of necessary software updates; provision of hardware and technical background to the operation of the database and the access by the members) was performed by the International Training Centre for Bankers Ltd. as a 'secondary' intermediary, whose direct liability was also established and sanctioned by a fine.[23]

In the BankData Case, GVH established the infringement in relation to the intermediaries on the basis of potential anti-competitive effects, the Treuhand-liability doctrine was expanded when the decision set forth that (i) the interpretation laid down in the AC Treuhand case did not limit the applicability of the intermediaries' liability to by-object hard-core restrictions of competition, and (ii) no conclusion could be drawn from Hungarian case-law that this type of liability would be excluded in cases assessed on the basis of potential anti-competitive effect.[24] It is notable that beyond this statement, the decision did not provide any assessment of or even any direct reference

[23] GVH imposed a fine of HUF 15 million (approx. EUR 47 000) on International Training Centre for Bankers Ltd.

[24] Decision of GVH Vj-8/2012/1751 of 11 January 2016, para. 1333.

to the existence of facts fulfilling the objective and subjective criteria to apply the Treuhand-liability.

3. *The Meat Products* RPM Case

In this case,[25] the function of the information shared by the market research company was directly linked to the enforcement of a vertical restraint. GVH established a retail price maintenance structure in which a major Hungarian meat product manufacturer used a so-called 'leaflet monitor' market research service to monitor the consumer prices applied by its retail partners.

The software of the 'leaflet monitor' service provides information to market players on the in-scope products (with their photos) currently available in promotional campaigns and the promotional prices on the basis of information published by the retail chains in their consumer leaflets. The leaflet monitor service is a standardized online database from which any manufacturer or wholesaler with access can conduct individual analyses, among others, on the promotional prices and market share of its products.

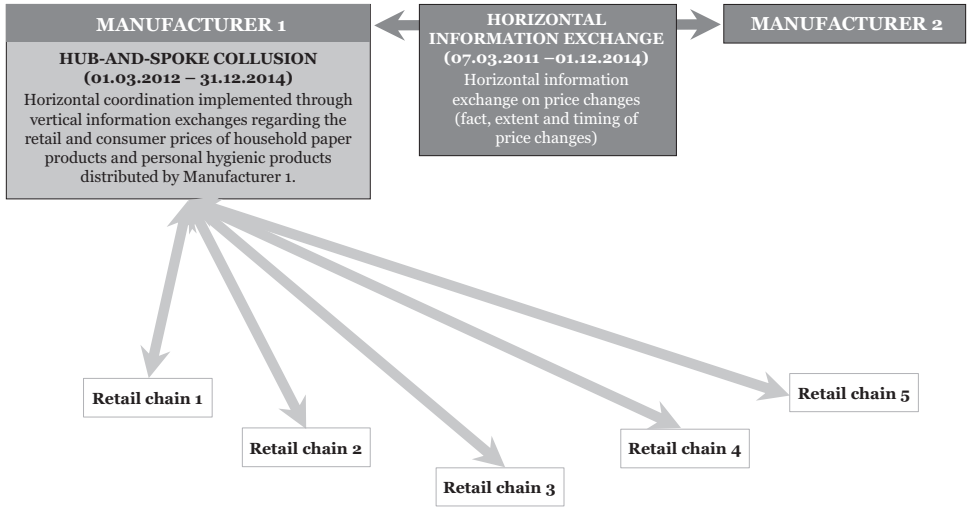
The leaflet monitor software can be installed by any number of users; data transfer is taking place via e-mails or file-updates, but access is available also directly from the webserver. Users can receive updates on daily product activity in e-mails, which contain the most relevant data for products that are currently in the database. In addition, the market research company regularly produces customized monthly, bi-monthly and quarterly reports and customized reports extracted from the leaflet monitor' database. Reports are available regarding the activity of different brands, products, their comparison, and the advertising activities of competitors. The 'leaflet monitor' software includes also a so-called 'minimum price alert' option, which generates an e-mail warning for the user if some of its products have been advertised by another market player below the given price.[26]

In relation to the 'leaflet monitor' service, GVH took the view that data subject to the information exchange were based on public information, therefore the behavior of the market research company could not contribute in any unlawful manner to the underlying vertical agreement (that is, the objective criteria of the Treuhand-liability is not satisfied).[27]

[25] Decision of GVH Vj-37/2014/303 of 26 July 2016.
[26] Decision of GVH Vj-37/2014/303 of 26 July 2016, paras. 169–179.
[27] Decision of GVH Vj-37/2014/303 of 26 July 2016, paras. 441 and 444.

4. *The Retail Hub-and-Spoke* Case

A hub-and-spoke structure is a specific form of market coordination in which information exchange processes are performed indirectly, through vertical relationships, that is, in such schemes, upstream suppliers or downstream customers may fulfil an intermediary facilitating function. The *Retail Hub-and-Spoke Case*[28] was originally launched by GVH to investigate a double hub-and-spoke system but later, in its preliminary position (that is, in a document equivalent to the 'Statement of Objections' used in the proceedings of the European Commission), GVH finally assessed the following 'one-hub' structure:



Source: Authors' own work.

GVH has adopted a decision that considering the indirect information exchange taking place in the hub-and-spoke structure, the infringement, namely the concerted practice resulting in the deliberate elimination of the risks of competition, can be established if the following cumulative criteria are met. Firstly, it must be proved that when the retail chain shared given pieces of information with the manufacturer in their – otherwise legitimate – vertical relationship, the retail chain provided this information with the intention or the presumption that the manufacturer would share it with competing retail chains. Thus, as a first step, the behavioral element (transfer of information to the manufacturer by the retail chain) and the related state of mind require a detailed assessment.

[28] Decision of GVH Vj-37/2014/303 of 26 July 2016.

Secondly, owing to the specific nature of the indirect relationship, it is also necessary to examine when the manufacturer passed competition-sensitive information from one retail chain to another retail chain, whether the latter retail chain knew or at least could recognize the circumstances under which the manufacturer had obtained this information. Thus, as a second step, the examination of another behavior element (that is, transfer of information by the manufacturer to competing retail chains) and the related state of mind (that is, whether the receiving party recognized the circumstances under which the manufacturer could access the concerned information) must be revealed.

These steps are essential to provide sufficient evidence that the retail chains deliberately replaced the risks of competition with the indirect coordination existing between them.

Ultimately, the infringement can be established, if both previously described stages of evidence related to the behavior of the retailers are fulfilled, and, in addition, it must also be demonstrated that in the course of its market conduct, the retail chain applied the information received indirectly, through the manufacturer.

The decision seems to have adopted the assessment framework evolved in British case-law[29] and applied the intent/state of mind requirement[30] in a multi-step approach following the route of the information. In the Retail Hub-and-Spoke Case, this approach resulted in the termination of the case because in the light of the evidence available, it could be established in only two separate information exchange situations that the manufacturer had provided competition-sensitive information to one of the retailers on its competitors' planned future price changes. Not even in these two occasions, however, could it be properly proved that the information-providing retailers

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[29] Case CP/0871/01 *Price-Fixing of Replica Football Kit* [2003]; Case 1022/1/1/*03 JJB Sports plc v Office of Fair Trading* [2004] CAT 17; Case 2005/1071, 1074 and 1623 *Argos Limited and Littlewoods Limited v Office of Fair Trading* and *JJB Sports Plc v Office of Fair Trading* [2006] EWCA Civ 1318.; Case CP/0480–01 *Agreements between Hasbro UK Ltd, Argos Ltd* and *Littlewoods Ltd Fixing the Price of Hasbro Toys and Games* [2003]; Case 1188/1/1/11, *Tesco v Office of Fair Trading* [2012] CAT 31.

30 Case 2005/1071, 1074 and 1623, *Argos Limited and Littlewoods Limited v Office of Fair Trading* and J*BB Sports plc v Office of Fair Trading* [2006] EWCA Civ 1318, para. 141.: 'The proposition which, in our view, […] is sufficient to dispose of the point in the present appeal can be stated in more restricted terms: if (i) retailer A discloses to supplier B its future pricing intentions in circumstances where A may be taken to intend that B will make use o f that information to influence market conditions by passing that information to other retailers (of whom C is or may be one), (ii) B does, in fact, pass that information to C in circumstances where C may be taken to know the circumstances in which the information was disclosed by A to B and (iii) C does, in fact, use the information in determining its own future pricing intentions, then A, B and C are all to be regarded as parties to a concerted practice having as its object the restriction or distortion of competition.'

had anticipated or could have reasonably foreseen that the manufacturer would pass the information to any of their competitors.

VI. Recent Hungarian experiences: challenges to the enforcement

Competition law has been modeled on information and decisions processed by the human mind, and also the experiences obtained from some enforcement elements make it clear that the digitalized markets make it inevitable to rethink some issues.

1. Role of extended economic and IT-related argumentation in the evidence

The Contact Lenses case has made it clear, and the BankData case also supports the fact, that proving information-sharing is extremely difficult. The examination of information exchange cases is extremely fact-sensitive and requires specific economic argumentation. The assessment of risk factors presented in detail in the Contact Lenses Case has also revealed the essential role of economic analysis and the lack of normative legal criteria for the assessment. GVH has pointed out some of these difficulties, in particular the fact that the economic analysis is mostly performed on data obtained in the investigation, the quality of which is not uniform.

2. Presence of 'secondary' intermediaries

The BankData case has raised serious theoretical issues by (i) considering the behavior and decisions of an association of undertakings as an intermediary, (ii) extending the applicability of the Treuhand-liability principle to the assessment of cases based on potential anti-competitive effects. However, there is an additional remarkable strand of the case that comes from the highly specialized role performed by the International Training Centre for Bankers Ltd. in the IT-implementation of the comprehensive information exchange. It seems likely that in the future, an increasing number of cases may occur in which without adequate knowledge and resources in the field of IT, the decision on information exchange cannot be executed directly by the 'primary' intermediary itself. This may increase the complexity of information exchange scenarios, and enforcers may face new difficulties in the assessment of liability (with special regard to the proof on the subjective relation that the secondary

intermediary actually executing the information exchange might have in regard of the purposes of such information exchange).

Further, in the recent years, new data-based IT-services, for example data mining, have emerged (and some of them have also created new markets) that, by monitoring and sorting large data sets, may supplement the traditional toolset and methodology of market research to identify patterns and outlining future trends. The expansion of data available for analysis and new generations of intermediaries with advanced IT-tools entering the market are recent developments that may intensify the tendencies outlined by Fejes (2016). Finally, a competition law dispute may become a battlefield not only for lawyers but also for economists and IT experts. On the one hand, the uncertainties of proof accompanied by the threat of significant sums of potential fines[31] can deter market participants from using advanced market focused IT systems, and on the other hand, interdisciplinarity of proof (regarding, for example, complex economic or statistical assessments) may considerably deteriorate the effectiveness of judicial control.

3. Costs of information exchange

In the Meat Products RPM Case**,** GVH stated that the data available through the 'leaflet monitor' service were based on public information, and access was granted to all market players, so the behavior of the market research company could not contribute in any unlawful manner to the underlying vertical agreement. The decision, however, did not clarify if the data shared through the 'leaflet monitor' database could be considered genuinely public information as defined by the Horizontal Guidelines[32] since the cost dimension of collecting public information and access to the database were not clearly elaborated.

As for the future, a large number of structured and unstructured data that are theoretically publicly available in the online space may add new elements to the assessment of costs involved in collecting and processing public data. Large sets of unstructured data are accumulated in the public domain but since these do not conform to any specific model, they are practically not available to the public without the advanced use of algorithms. The new methods of extracting information valuable to the market and the definition of the cost element of access to public information may also raise questions in investigations, which necessitate economic and IT support in the field of proof.

[31] In the *BankData case* GVH imposed a total fine of HUF 4.015 billion (approx. EUR 12,5 million).

[32] Horizontal Guidelines, paras. 92–94.

4. Age of the data

Although the Retail Hub-and-Spoke Case was terminated due to the lack of evidence, and the decision does not contain a detailed description of the relevant market and the investigated behavior, a closer examination of the information flow in the alleged hub-and-spoke structure raises, among others, the question of unilateral price disclosure and age of information in markets where the offline (traditional stores) and online (webshops) segments are interconnected and integrated. Retail of fast moving consumer goods may serve as an example for the markets where the real-time consumer prices of the products are available either in webshops or on price comparison websites or applications, and the dynamics of the market are defined by constantly repeated promotional campaigns and price discounts (that are often also disclosed and advertised in advance), which do not clearly fall in line with the average length of the contracts in the industry and the usual frequency of price negotiations.

The integration of online and offline market segments may ease the coordination because the manual collection of data can be avoided and algorithmic pricing strategies can be expanded to traditional 'brick-and-mortar' segments.

VII. Demand-side initiatives of GVH

1. Demand-side effects of digital economy

The digital era has transformed consumers' lives by introducing new ways of communication and generating new activities that are relevant from an economic and competition law point of view. On the one hand, consumers' traditional roles have been expanded, since they are present on the demand side not only by their purchasing decisions, but they create new content, share information, rank products and discuss their performed or planned consumer choices. On the other hand, there are industries where consumers pay with their personal data for'free'services, and consumers' data serve as the'fuel'of economic growth.

The demand side is undergoing rapid changes. There are many fundamental questions that are still open, among others, it is not quite clear whether algorithms support human decision-making, since the logic and the learning processes of the algorithms differ from the processes of human thinking and learning by necessity. As a result, some experts were led to draw the conclusion that explaining the individual decisions of algorithms in a way

that is *human* interpretable might present itself as a significant problem.[33] Competition authorities are also assisting consumers in not feeling lost if they meet unprecedented situations taking place in the digital marketplaces. The CMA also indicates some demand-side topics for further research, considering potential countermeasures as well: (i) to what extent customers can request secret offers from suppliers in order to undermine collusion; (ii) how consumers can create and use significant buyer power through joint purchasing; (iii) how consumers can mask their data to hide their information to avoid personalized prices (CMA, 2018).

By new types of competition issues, the digital economy raises competition enforcement challenges at different levels also in Hungary. Beyond performing investigations, GVH also plays an eminent role in the field of competition advocacy and policy making. GVH can draw a full picture of competition since it has competence in both supply-side and demand-side matters. GVH can act as an enforcement center, since it has tasks also in unfair commercial practices matters, provided that the nature and extent of an unfair commercial practice may substiantially affect the competition process by distorting consumers' choices.[34]

2. Digital Consumer Strategy

GVH has understood that impacts of digitalization spill over and reshape demand-side behaviour. In recent years, GVH's attention has been focused on unfair commercial practices related to the digital and database-related economy in order to understand what consumer harm may arise if no adequate competition interventions and policies are implemented to govern the new market phenomena.

GVH has realized that there are persons among consumers who can exercise a dominant influence in the digital environment (influencers), and information disclosure by influencers can take many forms (labelling with hashtags, product placements, sponsored posts, comments, etc.), mostly on

[33] Gershgorn, D. (2016) quotes Devi Parikh (Virginia Tech) who serves as a chair for the European Conference on Computer Vision.

[34] As regards unfair commercial practices, *Act XLVII of 2008 on the Prohibition of Unfair Commercial Practices Against Consumers* divides the competences between GVH, the consumer protection authority and the financial supervisory authority. The latter two act in cases where the concerned commercial practices are not supposed to substantially affect competition. Significant impact on competition process is presumed, among others, if the commercial practice is performed through a media service provider offering nationwide media service or through periodicals or below-the-line promotional activities available at least in three of the 19 counties of Hungary.

some platforms of social media. In 2017, GVH published a guidance document outlining the requirements on influencer activities sponsored by advertisers.[35] Interconnection between data protection law and competition law has also emerged in the Hungarian case-law, where provision of misleading information about the management of consumers' personal data was sanctioned.

GVH has adopted the approach that

> 'The dynamics of digital markets, the special features of the demand and supply side, and in particular the unique characteristics of the consumers' decisions, which differ from other markets, necessitate the application of new tools and the establishment of priorities for the future.'[36]

In 2018, GVH continued its proactive policy-making to ensure that the same standards apply to consumer decisions taken both in online/digitalized and offline/traditional markets, and therefore launched a Digital Consumer Strategy in which it summarized the experiences collected and set priorities to optimally allocate its resources.

Tools allowing consumers to compare prices are essential in consumers' orientation in the digital marketplace. It is an additional question if these tools should also offer masking features to hide consumer information and/or provide a benchmark for prices calculated on the basis of clean/anonymised consumer profiles.

Recently, in March of 2019, GVH launched a market analysis in order to understand the application of digital comparison tools (available websites and mobile-applications) and their effects on consumer decision-making process.[37] GVH emphasizes that on the one hand, these comparison tools can improve the information environment of consumer decision and, at the same time, increase transparency, but they can meet these goals if they can generate appropriate information as an input to consumer decisions. The market analysis was targeted on sectors where (i) consumers meet high search costs; (ii) comparison tools are widely used; (iii) a limited number of comparison tools is available and/or (iv) price comparison is accompanied by intensive

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[35] Hungarian Competition Authority (2017). *#GVH#Compliance#Influencer*. Retrieved from: http://www.gvh.hu/en/data/cms1037361/aktualis_hirek_gvh_megfeleles_velemenyvezer_2017_11_30_a.pdf (30.07.20190).

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[37] Hungarian Competition Authority (2019). Press Release: *The GVH will assess the operation of digital comparison tools in the framework of a market analysis*. Retrieved from: http://www.gvh.hu/en/press_room/press_releases/press_releases_2019/the_gvh_will_assess_the_operation_of_digital_compa.html (30.07.2019).

additional communication. On the basis of these aspects, retail, reservation of accomodation, travel services, financial and insurance services were identified as markets comprising the primary scope.

VIII. Conclusions

The aim of this article was to highlight the impact of the fourth industrial revolution on markets through introducing how digitalization and even traditional industries going online can affect information exchange. The assessment of information exchange as a potential – 'by object' or 'by effect' – restraint on competition is highly influenced by market characteristics. The main characteristics facilitating a collusive outcome are summarized in the table presenting market characteristics of the *BankData* case.

The availability of strategic information in abundance – provided by the Big Data environment – and the development of highly efficient processing methods enables a higher level and a different kind of information exchange superior to past conducts.

Although the very fast and exponential growth of digitalization has already influenced the information exchange practice of competition authorities – as it is presented above through the recent case-law of GVH – the real outbreak of digitalization and Artificial Intelligence still remains to be seen.

As it is presented by introducing the basic model of the Prisoner's Dilemma, collusion in traditional market settings is an unstable outcome. The higher the number of firms involved, the more difficult the environment to collude in traditional industries is. The use of algorithms could facilitate collusion by allowing coordination and monitoring of a larger number of firms. The increasing availability of online data jointly with algorithms is very likely to enhance both transparency in the market and the frequency of interactions, which make industries more prone to collusion. It is highly questionable, however, that the availability of online data itself would be the only key component of the new risks for competition. The increase of market transparency results at least to the same extent from modern data mining technologies and the ability of algorithms to make predictions and to reduce strategic uncertainty. The increase of market transparency is not only a result of more data being available: complex algorithms with powerful data mining capacity provide an excellent tool to distinguish between intentional deviations from collusion and natural reactions to changes in market conditions (Claici, 2018).

We should not forget that cooperative outcome provides a higher return to firms, so replacing competition with coordination might be a rational way

to maximize profits. And since it is rational for humans, it will be rational for algorithms. As Ada Lovelace expressed: 'The Analytical Engine has no pretensions whatever to originate any thing […] It can do whatever we know how to order it to perform.'[38]

The future can lead even further as Ezrachi and Stucke (2018) highlights, however, at the moment, competition law – and enforcers – should be ready to face the current challenges of digitalization, Big Data and algorithms.

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Addressing Anticompetitive Data Aggregation: a Comment to Bundeskartellamt Decision B6-22/16

by

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CONTENTS

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Abstract

Data aggregation, understood as the process of gathering and combining data in order to prepare datasets that might be useful for specific business or other purposes, is not *per se* forbidden. However, some forms of it can be considered anticompetitive. In the Decision B6-22/16 of the German Federal Cartel Office (Bundeskartellamt) data aggregation, which included the collection of data from sources outside of Facebook's social network (from Facebook-owned services such as WhatsApp and Instagram and from third party websites or mobile applications) and their combination with the information connected with a particular Facebook user account without that user's consent, constituted an abuse of Facebook's dominant position on the German market for social networks. The Bundeskartellamt found that the processing of user's personal data by Facebook has, to some extent, been carried out in a way which infringed GDPR provisions.

In the same decision, the Bundeskartellamt also identified the exclusionary nature of Facebook's anticompetitive behaviour. According to the Bundeskartellamt, the illegal data aggregation formed a barrier to entry for Facebook's competitors which, through compliance with data protection standards, found themselves in a worst position. Facebook, through its inappropriate data aggregation gained a competitive advantage.

The Bundeskartellamt's decision is, therefore, reflecting the anticompetitive dangers that data aggregation might pose. Nevertheless, it is debated whether the Bundeskartellamt, as a competition authority, is competent to determine the compliance or lack of compliance of business terms with the provisions of the GDPR. This paper analyzes the Bundeskartellamt's decision as to where an anticompetitive nature of data processing has been identified, and tries to answer the question why it is problematic that it was the Bundeskartellamt and not a data protection supervisory authority that has issued such a decision.

Résumé

L'agrégation de données, entendue comme le processus de collecte et de combinaison de données en vue de la préparation d'ensembles de données qui pourraient être utiles à des fins commerciales spécifiques ou pour d'autres fins, n'est pas en soi interdite. Toutefois, certaines formes peuvent être considérées comme anticoncurrentielles. Dans la décision B6-22/16, l'Office fédéral allemand des cartels (Bundeskartellamt) a examiné l'agrégation de données effectuée par Facebook, qui comprenait la collecte de données provenant de sources autres que le réseau social Facebook (de services appartenant à Facebook tels que WhatsApp et Instagram ou sites Web tiers ou applications mobiles) et leur combinaison aux informations liées aux comptes utilisateurs Facebook sans consentement de l'utilisateur. Premièrement, le Bundeskartellamt a considéré qu'un tel comportement constituait un abus de position dominante de Facebook sur le marché allemand des réseaux

sociaux. Le Bundeskartellamt a également constaté que le traitement des données à caractère personnel des utilisateurs par Facebook a, dans une certaine mesure, été effectué en violation des dispositions du GDPR. Dans la même décision, le Bundeskartellamt a aussi identifié le caractère exclusif du comportement anticoncurrentiel de Facebook. Selon le Bundeskartellamt, l'agrégation illégale de données a constitué une barrière à l'entrée pour les concurrents de Facebook qui, en respectant les normes de protection des données, se sont trouvés dans la pire position. Facebook, par son agrégation inappropriée de données, a acquis un avantage concurrentiel. La décision du Bundeskartellamt reflète donc les dangers anticoncurrentiels que l'agrégation de données pourrait poser. Néanmoins, la question de savoir si le Bundeskartellamt, en tant qu'autorité de concurrence, est compétent pour déterminer si les conditions commerciales sont conformes ou non aux dispositions du GDPR est une question qui fait débat. Le présent article analyse la décision du Bundeskartellamt lorsqu'une nature anticoncurrentielle du traitement des données a été identifiée et essaye de répondre à la question du fait que ce soit le Bundeskartellamt qui ait pris une telle décision et non une autorité de contrôle en charge la protection des données.

JEL: K21, L40

Key words: data aggregation; data-driven markets; platforms; networks; data; information asset; abuse of dominant position; abusive business terms; exclusionary abuse; exploitative abuse.

I. Introduction

Data aggregation, for the purpose of this paper, should be understood as the process of gathering and combining data in order to prepare datasets that might be useful for specific business or other purposes. Although data aggregation is not *per se* forbidden, some forms of it can be considered anticompetitive. In the Decision B6-22/16[1] of the German Federal Cartel Office (hereinafter: Bundeskartellamt or the Office) data aggregation, which included the collection of data from sources outside of Facebook's social network (from Facebook-owned services such as WhatsApp and Instagram and from third party websites or mobile applications) and their combination with information connected with a particular Facebook user account without

[1] Bundeskartellamt Decision B-6/22/16 dated from 6 February 2019, p. 67. Retrieved from: https://www.bundeskartellamt.de/SharedDocs/Entscheidung/DE/Entscheidungen/Missbrauchsaufsicht/2019/B6-22-16.pdf;jsessionid=FC6BF3FCDCB8F64ECB7D934E0CA65021.1_cid387?__blob=publicationFile&v=8 (2 (hereinafter: Decision).

that user's consent, constituted an abuse of Facebook's dominant position on the German market for social networks.

The decision pointed out the twofold nature of the abuse. Firstly, there exists exploitation of users who indeed accepted Facebook's terms and conditions (within which privacy and cookie's policy were embedded) that allowed Facebook to combine Facebook account data together with data gathered outside the social network service, but in the view of the data protection standards, their acceptance cannot be viewed as a valid consent, which would be an appropriate legal basis for such a wide scope of processing activities. This acceptance was conditional on the possibility to provide Facebook's social network service to users, whereas such a great scope of data processing activities was not necessary for the provision of the social network service, and should be regarded as forced. Looking at Facebook's dominant position in the national market of social network services, and the direct as well as indirect network effects that are natural for such a multi-sided advertising-funded market, and the resulting imbalance of powers between users and the social network provider, the Bundeskartellamt concluded that the terms of use of the service, which require the user to accept the processing of wider scope of data than is necessary from the General Data Protection Regulation's[2] (hereinafter: GDPR) perspective, constitutes abusive business terms.[3]

Secondly, the Bundeskartellamt identified the exclusionary nature of Facebook's anticompetitive behaviour. According to the Office, illegal data aggregation formed a barrier to entry for Facebook's competitors which, through compliance with data protection standards, found themselves in a worst position than Facebook, which gained a competitive advantage by inappropriate data aggregation from different sources.

The Bundeskartellamt's decision is reflecting the real and potential anticompetitive dangers that data aggregation might pose. Nevertheless, it is debated whether the Bundeskartellamt, as a competition authority, is competent to determine the compliance or lack of compliance of business terms with the provisions of the GDPR.

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[2] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ L 119, 4.5.2016, p. 1–88.

[3] In the Bundeskartellamt's view finding of exploitative abuse can be based on the fact that also a breach of a rule from outside competition law took place. See: Volmar and Helmdach, 2018, p. 198.

II. Bundeskartellamt decision B6-22/16 – summary

1. Assessment of Facebook's dominant position

According to the Bundeskartellamt, Facebook is the dominant company in the German market for social networks for private users (Bundeskartellamt, 2019, p. 3). Other social networks or services which were only partially substitutable to Facebook's social network (such as: Pintrest, LinkedIn, Twitter) were excluded from the relevant market definition, and the decision that Facebook is a dominant company on the relevant market is explained by the fact that Facebook's user-based market share among daily active users in Germany exceeded 95%.[4]

The market shares where not, however, the sole indicator of Facebook's market power. The introduction of §18 paragraph 3a to the GWB[5], required the Bundeskartellamt, in the case of multi-sided markets and networks such as Facebook, to also asses additional conditions such as: direct and indirect network effects, the parallel use of services from different providers and the switching costs for users, the undertaking's economies of scale arising in connection with network effects, the undertaking's access to data relevant for competition and finally innovation-driven competitive pressure, while analyzing the dominant position of entities present on the relevant market.[6]

1.1. Facebook as a network

§ 18 paragraph 3a GWB distinguishes multi-sided markets and networks from traditional markets and establishes several other conditions that should be taken into consideration while assessing the existence of a dominant position of the entity. The Facebook social network service fulfils the definition of a network presented in the Gesetzentwurf der Bundesregierung: Entwurf eines Neunten Gesetzes zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen[7] (An

[4] The Bundeskartellamnt considers the number of daily active users as the key indicator and relevant measure for assessing the network's competitive significance and market success, as a social network's success is measured by the intensity of use (Bundeskartellamt, 2019, p. 6).

[5] Act against Restraints of Competition in the version published on 26 June 2013 (Bundesgesetzblatt (Federal Law Gazette) I, 2013, p. 1750, 3245), as last amended by Article 1 of the law of 1 June 2017 (Federal Law Gazette I, p. 1416). Retrieved from http://www.gesetze-im-internet.de/englisch_gwb/englisch_gwb.html#p0057 (hereinafter: GWB).

[6] See: § 18 para. 3a GWB.

[7] Drucksache 18/10207 – Deutsher Bundestag – 18. Wahlperiode, Retrieved from: http://dipbt.bundestag.de/dip21/btd/18/102/1810207.pdf (last accessed: 15.06.2019), (hereinafter: Proposal).

Official Proposal of a Ninth Amendment to the Law against Restrictions on Competition; hereinafter: the Proposal) where it is stipulated that a product has network character when direct network effects exist between the users of the product.[8] Such direct network effects exist when the growth or decline in the number of users has an immediate positive or negative impact on the usefulness of the product or its performance for the individual user.[9]

The Bundeskartellamt identified that the more private users are active on Facebook's social network, the higher the benefit for these users, as the interaction possibilities between users, and their ability to find friends and acquaintances, increases with more users of the social network.[10] Therefore direct network effects could be seen in the fact that the attractiveness of a social network increases with an increasing number of other users, as it improves users' possibility to be able to communicate with exactly those persons they are looking for.[11] Facebook's dominant market position is not solely funded on the amount of its social network users, but particularly on the identity of these users, which should be known for a potential user.[12] These are so called 'identity-based' network effects.[13] It is, therefore, difficult to motivate users to switch to another social network as strong identity-based network effects exist, and Facebook is the only social network provider which proposes a sufficiently big, and useful[14] from the users' perspective, social network (Bundeskartellamt, 2019, p. 6 and 2019a, p. 4). Especially when the possibility to switch from Facebook to other social network providers is weakening as Facebook's competitors tend to exit the market (Bundeskartellamt, 2019, p. 6), and there is a visible lock-in effect that keeps users within the network. The direct network effects associated with the functioning of Facebook's social network fulfils the GBW's definition of the 'network'.

1.2. Facebook as a multi-sided market

In multi-sided markets at least two distinguishable customer groups come together.[15] An example of such a market can be a platform that acts as an

[8] Proposal, p. 48.
[9] Ibidem.
[10] Decision, p. 67.
[11] See: Decision, p. 67. See also: Bundeskartellamt (2019a), p. 4.
[12] Decision, p. 67.
[13] Ibidem.
[14] Useful, in this context, means, the user pool is relevant for the user, as he/she will be able to identify his/her friends among the users. According to the results of the survey carried by the Bundeskartellamt during the proceedings, about 85% of the users surveyed consider it as least important that their friends also use the network (See: Decision, p. 85, point 274)
[15] Proposal, p. 49.

intermediary and brings at least two customer groups together. Members of one customer group benefit from the presence on the platform of another customer group. The platform as an intermediary creates a value that these customers could not readily obtain without coordination provided by the platform (Evans and Schmalensee, 2007, p. 2). Multi-sided markets may exist in many forms. One of them is a shopping mall where the identified 'customer groups' are, on one side – stores and on the other – customers. Another multi-sided markets are ad-supported media where the customer groups consist of advertisers and consumers who listen to the radio, watch TV or read newspapers and buy products or services advertised through these media. More examples include operating systems market (developer of programmes and end customers of the operating system), game consoles market (developers of games and players), market of credit card systems (credit card accepting businesses and credit card owners), app stores (developers of apps and end-users)[16]. In order for a platform to fulfil the concept of a multi-sided market of § 18 paragraph 3a GWB, the intermediary role of the market should exist. In the case of Facebook's social network, which is financed through targeted advertising, Facebook acts as an intermediary between private users and advertisers.[17]

Other characteristics of multi-sided markets include, in particular, indirect network effects.[18] They arise from the fact that several, distinguishable demand groups use the network.[19] Indirect network effects exist when the benefit or gain of one customer group depends on the number of the other customer group within the platform.[20] From the perspective of Facebook's social network, the benefits of the fact that the network has a greater amount of users lies on the side of advertisers.[21] The greater the number of users, the more users see the advertisements and the sale opportunities for advertised products rise.[22] Although as a rule, each group benefits from the fact that the other group uses the platform, a user survey performed during the proceedings revealed that the vast majority of the surveyed users find targeted advertising negative or at least neutral.[23] Facebook's primary product – the social network – shares the characteristics of a multi-sided market and a network in accordance with

[16] The Proposal, pp. 48–49. For further examples and information about multi-sided markets please see: Evans and Schmalensee, 2007, pp. 6–11.

[17] Decision, p. 67

[18] Proposal, p. 49.

[19] Proposal, p. 50

[20] Decision, p. 68. See also: Bundeskartellamt, 2018, p. 9.

[21] Decision, p. 68

[22] Ibidem.

[23] Decision, p. 68, point 221.

§ 18 paragraph 3A GWB, the dominant position of Facebook on the social network market has been further analyzed taking into account:

1. direct and indirect network effects,
2. parallel use of services from different providers and switching cost for users,
3. economies of scale arising in connection with network effects,
4. access to data relevant for competition,
5. innovation-driven competitive pressure.

Since this paper's aim is to focus on the possible anticompetitive effects of data aggregation carried out by Facebook, further analysis will be limited to the criteria concerning access to relevant data and innovation-driven competitive pressure.

1.3. Facebook's access to relevant data

The purpose of introducing the criterion of 'undertakings' access to data relevant for competition' to the GWB assessment of market dominance indicates that the German legislator sees the possibility for a market position of a company to be significantly influenced by its access to data, especially when the company offers a data-driven product such as an advertising-financed social network.[24] Market power is, therefore, not necessarily associated with pricing but it can also be associated with (exclusive) access to data.[25] The express inclusion of the new feature in the catalogue of § 18 GWB has as its purpose the improvement of the analysis of market and competitive conditions and the examination of whether there is market dominance, especially when challenges arise of applying competition law in the digital age.[26] This criterion takes into account the fact that competitive advantages of companies with Internet-based business models can be based on special resources and capabilitie.[27] The market position might, therefore, depend on the type and extent of data and their importance for the business activity.[28]

Exclusive control over certain competitive data can be a barrier to entry for competitors, especially if there are indirect network effects on the market and there exist limited opportunities for competitors to build comparably large datasets.[29] However, the mere possession of a great amount of data does not mean the company will definitively achieve a dominant market position, as the

[24] See: Proposal, p. 51.
[25] Proposal, p. 48.
[26] Ibidem.
[27] Proposal, p. 48.
[28] Proposal, p. 51.
[29] Ibidem.

ability to aggregate data through their analysis and combination with other data is also relevant for the creation of possible competitive advantages.[30]

The Bundeskartellamt, in its decision, agreed that the extent of data processing can also be considered as a part of the quality of the service, because the economic use of customer and user data as well as data of third parties is – especially in digital markets – a competitively significant factor.[31] The advertisers who finance the network are also interested in as detailed datasets about their potential customers as possible. There, therefore, exist a strong incentive to widen the scope of data processed by the platform, as the market success of the service is related to a strongly-detailed user profile.[32] Access to competitive data is a significant aspect of examination of market power of social networks, because of the characteristics of this product, which is a data-driven advertising-funded product, whose affordability is linked to the aggregated personal data of users.[33] Even Facebook agreed that the accuracy and degree of personalization of a social network is dependent on the number and variety of received data – the broader the database, the more effective the service that can be provided.[34]

Facebook collects data from a number of different sources. Firstly, Facebook gathers data about its users while they are involved in customary and purposeful use of its social network.[35] At registration, the user normally provides Facebook with data about its e-mail address, name and surname and age.[36] Through the establishment of a Facebook profile page, the user can also share information about its gender, relationship status, place of residence, education, occupation, employer, interests and hobbies.[37] An active user also gives Facebook access to his posts and interactions with other Facebook users.[38] Through the existing mobile location function and other technical possibilities involving the geographical mapping of IP addresses, Facebook accesses information about users movements and paths he travels.[39] When a user logs-in he can be recognized by Facebook across devices and device-related information is also gathered.[40] Facebook accesses additional

[30] Proposal, p. 51.
[31] Decision, p. 120, point 380.
[32] Decision, p. 120, point 381.
[33] Decision, p. 154, point 482.
[34] See Decision, p. 158, point 493.
[35] Decision, p 154, point 483.
[36] Ibidem.
[37] Ibidem.
[38] Decision, p 154–155, point 484.
[39] Ibidem.
[40] Ibidem.

information about the identity of user's friends, who might not be a part of Facebook, from the address books that the user uploads to Facebook.[41]

Secondly, Facebook gathers information collected through its corporate services such as WhatsApp, Instagram, Oculus etc.

The third source of data is found in third-parties who use Facebook developer interfaces (API) on their websites or in their mobile applications. Such social plug-ins as 'Share' or 'Like' buttons and 'Facebook Login'[42] act as tracking cookies which monitor behaviour of users on these 'connected' websites or apps, even if the user is not registered or logged into Facebook.[43] Also Facebook's measurement and analysis tools used by third-party companies, in order to assess the success of their websites or mobile apps, serve as an important source of data.[44] A user who is visiting the website of a third-party is monitored and information about his IP address, browser type, URLs of visited websites, time of a visit, etc. is sent to Facebook thorough ID integrated in the cookie that enables the user behaviour to be combined with the user's Facebook profile information.[45] When a mobile application is used then the information about the user's Facebook app ID, and metadata about the operating system used (its name, version) and about the app installed, is sent to Facebook through an advertising ID of the operating system, thus the use of additional cookie is redundant.[46]

The fourth source of data are the advertisers[47] who, while ordering an advertising campaign to be launched on Facebook's social network, have a possibility to upload their own customers list which includes data already possessed by the advertisers on their existing customers.[48] Customer data might include their last name, profession, address, city, country, date of birth, age, gender, buying behaviour and various other information which is then matched with Facebook data. These data help Facebook to identify the target audiences for particular products.[49]

Access to such data allows constant adaptation of products through technical improvements.[50] The vast data sources secure the constant funding of the

[41] Ibidem.

[42] With the 'Facebook Login', the user can access the third party website with his Facebook identifying registration data, i.a. with his e-mail address/ phone number and his Facebook password. (Decision, p. 22, point 63).

[43] Decision, p. 155, point 486.

[44] Ibidem.

[45] Ibidem.

[46] Ibidem.

[47] Decision, p. 156, point 487.

[48] Ibidem.

[49] Ibidem.

[50] See Decision, p. 156, point 488.

network through advertising, as the data allow for refining of the algorithms that assign advertisements to the particular user.[51] The personalized content that is visible on Facebook user profile's News Feed can easily be adapted and modified in accordance with the information resulting from the array of data collected.[52] The aggregated data help to improve algorithms that calculate relevance of posts for a particular social network user.[53] Moreover, the diverse data sources allow for highly accurate advertising targeting, the increased data sources allow for a prompt and accurate identification of target groups according to specific personal criteria.[54] Data can be also further used for product development and innovation research.[55] The optimization of the News Feed algorithm and other Facebook products attracts new users and the improved targeting capabilities attract advertisers that in turn bring their own data sources and generate further data through the use of Facebook measurement tools.[56] This various sources of data which are combined with Facebook's social network user profiles allows Facebook to create highly-detailed user profiles that might be difficult or even impossible to duplicate by Facebook's competitors.[57]

Most competitors – with the exception of Goggle – do not have access to a comparable extent of detail-like level of personal data.[58] Facebook's base of 23 million daily active users allowed Facebook to accumulate huge amounts of data.[59] By taking into account that data usability and value is determined by their combination to certain patterns, the combination increases the value of data which is augmented if other data elements are available.[60] By means of algorithms, the on-line behaviour and interests of users can be predicted and with rising amount of user-related and other data available, the prediction can be made even more accurate.[61] The Bundeskartellamt concluded that larger amounts of available data retrieved from various sources imply the rise of a market advantage.[62]

Since Facebook has a large number of different data sources that help it to aggregate data which are of competitive relevance for the provision of

[51] Ibidem.
[52] Decision, p. 156, point 489.
[53] Ibidem.
[54] Decision, p. 157, point 492.
[55] Decision, p. 158, point 493.
[56] Decision, p. 159, points 496- 497.
[57] See Decision, p. 158–159, point 495 and p. 160, point 498.
[58] Decision, p. 154, point 482.
[59] Decision, p. 159, point 495.
[60] Ibidem.
[61] Ibidem.
[62] Ibidem.

a social network, an additional market barrier has been identified.[63] Although possibilities exist for competitors to install cookies and purchase third-party data, the characteristics of Facebook's accurate and highly-detailed data show that the competitors' sources are not comparable.[64] Competitors cannot duplicate the data collection accessible to Facebook, especially when they are smaller competitors who only have limited financial or business options to aggregate data from various relevant sources.[65] Media agencies reaffirmed that Facebook has advertising-relevant data that is not provided by any other online advertising provider, that Facebook has more detailed data than other providers, and that Facebook has more data than other publishers.[66] Thus, the investigation showed that Facebook has a unique database.[67] Even if the data collection of Google Group is comparable to the data aggregated by Facebook in the view of its amount and detail, Google's database did not achieve market success in the social networks for private users market, which only shows the strong direct network effects that are associated with Facebook's social network service.[68] Facebook has therefore advantageous or even exclusive access to data sources which are of competitive relevance.

1.4. Facebook's encounter with innovation-driven competitive pressure

According to § 18 paragraph 3a point 5 GWB, in assessing the market position of an undertaking, account shall also be taken to innovation-driven competitive pressure. This criterion has been introduced as reflecting the dynamic nature of digital markets, where one innovative product can be easily replaced by another innovative product, the so called 'theory of destructive creation'.[69] The competitive pressure, due to the innovative power of Internet-based services, includes the possibilities of disruptive changes that can lead

[63] See Decision, p. 154, point 482.

[64] Decision, p. 160, point 498. The investigation showed that Facebook's competitors, except Google, did not collect data from their corporate services, nor have they installed social plugins such as Like or Share or Log-in button (Decision, p. 160, point 498).

[65] Decision, p. 160, point 498.

[66] Decision, p. 160, point 499.

[67] Ibidem.

[68] Decision, p. 160–161, point 499.

[69] Online platforms often engage in constant incremental innovation as they seek to obtain advantages over rivals to attract participants on multiple sides and are subject to episodic, but increasingly frequent, disruptive innovation in which new, or seemingly different, firms attract their customers away. This dynamic competition is particularly important for 'attention' platforms for which competition is designed to attract the attention of users, which is then resold to marketers, including advertisers, who want to persuade those users to buy things. An attention seeker is under constant threat that someone will come up with an entirely clever new way to grab people's attention (Evans, 2016, p. 3–4).

to the vulnerability of a strong market position of a company in the short term.[70] Each case should be therefore carefully examined as to whether there isn't a merelyabstract, too vague vulnerability of the market position. The possibility of eventual disappearance of a market-dominant position would lead to a denial of market dominance and the allegation of abuse of that position would *per se* be removed from scrutiny.[71]

Taking into account the disruptive nature of innovative markets, the Bundeskartellamt had also to assess the future market power of Facebook, taking into account the possible innovations that might pose a danger to its dominant position. The Office came to the conclusion that even an innovative power of the Internet will not have any negative impact on the market power of Facebook.[72] The high market shares of Facebook and direct and indirect network effects indicate that Facebook's dominant market position is secured.[73] None of the competitors had successfully build pressure on the market position of Facebook through innovation.[74] Moreover, it has been identified that Facebook-owned innovations show that there is no competitive pressure on the market position on Facebook as Facebook successfully transformed from a 'web company' to a 'mobile first company' through the introduction of new technological possibilities to users and advertisers.[75] Furthermore, the Bundeskartellamt investigation showed that the only existing innovation-driven competitive pressure to Facebook is centred on sub-functions of social networks (such as *Instagram*, *Facebook Messenger*, *WhatsApp*, *Poke*, *Paper*, *Moments* or *Facebook Camera)* as standalone apps and not to the Facebook social network as a whole.[76] This substitutional competition remains, however, marginal and the market position of Facebook is not endangered.[77] All the above shows little vulnerability of Facebook's future market position on the social network market for private users to innovative-driven competitive pressure.[78]

[70] Proposal, p. 51.
[71] Ibidem.
[72] Decision p. 161, point 501.
[73] See Decision, p. 161, points 502–503.
[74] Decision, p. 161, point 504.
[75] Decision, p. 163, point 506; For the list of innovative Facebook own products and their description please see: Decision, p. 163–164, points: 507–511.
[76] Decision, p. 165, point 514.
[77] Ibidem.
[78] Ibidem.

2. Exploitative abuse of market power

The Bundeskartellamt, after taking into account all of the § 18 paragraph 3a GWB conditions, concluded that Facebook is a dominant company on the national market for social networks for private users. The Office has also identified that Facebook has abused its dominant position in an exploitative and exclusionary way.[79]

The exploitative abuse presented itself through Facebook's infringement of the GDPR. The Bundeskartellamt concluded that the market power of Facebook enables data processing even against the will of the users, and thus to a much greater extent than users might have expected.[80] At the moment of setting up a Facebook user account, one has to accept Facebook's terms of service. These terms include references to the data and cookie policies where it is stipulated that Facebook also collects data on users and their devices from its corporate services, as well as, outside of Facebook-related activities via Facebook analytical and measurement tools implemented in third party mobile applications or websites. Without the acceptance of these terms and conditions, the Facebook social network service would not be provided.

2.1. Unlawfulness of Facebook's data aggregation

Each personal data processing activity that concerns users residing in the European Economic Area has to satisfy one of the legal bases indicated by the GDPR. Articles 6 and 9 of the GDPR provide a list of the legal grounds that might be invoked by any entity which is carrying out the processing activity for this activity to be legal. For the processing of personal data, which are not a 'special category' data, one of the following grounds has to be established:

- the data subject consents to the processing of his or her personal data for one or more specific purposes; (Art. 6. 1a)
- the necessity of processing to perform a contract to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract; (Art. 6. 1b)
- the necessity of processing for compliance with a legal obligation to which the controller is subject; (Art. 6. 1c)
- the necessity of processing to protect the vital interests of the data subject or of another natural person; (Art. 6. 1d)

[79] 'Abuses can be exploitative, earning an unjustifiably high profit at the expense of customers, or exclusionary, aimed at excluding competitors from the market by other means than competitive efficiency (e.g. by refusing to supply competitors with necessary input on upstream markets or by unjustifiably lowering prices)' (Zanfir-Fortuna, and Ianc, 2018, p. 5).

[80] See Decision p. 120, point 385.

- the necessity of processing for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller; (Art. 6. 1e)
- the necessity of processing for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child. (Art. 6. 1f)

With regard to the personal data processing activity carried out by Facebook, the legal grounds identified by Facebook were the necessity to perform a contract (Art. 6.1.b GDPR) and the necessity to fulfil legitimate interests pursued by Facebook (6.1.f GDPR) (Bundeskartellamt, 2019, p. 3). These grounds where, however, identified as insufficient, from the Office's perspective. The Bundeskartellamt indicated that the fulfilment of the contract did not necessitate the processing of such a vast array of personal data that has been determined in Facebook's terms and conditions (Bundeskartellamt, 2019, p. 10).

Nor did the second proposed ground pass the scrutiny of the Bundeskartellamt. The Office did not recognize any particular interest of Facebook, third parties and users that could outweigh the interests or fundamental rights and freedoms of the data subject. The Office concluded that the only valid ground for such a far-reaching data processing is a voluntary consent, which has not been given by users to Facebook. The mere fact of accepting terms and conditions in order to conclude the contract with Facebook and set up a Facebook account, cannot be regarded as an act of providing the valid consent for personal data processing, which was described under the cookie and privacy policy in Facebook's terms and conditions.[81]

Moreover, the Office acknowledged that consent cannot be regarded as valid when it is the prerequisite for using the social network service (Bundeskartellamt, 2019, p.10).[82] Article 4(11) GDPR stipulates that consent of the data subject means 'any freely given, specific, informed and unambiguous indication of the data subject's wishes by which he or she, by a statement or by a clear affirmative action, signifies agreement to the processing of

[81] 'Compulsion to agree with the use of personal data additional to what is strictly necessary limits data subject's choices and stands in the way of free consent. As data protection law is aiming at the protection of fundamental rights, an individual's control over their personal data is essential and there is a strong presumption that consent to the processing of personal data that is unnecessary, cannot be seen as a mandatory consideration in exchange for the performance of a contract or the provision of a service' (Article 29 Working Party Guidelines on consent under Regulation 2016/679, 2018, p. 8).

[82] Summary, p. 11.

personal data relating to him or her'. Article 4(11) GDPR is substantiated with recitals 42 and 43 of the GDPR which provide that '[c]onsent should not be regarded as freely given if the data subject has no genuine or free choice or is unable to refuse or withdraw consent without detriment'[83] and that 'if the performance of a contract, including the provision of a service, is dependent on the consent despite such consent not being necessary for such performance'.[84] Thus, the consent for particular processing cannot be regarded as freely given when it is bundled with the acceptance of terms or conditions, nor when the performance of the contract or service is tied with the request for consent to process personal data, which are not necessary for the performance of that contract or service. The mere acceptance of Facebook's terms and conditions by users does not fulfil the requirement of a freely given consent for the data processing indicated under Facebook's terms and conditions, which are not necessary to perform a contract and provide a social networking service. The Bundeskartellamt indicated that 'a personalized network could also be based to a large extent on user data processed in the context of operating the social network'[85], thus 'processing data from third-party sources to the extent determined by Facebook in its terms and conditions is neither required for offering the social network as such nor for monetizing the network through personalized advertising'.[86] It can be concluded that Facebook has processed data without a legal basis, which means that data aggregated that were not necessary to provide a social network service have been processed unlawfully.

2.2. Imbalance of power between Facebook and its users

Taking into consideration the unlawful nature of data aggregation and the imbalance of the bargaining position between Facebook and the users of its dominant social network, the Bundeskartellamt found that the terms and conditions imposed by Facebook could be identified as constituting an exploitative abuse.[87] The Office invoked the relevant Federal Court's of Justice jurisprudence, which shows the conditions under which § 19 GWB can be applied. According to the Bundeskartellamt's interpretation of the *VBL-Gegenwert I*[88] and *Pechstein*[89] rulings, the mere fact that the dominant

[83] Recital 42 GDPR.
[84] Recital 43 GDPR.
[85] Summary, p. 10.
[86] Ibidem.
[87] Decision, p. 169, point 523.
[88] Federal Court of Justice, judgment of 6 November 2013, file KZR 58/11, *VBL Gegenwert I.*
[89] Federal Court of Justice, judgment of 7 June 2016, file KZR 6/15, *Pechstein v International Skating Union.*

company infringes provisions of law which binds it, also when this law applies to its data processing activities, demonstrates that an abuse of dominance took place. There is therefore no need to carry out a balance of interest test in the case where a norm's addressee violates the rules of the legal system.[90] Nevertheless, the Bundeskartellamt carried this test out as a 'precautionary measure'[91] where it has taken similar factors into consideration as those analyzed under the GDPR-compliance test.

As already presented, Facebook apart from its social network and user-oriented services and products (such as: *Instagram*, *WhatsApp*, *Masquerade*, *Oculus*) offers a range of different services and tools for website operators, developers, advertisers and other businesses. These tools, called 'Facebook Business Tools', allow to integrate social plug-ins such as: 'Like' and 'Share' buttons, Facebook login and other analytics services into websites and products offered by those third parties. Where visible interfaces such as 'Like' or 'Share' buttons are embedded on websites and mobile applications, then the data about a user's behaviour that entered the website or installed an app, will be sent directly to Facebook.[92] This transfer of data will start even if the user will not scroll over the website or click on the Facebook button.[93] Moreover, invisible analytics tools which are embedded on the website for user analyses, carried out by the website operator, also transfer user data to Facebook every time a user enters the website.[94] Furthermore, accordingly to Facebook terms and conditions, these data can be combined with data from a user Facebook account and used by Facebook even if the user blocked web tracking in its browser or device settings.[95] The integration of Facebook Business Tools allows Facebook to also track user behaviour on these websites even if they are not logged into or registered with Facebook.[96] The analytics tools available to third party businesses represent an important data source for Facebook as they provide substantial information on the devices used and on the interactions of users with the website to Facebook. Facebook then through ID integrated in a form of a cookie, substantiated with information stored on the device, assigns these data to the user account on Facebook.[97]

Taking into consideration all of the above, the Bundeskartellamt found that the terms and conditions imposed by Facebook could be identified as

[90] Decision, p. 281, point 893.
[91] Decision, p. 281, point 894.
[92] Press release, p. 3.
[93] Ibidem.
[94] Ibidem.
[95] FAQ p. 1.
[96] FAQ p. 3.
[97] FAQ p. 3.

constituting an exploitative abuse,[98] because when one contractual party is so powerful that it is practically able to dictate the terms of the contract and the contractual autonomy of the other party is eliminated, the general clauses under civil law, which include also § 19 GBW, should be applied in order to balance the conflicting positions of the contractual parties.[99] Since data protection law can be considered a special law the aim of which is to reconcile interests between consumers ('data subjects') and entities which process their data for commercial purposes,[100] the provisions of data protection law under the GDPR must be analyzed when assessing the appropriateness of data processing conditions of a dominant undertaking under competition law.[101]

The Bundeskartellamnt identified that data processing conditions embedded into terms of use of the social network, are to be considered a type of business terms under § 19 paragraph 1 and paragraph 2 no. 2 GWB.[102] The Office concluded that Facebook's social network's terms of use for an individual user, concretized by the data and cookie policies and other related documents, constitute an abuse of Facebook's dominant market position in the market for social networks for private users, since they violate the requirements of the GDPR.[103] Facebook abused its dominant position by obtaining user- and device-related data from different sources (such as Facebook corporate services: WhatsApp, Oculus, Masquerade and Instagram; and Facebook Business Tools) and combining them with the data of Facebook's social network user accounts, without users' consent.[104]

This practice led Facebook to have 'quasi' unlimited access to personal data of its users.[105] Moreover, the Office carried the balance of interest test, which follows the requirements set up under the *Perstein* case and involved the weighing of affected fundamental rights[106] of users and their right to informational self-determination, which led to the same conclusions as the GDPR compliance test.

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[98] Decision, p. 169, point 523.

[99] Decision, p. 169–170, point 527.

[100] Decision, p. 171, point 530.

[101] Decision, p. 169, point 526;

[102] D19 para. 1 together with para. 2 no. 2 GWB stipulates that an abuse of a dominant position of a dominant undertaking who as a supplier or purchaser of a certain type of goods or commercial services demands payment or other business terms which differ from those which would very likely arise if effective competition existed, is prohibited. See also: Decision, p. 168, point 524.

[103] Decision, p. 169, point 523.

[104] Decision, p. 168, point 522.

[105] Decision, p. 283–284, point 902.

[106] Decision, p. 282, point. 895.

At the end, an isolated from German jurisprudence, competition law balance of interest has been proposed. Under this test, the Office tried to balance the reasonable expectations of users, understood as their interest in understanding the scope and meaning of terms, scale, aim and sources of the processing activities linked with the provision of the service,[107] together with Facebook's interest in using data for the improvement of its products and personalized advertising.[108] The Bundeskartellamnt recognized that the processing of data is necessary in the data-driven business model that Facebook represents, but it does not mean that the scope of the data processing can be unilaterally determined by the dominant entity.[109] The scope of processing is, therefore, subject to antitrust review[110] and it was found to be abusive since users did not have a possibility to make independent decisions as to the contract conditions[111], nor did they have a possibility to prevent Facebook from collecting and processing unlimited data from the aforementioned variety of sources.[112]

The only possibility to limit the scope of data processing activities carried out by Facebook was for a user to switch to another social network, cease to use Facebook-related services or to practically stop using the Internet at all.[113] Moreover, the Bundeskartellamt found that in case of Facebook social plug-ins (Like, Share buttons), Facebook Log-in function, measurement and analytics tools installed in third party websites, for a user to limit Facebook's access to data, he would have to practically stop using the Internet, as it would not be possible for him to discern websites which have this tools embedded from those which do not, as they can also be invisible.[114] Since, Facebook enjoys a dominant position on the relevant market for social networks, it is not feasible to limit the 'unlimited' Facebook data gathering through switching to another social network.[115] If users will not leave Facebook's social network, then the only possibility, meaning the global limitation of their Internet activity together with the refusal to use widely-used Facebook-related services (such as WhatsApp or Instagram), will constitute a significant and disproportionate restriction to users' willingness to generally use the Internet.[116]

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[107] Decision, p. 283, point 899.
[108] Decision, p. 282–283, points 897, 899.
[109] Decision, p. 282, point 897.
[110] Ibidem.
[111] Decision, p. 283, point 899.
[112] Decision, p. 283–284, point. 902.
[113] Decision, p. 284, points 902–903, 905.
[114] Decision, p. 284–284, point 905.
[115] Decision, p. 284, point. 902.
[116] Decision, p. 284, point 903.

The user, therefore, seems to have no possibility to limit Facebook's data aggregation that is made outside of the social network. He is, thus, forced to allow Facebook to assign his data gathered outside the social network to his Facebook user account even when he uses third-party websites or services. This constitutes an appropriate forcing of access to data from outside of Facebook services by Facebook. As a result of these findings, the decision prohibited Facebook from making the private use of Facebook social network conditional on Facebook being able to combine information saved on Facebook users' account with information collected on third-party websites or mobile apps without user consent.[117]

3. Exclusionary abuse of market power

According to the Bundeskartellamt, illegal data aggregation also formed a barrier to entry for Facebook's potential competitors in the social networking market.[118] The aggregation (*inter alia* the collection, combination and analysis) of data is considered, in this decision, to be an essential basis for the emergence and success of a social network business model.[119] This was envisaged by the German legislator through the introduction of the data access criterion under § 18 paragraph 3a no. 4 GWB.[120] As has been already mentioned, access to data helps to establish very detailed knowledge about the user. This knowledge enables, in turn, successful targeted advertising which is demanded by the advertisers who fund the social network.[121]

The Bundeskartellamt found that Facebook gained a competitive advantage over its competitors by the aforementioned inappropriate data aggregation from different sources and their combination with Facebook accounts.[122] The unlawfully collected and combined data allowed Facebook to optimize its services as well as to attract more users and advertisers to its products.[123] Such data was, however, not available for these competitors who have lawfully handled the processing of personal data in the past and nowadays find themselves at a competitive disadvantage compared to Facebook.[124]

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117 Decision, p. 2.
118 Decision, p. 279, point 888.
119 Ibidem.
120 Ibidem.
121 Ibidem.
122 Decision, p. 280, point 888.
123 Decision, p. 279, points 886–887.
124 Decision, p. 280, point 888.

The already existing advantage of Facebook, due to its access to a great amount of competitively-relevant data, was further expanded by inappropriate and thus illegal combination of data retrieved from other sources with Facebook accounts.[125] This phenomenon increased the existing market entry barrier which is strengthened through the direct network effects.[126] In this context, Facebook's abusive terms and conditions were of market power relevance.[127] Facebook's anticompetitive access to data has therefore secured its market power towards end customers and competitors in the advertising market as well as raised barriers to entry for potential competitors on the social network market.

4. Prohibition

All of the above led the Bundeskartellamt to issue Decision no. B6-22/16, which prohibited Facebook, as a dominant company on the national market of social networks for private users, from making use of Facebook social network by private users residing in Germany, conditional on Facebook being able to combine information saved on Facebook users' account with user and device-related data collected through its corporate services as well as through Facebook Business Tools without user consent.[128] The Bundeskartellamt has also prohibited the data processing policy expressly stated in Facebook's terms of service and detailed in the data and cookie policies, which Facebook imposes on its users and ordered the termination of this conduct.[129]

III. Bundeskartellamt decision B6-22/16 – analysis

The above presented Buneskartellamt decision has been broadly commented on. Some pointed out the problematic issues pertaining to the definition of the relevant market[130] (Małobędzka-Szwast, 2018, p. 145–146 and Cunnane, 2019), some criticized the flexible approach to market

[125] Decision, p. 279–280, point 888.
[126] Ibidem.
[127] Decision, p. 280, point 888.
[128] Decision, p. 288, point 916.
[129] Ibidem.
[130] The problematic issues included: the disregard of the Bundeskartellamt of the second side of this multi-sided market, meaning the advertising side and focusing only on the user-side; the limitation of the geographical market only to the German market instead of global one. (Małobędzka-Szwast, 2018).

definition based on functional similarities and differences (Lamadrid, Ibanez Colomo, 2019), others appraised the functional interchangeability-test carried out by this Office (Newman, 2019). Yet some found that the abusiveness test carried out by the Bundeskartellamt is valid (Volmar and Helmdach, 2018) while others would probably find this test to be unnecessarily intruding into the competences of data protection authorities and blurring the delineation between data protection rules and competition rules (Lamadrid, 2014).

As described above, the Bundeskartellamt identified two anticompetitive practices of Facebook. First, the exploitative one, where users were forced to accept Facebook's abusive terms and conditions. Second, the exclusionary one, where the abusive business terms impeded Facebook's competitors from entering or strengthening their position on social networks and advertising markets. While the first practice raised a lot of concerns, the second, while still requiring attention, seems to be less controversial.

1. Data aggregation as a barrier to market entry

The Bundeskartellamt recognized in its decision that Facebook's vast access to competitively relevant-data, together with the direct and indirect network effects, constitutes a barrier to entry for newcomers to the social network market. This finding follows from the acceptance of the fact that data are of a competitive significance and that having exclusive access to a certain type or scope of illegally acquired data can constitute a breach of competition law. Moreover, if data is considered an important input of production for the services provided on the online platform, and a specific and competitively-relevant data, necessary for new entrants to compete with the dominant incumbent, is not accessible, the databases held by an incumbent may constitute an entry barrier (Graef, 2015, pp. 488–489).

It is worth noting that access to data can be limited in a variety of ways. Databases and their content are protected by the law. While the structure of a database enjoys copyright protection, its content, for which obtaining, verification or presentation a substantial investment has been made on the side of the database producer, is protected *sui generis* (Graef, 2015, pp. 480–482). The content of the database that has been created through user activity and collected by a business entity, such as information on suppliers and customers (users), can be protected as trade secrets (Graef, 2015, p. 482).

The Office, after finding that Facebook's vast access to competitively relevant-data, together with the direct and indirect network effects, constitutes a barrier to entry for newcomers to the social network market who have a limited access to these data, did not impose a duty on Facebook

to share that data with its competitors. This could have been possible if the Bundeskartellamt had imposed a duty to deal through, for example, forced licensing agreements of databases. It seems that the Bundeskartellamt did not want to further scrutinize the possibility of market foreclosure, but focused only on the limited extent of illegal data processing.

However, also a refusal to supply user data to competitors, when the data controller is a dominant entity on the market, could constitute another form of anticompetitive behaviour. When certain data are to be considered an 'essential facility', the competition authority might impose upon a dominant player the duty to share data[131] (Gurkaynak, Guner and Yasar, 2015, p. 163). For a dataset to be an essential facility, there has to be 'no actual or potential substitute on which competitors in the downstream market could rely so as to counter — at least in the long-term — the negative consequences of the refusal'.[132] In order to identify data as essential there has to be no possibility to duplicate them in the foreseeable future. The possibility of duplication means that 'the creation of an alternative source of efficient supply that is capable of allowing competitors to exert a competitive constraint on the dominant undertaking in the downstream market' is possible.[133]

Indeed, the Bundeskartellamt identified at one point that the data to which Facebook has access are essential, as competitors cannot duplicate them, especially when they are smaller and have only limited financial or business possibilities to aggregate data from various relevant sources, but refused to impose any sanctions or orders on this ground.[134] The characteristics of Facebook accurate and highly-detailed data show that the competitors' sources are not comparable[135] and that Facebook has a unique database of advertising-relevant data.[136] Even the Google's database, which is comparable to the data aggregated by Facebook, in the view of its amount and detail, did not achieve market success on the market for social networks for private users, because

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[131] As an example of competition authority's decision where the sharing of dataset was imposed upon the incumbent please see: Autorite de la concurrence. Décision n° 14-MC-02 du 9 septembre 2014 relative à une demande de mesures conservatoires présentée par la société Direct Energie dans les secteurs du gaz et de l'électricité (2014).

[132] Communication from the Commission – Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, OJ C 45, 24.2.2009, p. 7–20, para. 83 (hereinafter: Guidance on Abusive Exclusionary Conduct).

[133] Ibidem.

[134] Decision, p. 160, point 498.

[135] Decision, p. 160, point 498. The investigation showed that Facebook's competitors, except Google, did not collect data from their corporate services, nor have they installed social plugins such as Like or Share or Log-in button (Decision, p. 160, point 498).

[136] Decision, p. 160, point 499.

of strong direct network effects that are associated with Facebook's social network service.[137]

All of the above indicates that Facebook's data might be regarded as an essential facility for its competitors on several markets.[138] However, the Bundeskartellamt refused to analyze further the matter and did not issue an order for Facebook to share its data with competitors. The Office's limited analysis is probably based on the fact that the scope of the proceedings did not cover Facebook's refusal to share data. Moreover, Facebook's aggregated data might not have fulfilled all the requirements in order to be covered by the essential facility doctrine,[139] or the sharing of personal data could not be envisaged by the Office as it would violate data protection provisions, which allow for personal data transfer only under certain circumstances.[140]

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[137] Decision, p. 160–161, point 499.

[138] As the Autorité de la concurrence and the Bundeskartellamt have indicated in their joint report from 2016 'conducts depriving some competitors from access to data could also weaken competition and even lead to exclusion of competitors in different situations', one of this situations could occur when data is an essential facility for an undertaking asking for access to carry its economic activity (Autorité de la concurrence and Bundeskartellamt, 2016, p. 17.).

[139] The requirements for a database as an intellectual property right or a form of know-how to be shared have been enumerated in the CJ judgment of 29 April 2004 in Case C-418/01 *IMS Health*, ECLI:EU:C:2004:257, paras. 28, 52). For a database to be considered an essential facility, to which the access should be provided, it must be determined that: there are no products or services which constitute alternative solutions, even if they are less advantageous; technical, legal or economic obstacles exist capable of making it impossible or at least unreasonably difficult for any undertaking seeking to operate in the market to create alternative products or services; the undertaking which requested access intends to offer new products or services not offered by the owner of the essential facility and for which there is a potential consumer demand; the refusal is not justified by objective considerations; the refusal is such as to eliminate all competition on that market.

[140] An example of domestic case-law where blocking of forced personal data sharing from the dominant entity to its competitors on a downstream-market on a basis of the data protection provisions incorporated in the Finnish Act on the Protection of Privacy in Electronic Communications (OJ 516/2004) took place, is the Judgment of the Finnish Market Court of 6 April 2009 in combined cases Dnro 281/05/KR and Dnro 293/05/KR. The Market Court found Suomen Numeropalvelu Oy – Finlands Nummertjänst Ab (SNOY) guilty of abuse of dominance by refusing to submit telephone subscriber information for the electronic telephone catalogue provided by Eniro Oy, but due to the amendments to the Finnish Act on the Protection of Privacy in Electronic Communications, which required the entities carrying data processing activities to inform the telephone number holders about the purpose of their personal data processing as well as to inform them about the right to object the publication of their data in electronic telephone catalogue, SNOY was no longer obliged to unconditionally share data with its competitor (see judgment of the Finnish Market Court of 6 April.2009 in combined cases Dnro 281/05/KR and Dnro 293/05/KR, para. 282).

2. GDPR violation as an antitrust violation

2.1. German perspective

The most debated issue concerning the decision pertains to the fact that the Bundeskartellamt interprets the rulings of the German Federal Court of Justice in *VBL-Gegenwert* I and *Pechstein* cases as implying that a violation of any consumer protection law, data protection law inclusive, by a dominant entity is able to constitute a harm under competition law (Manne, 2019) and that data protection law is a sort of consumer protection law (Volmar and Helmdach, 2018, p. 198). What has been criticized is that the Bundeskartellamt made a referral to the above-mentioned jurisprudence, which in fact involves very different factual backgrounds (Heinz, 2018). While *Pechstein* is about 'agreement imposed by monopolist International Skating Union on athletes for competing in the world championships, so essentially concerning the basic right to carry out their profession' (Heinz, 2018), and *VBL-Gegenwert* I is about 'the provision of retirement benefits and a condition inappropriately impeding customers from exiting a long-term agreement with the dominant supplier' (Heinz, 2018), S. Heinz finds that the Facebook case is about 'access to social network for leisure purposes' (Heinz, 2018), which needed to be taken into account when balancing the interests but it was not. However, both judgments refer back to the possibility of the competition authority to assess the abusiveness of terms of contract on the basis of the verification whether such conditions do not infringe the legal provisions from other branches of law, and are balanced in the view to fundamental rights, which is what the Bundeskartellamt had the right to verify.

The Bundeskartellamt, by taking the view that an application of Article 19 GBW is possible whenever the party is in an unbalanced negotiating position against contract terms which violate constitutional rights (*Pechstein*) or civil provisions (*VBL-Gegenwert I*), and by applying this understanding also to the violation of data protection law, quite importantly broadened its competences in the assessment of the abusiveness of these terms. The proportionality test carried by the Bundeskartellamt shows its reliance on fundamental rights, but this seems to be only possible due to the interpretation presented in the German jurisprudence. If such a balancing exercise would have to be carried out in accordance with EU jurisprudence, then the interests of the parties could have been determined differently.

The balancing of interests might have to be carried out on the user interest to use the social network free of charge and Facebook's objective to provide such a network free of charge. The development and maintenance of this social network service requires significant innovation and substantial

investment from Facebook's side, and in return it obliges users to provide it with a broad scope of user data (Linklaters, 2019). Recent studies have shown that users are not willing to pay for services which offer them greater privacy (this phenomenon is called a 'privacy paradox')[141]. Thus, it seems they might not feel that Facebook's vast data collecting practices are improper. What they seem to worry about is their ability to access the social network for free. The Bundeskartellamt did not, however, assess the possibility that indeed users are willing to agree to Facebook's terms and conditions as they would find the aggregation of their data by Facebook as a fair, hence proportionate, price for a free service (Linklaters, 2019). The Bundeskartellamt, by sticking to German jurisprudence, has found itself competent to assess if Facebook's terms and conditions violate the GDPR, and whether this violation is able to constitute a 'harm' under competition law. The Bundeskartellamt clearly identified that a violation of the GDPR provisions constitutes a harm under competition law.

2.2. Commission and CJEU perspective

However, the position of the Commission and the CJEU on the possibility of intertwining data protection principles and competition rules differs from the one proposed by the Bundeskartellamt. CJEU position presented in the *Asnef-Equifax*[142] judgment, together with Commission's views presented in merger cases (*TomTom*/*TeleAtlas*,[143] *Google*/*Doubleclik*,[144] *Facebook*/*WhatsApp*,[145] *LinkedIn*/*Microsoft*,[146] *Google*/*Sanofi*/*DMI JV*[147]), showed that neither the CJEU nor the Commission is willing to include data protection parameters in its analysis even if it has been observed in *LinkedIn*/*Microsoft* merger case that data may have a potential economic relevance for entities' market position.[148] Some scholars, have however argued that since there has been 'not a single abuse of dominance case that *expressis verbis* disregards the relevance of data

[141] '[U]sers claim to be very concerned about their privacy but do very little to protect their personal data (…). Although users are aware of privacy risks on the internet, they tend to share private information in exchange for retail value and personalized services'. This holds true also for the users of social networks. (See: Barth, Jong (2017), p. 2).

[142] CJ judgement of 23 November 2006, Case C-238/05 *Asnef-Equifax et al v. Asociaci ón de Usuarios de Servicios Bancarios*, ECLI:EU:C:2006:734, para. 63 (' any possible issues relating to the sensitivity of personal data are not, as such, a matter for competition law, they may be resolved on the basis of the relevant provisions governing data protection').

[143] European Commission, Case No. COMP/M.4854 – *TomTom*/*Tele Atlas*.

[144] European Commission, Case No. COMP/M.4731 – *Google*/*DoubleClick*.

[145] European Commission, Case No .COMP/M.7217 – *Facebook*/*Whatsapp*.

[146] European Commission, Case M.8124 – *Microsoft*/*LinkedIn*.

[147] European Commission, Case M.7813 – *Sanofi*/ *Google* / *DMI JV.*

[148] European Commission, Case M.8124 – *Microsoft*/*LinkedIn*, para. 179.

protection laws' there is no rule that compels the competition authorities to apply this 'separation dogma' to abuse of dominance cases (Volmar, Helmdach, 2018, p. 209).

For example, it is possible to derive from the *Astra Zeneca*[149] case that the abuse of a dominant position could arise if the incumbent provided misleading information with the lack of transparency (Schneider, 2018, p. 222–223). Therefore, an abuse 'can result from company's non-transparent data collection standards' (Schneider, 2018, p. 222–223). Moreover, looking at the *BRT II*[150] case, if similar to the Bundeskartellamt's Facebook proceedings would have been carried out by the Commission, it would not have to refer to data protection law in order to find an abuse, but it could base its finding solely on the inappropriateness of the terms (Volmar and Heldmach, 2018, p. 203). The violation of data protection law only strengthens the abuse theory, which simply requires that the clause of the agreement is not strictly necessary for the provision of a particular service, thus not necessary to achieve the object of the contract. If collecting data about a user's online behaviour outside of Facebook is not necessary for him to use Facebook, then the data processing provisions embedded into the contract may be unnecessary from the perspective of the proportionality test (Volmar and Helmdach, 2018, p. 202). If data processing lacks necessity, it could therefore 'fail both the GDPR and the proportionality test' (Volmar and Helmdach, 2018, p. 203), since the necessity test of terms and conditions relating to the processing of personal data on social network markets can be carried out only through the analysis of GDPR provisions, competition authorities would therefore seem to be, on the basis of this particular ruling, authorized to establish an abusive nature of these terms.

As a result of the *BRT II* case, the ECJ determined that if abusive practices are exposed, it is possible to decide on 'consequences with regard to the validity and effect of the contracts in dispute or certain of their provisions'.[151] The Bundeskartellamt did not, however, decide on the invalidity of the contractual clauses pertaining to the data protection, and effects of these contracts, but imposed a duty to change the data processing behaviour of Facebook. This decision should therefore be seen as an interference with the competences of data protection authorities (supervisory authorities).

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[149] CJ judgment of 6 December 20120, Case C-457/10 *Astra Zeneca v Comission*, ECLI:EU:C:2012:770, para. 93.

[150] ECJ judgment of 27 March 1974, Case 127/73 *Belgische Radio en Televisie and société belge des auteurs, compositeurs et éditeurs v SV SABAM and NV Fonior*, ECLI:EU:C:1974:25 (hereinafter: *BRT-II*).

[151] Case 127/73 *BRT-II*, para. 14.

2.3. The delineation of competence between the competition and data protection authorities

EU Charter of Fundamental Rights under its Article 8 establishes the following:

1. Everyone has the right to the protection of personal data concerning him or her.
2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.
3. Compliance with these rules shall be subject to control by an independent authority.[152]

On the basis of Article 55 GDPR,[153] it is the data protection authority (called supervisory authority), not the competition authority, that is competent to verify and identify infringements of data protection law. One of the primary tasks of the supervisory authorities is to monitor and enforce the application of the GDPR, as well as to fulfil any other tasks related to the protection of personal data, on its territory.[154] The inclusion of data protection issues into the competitive analysis seems to lead to an unnecessary blurring of these two distinctive branches of law, and to the interference of the competences of the competition authority with the competences of the data protection authority (Lamadrid, 2014).

It is, however, true that the market players in the digital economy propose 'zero-price' services where the user does not have to pay for the services with their money but with their data and that this data later translates, through advertisers, into monetary gain for those who offer them. Consequently, it can be established that data, particularly personal data, can be a source of market power and serve as a basis for the obtaining of a dominant position in data-driven markets, such as the social network market.

The Bundeskartellamt states that since access to data is essential for the establishing of the market position of a company, the way it gathers and further uses that data can be scrutinized by the competition authority.[155] Some

[152] Charter of Fundamental Rights of the European Union, OJ C 326, 26.10.2012, pp. 391–407.

[153] 'Each supervisory authority shall be competent for the performance of the tasks assigned to and the exercise of the powers conferred on it in accordance with this Regulation on the territory of its own Member State' (Article 55 GDPR).

[154] See Article 57(1)(a),(v) GDPR.

[155] This conclusion repeats findings of the Bundeskartellamt and the Autorite de la concurrence joint report were it was established that the way personal data is processed 'could be considered from a competition standpoint whenever these policies are liable to affect competition,

displeased with the approach of the Bundeskartellamt argue that 'all sort of features are essential for the market position of economic entities: product quality, prize, IP, consumer loyalty, branding, reputation' (Manne, 2019), but the Bundeskartellamt failed to assess all of these qualities. The Bundeskartellamt did, however, answer the question why other competitive features of Facebook's business model have not been taken into consideration, and why the way in which access to data is generated is so fundamentally different from other competitive features of this particular market. First, the recent amendment of the GWB has reflected the importance of data for markets which have the characteristics of a network. The relevant market is a data-driven one, meaning that without personal data of its users it would not be able to function as a zero-prized market, and this particular market's feature is different from any other relevant market where personal data are not so essential. Thus, in the opinion of the Bundeskartellamt, the data protection parameters, as being inherent to the market position on data-driven markets, have to be assessed. Moreover, the data protection provisions are to be understood as sort of consumer protection provisions that are also relevant for the competition protection authorities, which have to keep an eye on the balance of power between negotiating parities to a contract.[156]

This link of personal data collection with the possible creation of a dominant position shows a certain interaction between data protection and competition rules. It should, however, remain clear that data protection authorities have their own distinct competences in the assessment of the infringements of GDPR provisions, and that competition authorities are competent to assess the abusive nature of the terms and conditions imposed by dominant entities.

Each supervisory authority has been given a power to 'order the controller or processor to bring processing operations into compliance with the provisions of this Regulation, where appropriate, in a specified manner and within a specified period'.[157] This power has been, however, in the Bundeskartellamt decision, implemented not by the supervisory authority but by the competition authority. It can be therefore observed that '[b]y doing this FCO [Bundeskartellamt] reaches into the area of data protection and claims that the data protection authorities do not have exclusive competence in this area' (Linklaters, 2019).

It seems that on digital markets the way in which personal data are processed might be one of the elements of the analysis of the fairness of terms under national and EU competition law, however it cannot constitute a core

notably when they are implemented by a dominant undertaking for which data serves as a main input of its products or services' (Bundeskartellamt, Autorite de la Concurrence , 2016, p. 23).

[156] Decision, p. 283, para. 901.

[157] Article 58 (2)(d) GDPR.

of the analysis. Looking at the competence of the supervisory authorities, it can be argued that competition authorities in the EU should not determine by themselves whether the terms of the contract relating to data processing constitute an infringement of the GDPR. A competition authority, in its analysis of the abusiveness of business terms, should rely on the supervisory authority's decision made prior to the competition authority's decision, where the infringing nature of such a processing under the GDPR would have been recognized. Otherwise, unless such a decision by the supervisory authority is issued, the competition authority could only rely on the proportionality test in order to asses fairness of these terms, which might be insufficient without the legal analysis of the compliance with the GDPR.

Therefore, the assignment of the competences of the data protection supervisory body by the Bundeskartellamt, which is a competition authority, in assessing the relevance of Facebook's terms and conditions with the GDPR seems to be the most problematic issue, as it goes against the Commission view that any privacy-related issues flowing from the increased data concentration fall within the scope of EU data protection law and not within EU competition rules. Facebook's appeal to the Regional Higher Court (Oberlandesgericht) in Düsseldorf, will provide an answer as to whether the Bundeskartellamt is a competent body to carry out such an analysis under German law. The outcome of the court proceedings will also determine the future of Bundeskartellamt's policy regarding proceedings and its possibility to assess other abuse of dominance cases that relate to the intertwining between data protection and competition law. However, the answer to the question whether and if so, to what extent, the Commission or other EU competition authorities are competent to assess the validity of contractual terms regulating the data processing policies with the GDPR, still remains open.

IV. Conclusion

The Bundeskartellemt's decision in the Facebook case reflects the dangers created by illegal data-aggregation practices to both competitors and consumers. This decision also reflects the importance of non-financial parameters, such as privacy and data protection on 'free markets' and acknowledge the opinion of the European Data Protection Supervisor Giovanni Buttarelli that there might exist a form of abuse of dominance where the dominant entity would abusively use 'non-negotiable "privacy policies"' (Buratelli, 2015, p. 5).

The latest amendment to GWB may support the Bundeskartellamt's view that personal data serve as a relevant competitive parameter. This amendment

includes access to data into the assessment of market dominance on relevant markets with the characteristics of a network (a multi-sided market), but does not relate to the ability of the German competition authority to assess the abusiveness of data protection policies embedded into a network's terms and conditions. This ability for the German competition authority derives from the jurisprudence of the Federal Court, which allows the scrutiny of business terms from the civil law and fundamental rights' perspectives. This could also be possible for the Commission which might rely on CJEU jurisprudence regarding the balance of interests test. However, it is not yet determined whether the performance of such a test by competition authorities would not impede the competences of data protection supervisory authorities.

The possibility to acknowledge the abusiveness of contractual terms regarding the processing of personal data by the competition authority stays problematic. One of the possibilities to avoid conflicts of jurisdiction is that only after a decision about the infringing character of these particular terms in the view of the GDPR would be issued by the competent supervisory authority, the competition authority could then rely on these findings in order to take measures that would safeguard consumer interests and sanction incumbents for their abusive behaviour from the anticompetitive perspective, if a harm under competition law could be established (of course the competition authority would have to respect the *ne bis in idem* rule).

The Bundeskartellamt's position presented in the Facebook proceeding seems to indicate that monitoring of data processing activities of dominant companies cannot be fulfilled solely by supervisory authorities and for this purpose, the intervention of the competition authority, whenever the entity enjoys a dominant position, is possible.

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Evolving Dynamics in Competition Law: A GCC Perspective

by

Nora Memeti*

CONTENTS

Abstract

This article examines the Competition Laws of the Members States of the Gulf Cooperation Council (GCC). It examines their content, puts all of them under general scrutiny from their enactment until today and compares their basic features to other (developed) competition law jurisdictions, such as EU Competition Law and US Antitrust Law.

The article argues the importance of the Advocacy principle in the region and the incentives international organizations (IOs) have induced so far for the development of Competition Law in the GCC Countries, including the link between trade and Competition Law.

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In today's economy where online giant companies dominate, where the restrictive conduct among separate independent commercial entities grows immensely, and where mergers do not identify formal state borders, the need for global Competition Law enforcement is indispensable. Therefore, in order to be part of the global competition world, a creation of GCC Competition Law may be considered progressive and advantageous. The article argues the purposes and motivations why such awareness is desirable and provides legislative and normative recommendations on how to accomplish this endeavor.

Resumé

Cet article examine les lois sur la concurrence des États membres du Conseil de coopération du Golfe (CCG). Il examine leur contenu, les analyse d'un point de vue général depuis leur adoption jusqu'à aujourd'hui et, dans une certaine mesure, les compare aux autres juridictions (les plus développées notamment), telles que la législation européenne sur la concurrence et la législation antitrust américaine. L'article fait valoir l'importance du principe du plaidoyer dans la région, les initiatives que les organisations internationales (OI) ont prises jusqu'ici pour le développement du droit de la concurrence dans les pays du CCG, notamment le lien entre commerce et droit de la concurrence. Dans l'économie d'aujourd'hui – où les géants de l'Internet dominent et les comportements restrictifs entre entités commerciales indépendantes distinctes se multiplient et les fusions n'identifient pas les frontières officielles des États – la nécessité d'appliquer le droit mondial de la concurrence est indispensable. Par conséquent, une création du droit de la concurrence du CCG peut être considérée comme une solution progressive et avantageuse. L'article fait valoir les buts et les motivations pour lesquels une telle prise de conscience est souhaitable et fournit des recommandations législatives et normatives sur la manière dont cet effort doit être accompli.

Key words: competition law; GCC Member States; institutional framework; legislative framework.

JEL: K21

I. Introduction

The research on Competition Law,[1] its adoption and particularly enforcement in developing Countries (Waked, 2008; Waked, 2014; Molestina, 2019) such as the Member States of the Gulf Cooperation Council (hereinafter: GCC), is a difficult and challenging task (Palacios-Lleras, 2010). The GCC

[1] 'Antitrust' and 'Competition Law' are used interchangeably hereinafter.

Member States, namely Kuwait, United Arab Emirates (Emirates), Saudi Arabia (Saudi), Qatar, and Oman have all adopted Competition Laws during 2004–2014. Bahrain is the last country within the GCC to enact a Competition Law just last year, in 2018.

One of the reasons for adoption of Competition Laws in GCC countries has to do, among others, with policies of International Organizations (hereinafter: IOs) (Gerber, 2010; Evenett, Lehmann and Steil, 2000; Kennedy, 2018), including the World Trade Organization (hereinafter: WTO), and the International Competition Network (hereinafter: ICN). They have played an important role in providing awareness and assistance to developing countries, including the GCC. It is totally legitimate to ask whether enforcement is a real concern for countries other than developed ones (Molestina, 2019). Whereas GCC Member States experience similar linguistic, cultural and religious qualities, it is considered that drafting Competition Law at the GCC level on one hand, and the improvement of economic integration on the other hand, should be easier compared to, for example, the institutional and legislative hardship experienced at the EU level. Although extensively discussed in conditions of an open market, and due to incomes originating from oil production in particular, still, the idea of creating a supranational institutional infrastructure of competition law at the GCC level looks distant (Fox, 2015).

This paper is divided into three parts. In the first part, the importance of Competition Advocacy will be discussed. The second part will provide an overview of the separate national Competition Laws of all GCC Member States, covering the main three pillars of competition law namely Anti-competitive Agreements, Abuse of a Dominant Position and Mergers. The institutional infrastructure and the applicable sanctions will be partially mentioned here. The last part examines potential benefits from the creation of competition law at the GCC level. The paper suggests potential inter-governmental organs to be shaped based on a common legislative framework such as the ones in the EU. These organs may be endowed with supranational powers and apply basic principles of transparency and impartiality when placing GCC companies under scrutiny. Due to its limited scope, this article does not address state aids or subsidies. In terms of methodology, this article applies the analytical, comparative and descriptive methods, including discussions of relevant case law.

II. Competition advocacy: a helping hand

In circumstances where GCC countries have already adopted respective competition law legislations and are facing challenges in their practical

implementation, this article is a proponent of competition advocacy as a helping hand in the process.

Competition advocacy is generally defined as a notion covering all activities a competition authority is intending to undertake in order to promote competition, apart from those that involve enforcement of the law (International Competition Network, 2002, p. 25). The ICN states that competition advocacy is a soft law conducted by a competition authority in order to promote a competitive environment (International Competition Network, 2002, p. 25; Rakic, 2016, pp. 111–132). During the advocacy process, the Competition Authority is the one to assess and agree on the most important steps to be taken as necessary for the enhancement of the whole process. This mainly starts with the establishment of an independent authority. So far, Oman is the only example within GCC of having established an independent Center for Enforcement of Competition Law separate from the Ministry in charge.

When listing the preconditions of Competition Law adoption and enforcement, Professor Gal makes an analogy with the main ecological needs such as the soil, sun, water and pesticides (Gal, 2004). Therefore, she states that the main preconditions for competition law to bloom will be the socio-economic ideology as well as institutional, organizational, and political qualifications.[2]

In order to be able to provide a comparative analytical approach to the separate competition laws of GCC countries, the main pillars of EU Competition rules (Jones and Sufrin, 2016; Wish and Bailey, 2018) and US Antitrust law (Elhauge, 2017; Lundqvist, 2014; Hawk, 2013) will be observed. There are three reasons to do so: first, because they are generally considered more advanced; second, because GCC countries' competition rules are shaped drawing inspiration from them; and third, they may represent notable models for designing GCC Competition Law.

Starting with the EU, European Competition rules are included in Chapter I, Title VII of the Treaty on the Functioning of the EU (TFEU) (Foster, 2016).[3] EU Competition Law stands on three main pillars including Anticompetitive Agreements, Abuse of a Dominant Position and Mergers (Jones and Sufrin, 2016). The first two pillars are covered within Articles 101–109 TFEU, the third pillar, namely Merger, is regulated only as a secondary legal source so far, not included in the TFEU. All agreements, decisions by associations and concerted practice deemed restrictive for competition and affecting the trade between Member States are prohibited (Doleys, 2012; Colino, 2017; Odudu, 2010).[4]

[2] Professor Gal, specifies that these conditions are country- specific and must stay so.

[3] Articles 101–109 Treaty on the Functioning of the European Union.

[4] First pillar: Article 101(1) TFEU. The following paragraph of this article declares void those caught by Article 101(1). And the third paragraph of Article 101 provides exemptions if four conditions are fulfilled.

One or more companies enjoying a dominant position in the common market or a substantial part thereof, and which may affect trade between Member States, is prohibited from abusing such position (Behrens, 2015; Akman, 2008, 2009, 2017).[5] Mergers are primarily regulated by a Regulation (EUMR) referring to 'concentrations with EU dimension' (von Koppenfels, 2015; Drauz, Chellingsworth and Hyrkas, 2009).[6] Many other regulations, directives, soft laws (such as Notices, guidelines from the secondary legislation) and particularly case law have been developed in the sixty years of the existence of EU Competition Law.

For a long time, advocacy of EU Competition Laws in the GCC region has been accomplished implicitly (and primarily) through Egypt, which has traditionally been influenced by French jurisprudence (Ghoneim, 2002, p. 46).[7]

On the other side of the Atlantic Ocean, although the first federal antitrust statute was adopted in Canada in 1889, a year before the Sherman Antitrust Act was adopted in the US; GCC countries have generally followed US Antitrust law (Collins et al., 2003). With the adoption of the Sherman Act[8], US Antitrust Law was conceived with its main aim to control anti-competitive acts of business firms (Fox, 2013; Kovacic and Shapiro, 2000). Today, this field is known as Competition Law and Policy, as underlined by Professor Fox (Fox, 2013). Analogous and diverse principles, aims and objectives characterize the most developed competition laws in the EU and the US regarding both substantive and procedural rules. (Waked, 2014; Petersmann, 1999; Hyman, 2012). GCC Member States have in particular absorbed the penalty system embodied in US Antitrust Law, particularly the criminalization of cartels (Whelan, 2014). However, the substantive rules, including the three main pillars, are mainly transplanted from EU Competition Law. Noting the objectives and goals of the separate competition laws of GCC community, in general, similarities are obvious regarding the US pro-freedom for business aim and dissimilarities with EU Competition Law, considered to be more aware of open-market considerations (Fox, 2006, 211).[9] However, it is logical that competition law, although derived from the most developed systems, cannot be understood in the same way in developing countries. In particular, the cultural perspective plays a key role in that respect. Dabbah (2010) underlines that the legal culture of a particular developing country is of vital importance linked closely to its population.

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[5] Second pillar: Article 102 TFEU.

[6] Third pillar: mergers and acquisitions regulated under Regulation No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation).

[7] See also Omani's example elaborated below on the issues of Competition Advocacy.

[8] 15 U.S.C. §§ 1–7 (1890).

[9] Find more below at the third part under the Separate Competition Laws of GCC Countries.

There are some specific advocacy developments in the GCC as well. During the latest Annual Conference organized by the Kuwait International Law School in Kuwait (KILAW), representatives of the Omani Competition Council introduced a project on Competition Law advocacy in Oman (Hamouda, Barashidi, 2019). The project was divided into two parts, the first part presented was 'what and how to learn from US Antitrust Law', which, based on the reviewers will take place in the following two years. The second part was perceived to be the 'lessons from EU Competition Law'. The authors stressed various aspects of EU Competition Law and US Antitrust Law, in particular including the aims and objectives, the relation with consumer welfare principle, the penalties and fines, etc.

An additional attribute related to advocacy is the impetus of international organizations such as the ICN and the WTO. Whereas the ICN is an association of competition authorities aiming for the promotion and convergence of domestic laws (in particular procedural matters of merger control); the WTO is an intergovernmental IO promoting a cooperative agreement about trade between different governments.[10] Mario Monti's speech noted their relevance when stating that 'EU Governments must follow the European example by adopting their national merger laws according to the ICN recommendations'.[11] This article suggests that this note should not be pursued only by European States and certainly not only within mergers. There is nothing bad using the invented wheels and there is no need to re-invent them also, (Whish, QC, Gest lecture at the Latvian Law Institute, 2014). So far, from the GCC countries, Kuwait, Saudi Arabia and Qatar are members of the ICN.[12] The compliance consideration and the aim for convergence should stay on top of other requirements for membership in different IOs. Although ICN recommendations stand as soft laws only, they provide example of best practices and accepted principles shared among members (Bode and Budzinski, 2005).

The WTO on the other hand, behaves analogously to the EU which constantly encourages EU Member States to enact consistent and coordinated competition laws.[13] Parallel awareness can serve all GCC countries that are

[10] See the WTO Agreement and the relevant Annexes, www.wto.org/english.

[11] SPEECH 04/449 European Commissioner for Competition International Antitrust – A Personal Perspective by Mario Monti, delivered at Fordham Corporate Law Institute, New York, 7 October 2004. Retrieved from: http://europa.eu.int/rapid/pressReleasesAction.do?reference=SPEECH/04/449&format=HTML,&aged=0&language=EN&guiLanguage=en (25.03.06).

[12] See at https://www.internationalcompetitionnetwork.org/about/.

[13] See at: https://www.wto.org/english/tratop_e/comp_e/comp_e.htm, Syria may be considered as the example to illustrate how accession to the World Trade Organization (WTO) was conditioned upon the country meeting several requirements. One of these requirements

members of the WTO. For the record, Qatar and the UAE were GATT contracting parties and original WTO members; Oman joined the WTO in 2000 and Saudi Arabia in 2005. Kuwait is a WTO original member as a GATT contracting party since 1963; Bahrain also is a WTO original member as a GATT contracting party since 1993.[14]

Finally, trade is another aspect closely related to the advocacy principle.[15] GCC Member States are actively engaged in national and particularly international trade, mainly in the export of oil and more than 80% in import in all other industries.[16] Since trade and competition in the market have always been considered as two sides of the coin, businesses must be aware of both (Fox and Healey, 2013, p. 769). If jurisdictions transplant similar norms within competition law, countries may benefit more from trade (Fox and Healey, 2013, p. 769). However, this does not stand as an absolute true. 'Copy-paste' rules and principles or legal transplants never function efficiently without due regard to specific circumstances of each national jurisdiction.[17] As Professors Fox and Gal write, developing countries deserve a competition law that fits the facts of their markets and responds to their conditions and needs (Gal and Fox, 2015, p. 296). They add that, developing countries deserve a law so designed so the public will find it understanding and legitimate.

Based on different laws related to trade, other than competition law, the governments of GCC countries have reached agreements to grant their citizens and companies certain advantages.[18] For instance, Oman and the Emirates are considered to be the fastest growing economies in 2019 according to a report by the Institute of International Finance (IIF).[19] For 2019, Oman's growth has also been predicted to reach 3.1 per cent, while Bahrain's real GDP is expected to grow 2.4 per cent, Saudi Arabia's 2 per cent, and Kuwait's 0.4 per cent.[20] Omani regulations prescribe that GCC nationals have the right

concerned changes to Syria's economic laws and introducing a specific Competition Law domestically, see more Dabbah, 2010; Waked, 2016.

[14] See WTO web site available at: www.wto.org/english. https://www.wto.org/english/thewto_e/gattmem_e.htm (1.08.2019).

[15] The unified Economic Agreement between the countries of the Gulf Cooperation Council, available at www.worldtradelaw.net/fta/agreement/gccfta.pdf

[16] See www.credendo.com/country-news/economic-developments-six-gcc-countries, see also, International Monetary Fund, Gulf Cooperation Council, Trade and Foreign Investment-Keys to Diversification and Growth in the GCC. 2018.

[17] On legal transplants see Watson, 1994.

[18] The Economic Agreement of 2001, see more at: www.gcc-sg.org.

[19] https://gulfbusiness.com/uae-oman-fastest-growing-economies-gcc-report/.

[20] Despite the UAE's predicted growth over last year, IIF analysts suggested growth would slow to 2.7 per cent in 2020. They added that they expect the country's nominal GDP to increase from Dhs1.59 trillion ($434bn) in 2018 to Dhs1.63 trillion ($458bn) in 2020.

to buy residential, industrial and commercial properties, but not agricultural properties.[21] 1,038 Gulf nationals purchased property in the Sultanate in 2018, compared to 855 during 2017.[22] Same year, Qatar enacted two national laws, enabling GCC nationals to conduct business in Qatar and second, GCC companies to open branches in Qatar.[23] GCC nationals, whether natural or legal persons, can engage in retail and wholesale trade in Qatar under some conditions.[24] Such GCC companies will be treated like Qatari companies in accordance with the legislation in force.[25]

III. Competition laws of GCC Member States

This section examines the competition laws of each of the six GCC Members States. It reviews them chronologically based on the time of the adoption of the respective national competition law.

1. Qatar and its straightforward law

Qatar is the first country to be discussed in this paper, since chronologically it has the oldest competition law in the region. The Qatari Act for Protection of Competition and Prevention of Monopolistic Practices was adopted in 2006.[26] This law was enacted in correlation with the Qatari accession to the WTO.[27] It comprises of 20 articles, setting out in a straightforward way the prohibiting rules on Anticompetitive Agreements and practices between two or more

[21] See https://www.arabianbusiness.com/politics-economics/406604-number-of-gcc-investors-in-oman-property-rises.

[22] See https://timesofoman.com/article/290567/Oman/GCC-nationals-buying-Oman-properties-rise.

[23] Safwan Moubaydeen and Zaher Nammour Dentons, Mondaq.com, 201, Law No. 6 of 2017 amending some provisions of Law No. 7 of 1987 on Regulating the Conduct of Business Activities by GCC nationals in the State of Qatar (GCC Business Activities Law) and Law No. 7 of 2017 Permitting GCC Companies to Open Branches in Qatar (GCC Companies Branches Law).

[24] Article 2 of GCC Business Activities Law, see the details.

[25] GCC Companies Branches Law, Article 1. Any problem of State action that unduly harms competition is left to political processes, which will be left out of this paper, see more: Crane, 2013.

[26] Act No. 19 of 2006 for the Protection of Competition and the prevention of monopolistic practices. The terms 'Law' and 'Act' will be interchangeably used in the text.

[27] The Agreement establishing the World Trade Organization and the multilateral trade agreements annexed thereto, and Decree No. 24 of 1995 ratifying Qatar's accession.

companies and the Abuse of monopoly or collective dominance.[28] For both violations the law provides for possible exemptions important for consumer welfare.[29] The second general exemption, well known for the region, is the one applicable to all sovereign State undertakings and to all entities subject to State direction and supervision.

Qatari Competition Law establishes a system of *a priori* notification of mergers and acquisitions to the Committee for the Protection of Competition within the Ministry of Economy and Commerce. The latter is under a duty to issue a decision within 90 days. Exceptions from the rules regulating mergers which, in the Committee's view, assist economic development in a manner that compensates for any detriment to competition, are also regulated with this law.[30]

The Committee in charge of the implementation of the law exercises its duties *ex officio* or upon the request of any person aware of an anticompetitive conduct in collaboration with the Ministry of Commerce.[31] Penalties for a breach of Qatari Competition Law include either a monetary fine, set between the minimum and maximum amount, or criminal punishment with a written permission from the Minister following the proposal of the Committee. In all cases, it is within the jurisdiction of the Courts to order the confiscation of any profit resulting from the contravention of competition rules. The closing provision lays down two main principles of liability: first, personal responsibility of the managers of legal entities involved in a violation if they were aware of the violating acts, and the failure to carry out their duties contributed to the offence, and second, joint liability of the legal entity for anticompetitive conducts undertaken by the employees in its name or in its interest.[32]

2. Kuwait and its startups

The Kuwaiti Competition Law was adopted in 2007 (one year later than the Qatari one) and entered into force in 2009.[33] Two specific bylaws accompanied

[28] Act No. 19 of 2006 for the Protection of Competition and the prevention of Monopolistic Practices, articles 3 & 4. Regarding 'Abuse' see in general terms also: Palacios-Lleras, 2010.

[29] Act No. 19 of 2006 for the protection of Competition and the prevention of monopolistic practices, articles 5 &6; In the United States, the concern for economic welfare is central also, see more: Kaplow, 2011, p. 693. See more general also: Crandall and Winston, 2003.

[30] Act No. 19 of 2006 for the Protection of Competition and the prevention of Monopolistic Practices, Article 10 & 11.

[31] Ibidem, Articles 7–9.

[32] Act No. 19 of 2006 for the protection of Competition and the prevention of monopolistic practices, Article 18.

[33] Law No. 10 for the year 2007, Regarding the Protection of Competition, as amended by the Law No. 2 of 2012.

the Law, the first adopted in 2009[34] followed by the second in 2015.[35] The Kuwaiti Competition Law repealed existing provisions in the Commercial Code dealing with anti-competitive behavior.[36] However, the New Company Law of 2016, in part VII, elaborates how the process of mergers should be conducted in Kuwait.[37] It can be argued that in Kuwait, and in the GCC in general, competition law is seen as an important part of commercial law (particularly the academia is of this opinion), under which mergers are regulated and organised, including therefore acquisitions or their combination as per the terms, mentioned therein (Al-Qaisi, 2019).

Structurally, the Kuwaiti Competition Law is divided into 5 parts and 28 Articles. Part one provides for general characteristics, such as definitions and characterizations of the main concepts.[38] Part two consists of harmful practices and monopoly abuses. The law prohibits all agreements, contracts, practices considered harmful to competition, as well the abusive control of one or more undertaking.[39] Similar to the Qatari Competition Law, two categories of exceptions are recognized, the first providing benefits to consumers and the second, for projects or utilities owned or managed by the State.[40] The law expands its applicability to violations committed in Kuwait, as well as to those taking place abroad having harmful effects in the national market. The law established the Authority for Protection of Competition in order to reach the objectives and aims prescribed within, set under the jurisdictions of the Ministry of Economy.[41] Companies engaging in mergers, except complying with the provisions of the Competition Law, must also comply with other laws, including Company Law, the Law on Capital Market etc. which were regulating mergers long before Competition Law was enacted. The Law on Capital Market is under the supervision of the Capital Market Authority (CMA), and prescribes a duty of prior notification of mergers and acquisitions.[42] In certain circumstances, the parties are obliged to notify the

[34] Council Regulation for implementation of Competition Law, No. 106.

[35] Council Minister Regulation for implementation of Competition Law No. 994.

[36] Kuwaiti Commercial Code, No. 68/1980.

[37] Law No.1 of 2016 on Promulgating the Company Law.

[38] Law No. 10 for the year 2007, Regarding the Protection of Competition, as amended by the Law No. 2 of 2012, Articles 1–3.

[39] Article 4 Law No. 10. See also KUNA, 2017, when the Kuwait Competition Authority for the first time made public announcements regarding several current investigations including meat, onion and fish importers engaged in price fixing activities. See more at: athttp://www.kuna.net.kw/ArticleDetails. aspx?id=2600420&language=en (30.07.2019).

[40] Articles 5–6 Law No. 10.

[41] For more, see the Competition Protection Agency, Ministry of Commerce. www.cpa.gov.kw.

[42] Regulated under Law No. 7 of 2010 concerning the establishment of the Capital Market Authority and Regulating Securities Activities issued on February 21, 2010. Law No. 108 of

Council of their intention to merge 60 days prior to the decisive day, and the failure to do so may result in penalties under Competition Law. The second burden that follows is to stay still until the Agency provides for a green light under the abovementioned jurisdictions, known as the standstill obligation principle. Based on one of the regulations issued in regard to the Law on Capital Market, if the proposed acquisition triggers the 35 per cent threshold of market control as mandated by Law No. 10 of 2007, the acquirer must notify the Authority for Protection of Competition.[43]

Practice shows that well-known platforms operate in Kuwait and that instances of interesting developments take place. For example, Delivery Hero Group Company (Delivery Hero), a leading European (German) global online food delivery, announced its acquisition of Carriage, a well known delivery platform operating in GCC.[44] The ongoing operation was published in the media and the Competition Authority declared that the merger must be scrutinised by the Competition Authority. In 2015, Delivery Hero announced again in the media that it is acquiring another Kuwaiti food delivery company, operating throughout GCC, known as its direct competitor of Carriage under the name of Talabat.[45] It was discussed at the time of the acquisition of Carriage, that it would be a natural step for Delivery Hero to strengthen their foothold in the GCC. Once more, the media discussed that these developments should be an incentive for Competition authoritiy to take a closer look at the acquisition in order to determine if this merger will have anti-competitive effect in the domestic market. The Authority in charge stated (again throught the media) that the acquisition of Carriage, which is already operating in Kuwait and other GCC countries, and the acquisition of Talabat (a competitor) by the same company may be harmful to competition in the online food delivery market and could potentially result in abusing its dominant position of these services. During this process, relevant parties should provide various corporate documents to the Market Capital Authority for revision, if requested so. Assuming the powers are in the hands of the Competition Authority, the Market Capital Authority can also require additional documents related to the practical and economic

2014 amending some provisions of Law No. 7, 2010, was issued on July 23, 2013. Law No. 22 of 2015 amending some provisions of Law No. 7, 2010, issued May 4, 2015.

[43] Regulation of acquisitions, Regulation No. 7 of 2013, issued based on Law No. 7 of 2010 on Establishing a Capital Markets Authority and Regulating Securities Activities. Except the main law, two regulations have been adopted, one in 2014, Cabinet Decision No. 37/2014 which is the implementing Regulation of Federal Law of 2012, and Cabinet Decision No. 13/2016 which provides the ratios and the controls related to the application of Federal Law of 2012.

[44] The details of the case are mentioned below in the part covering the development of GCC Competition Law.

[45] Delivery Hero acquired Talabat, another Kuwaiti food delivery company operating throughout the GCC for around KWD 50 million (equivalent to around 150 million Euros).

impact the acquisition may create. In the case of 'Delivery Hero', it remains to be seen which Authority will strech its powers to deal with the case (if one ever will). It is expected the outcome of the case to have detterent effect for other commercial entities in the local market, particularly to start-ups, although the Kuwaiti Government constantly encourages its citizens to be active in that direction (Ghura and Harraf, 2018). To sum up, if the watchdog 'barks', it will be marked as an important step toward enforcment procces and also a warning bell for other players in the future. One may be interested to see how the market will be defined, what is the impact of the merger in the market, are the violated procedural steps of Gun Jumping or/and standstill obligation be under scrutiny, should the undertaking-agency (platform) contracts including discriminatory provisions will be under investigation, etc. So far, (the not-well informed) consumers are of the opinion that Talabat and Carriage are strong local competitors, having no knowledge Delivery Hero holds all the strings.

Looking at sectorial development, the Kuwaiti financial market has emerged as the second largest market in the GCC between 2014 and 2018.[46] The investment Banking Department announced that the number of transactions in Kuwait grew by 163% within merger and acquisitions. Based on the well-known Financial Center 'Markaz', the dealings grew from 16 to 42 in the period between 2014 and 2018. These transactions are in particular important in the fields of food and beverage, telecommunications, education, and technology sectors.

Finally, as regards monetary fines, violators can be fined upto one hundred thousand Kuwaiti Dinars (equivalent to around three hundred thousand Euros) or an agreeable fee between the violator and the authority in charge, if the infringement is repeated. It is within the Authorities' discretional powers to also order the confiscation of the commercial activity or its restriction for a maximum of three years. In a country like Kuwait, where citizens experience one of the highest living standards, questions appear quite often such as: how important is the enactment of competition law (Denny, 2019) and is competition always good (Stucke, 2013). Consumers, if knowledgeable enough about the benefits enforcement of competition law may bring, are the one and only vehicle so far to ask for it (Vedder, 2006; Kovacic, 1997, p. 404). Since in many countries both competition law and consumer law come together, including the US, when consumer protection is at stake, the same routine applies in Kuwait as well (Leary, 2005). Qaqaya (2008) is very explicit when stating among others that competition between companies enhances consumer welfare by providing consumers with wider choices at competitive prices.[47]

[46] See more at: Investment Banking Department at Kuwait Financial Centre Markaz.

[47] The effects of anti-competitive business practices on developing countries and their development prospects.

3. The United Arab Emirates and its unusual competition law

The United Arab Emirates enacted a Federal Law on Anticompetitive and Monopolistic Practices in 2012 (hereinafter the Anticompetitive Law).[48] The Law contains 33 Articles regulating competition in all commercial sectors.

It is worth mentioning that the Law on consumer protection prescribes only monetary fines although it stipulates that for acts contrary to fair competition, a criminal prosecution can be initiatied with the Minister's approval (see more below).[49]

The Anticompetitive Law entered into force in 2013 and has been characterized as unusual (Fox and Trebilcock, 2013) since the legislator was to introduce an opening provision clarifying the policy behind the Competition Law, an approach that may help institutions related to its judicial review. A Committee, established on the basis of the Competition Law, and functioning under the supervision of the Ministry of Economy, is provided for as the relevant competition regulator in the country. The Committee was established recently (in 2018), and it remains to be seen how it will operate in practice.[50]

The Law in a very broad manner elaborates competitive markets governed by market mechanisms in accordance with the economic freedom principle, prohibiting restrictive agreements that may lead to the abuse of a dominant position, controlling the operations within mergers and avoiding all that may prejudice, limit or prevent competition.[51] The Competition Law includes specific rules with the objective of protecting consumers and small enterprises from anti-competitive conduct. Similarly to other jurisdictions, it includes restrictions such as price fixing, market sharing/ division and allocation, applying different conditions and the list goes on. The Law includes rules that prohibit undertakings from hampering competition and harming consumers and other competitors through the abuse of their dominant position. Through dominant position, undertakings are granted extra powers against their competitors, and based on EU practice, it can be concluded that special responsibilities will be attached.[52] The Law provides that its provisions shall be enforced on all businesses in relation to their economic activities in the Emirates. The

[48] Federal Law No. 4 of 2012 on anticompetitive and monopolistic practices, implemented on 27th October 2014 by adopting, with resolution of the Council of Ministers No. 37 of 2014.

[49] Law No. 39 of 2014 on Consumer Protection.

[50] Federal Law No. 4 of 2012 on anticompetitive and monopolistic practices, Articles 12 & 13. In 2018, the Ministry established the committee and issued the anticipated guidance and forms to allow concerned parties to make merger clearance submissions to the Ministry.

[51] Federal Law No. 4 of 2012 on anticompetitive and monopolistic practices Article 2 in correlation with Article 5.

[52] Article 6 Law No. 4.

Law may also be enforced against economic activities outside of the country that influence competition in the domestic market based on extraterritorial jurisdiction (Geradin, Reysen, and Henry, 2008; Svetlicinii, 2006).[53]

The list of abuses to the prejudice, limitation or prevention of competition is of an exhaustive nature as well. Although the Law does not determine the threshold, the Cabinet within the Ministry of Commerce enjoys discretional powers in this regard. The same freedom applies to mergers, for which based on the Law, a 30-day advance application is required.[54] Before mergers take place, companies are required to seek approval from the Ministry of Economy in cases where the merger or acquisition is likely to restrict competition in the market or where the overall share exceeds 40% of the total transactions in the market. The Ministry of Economy will review such proposals and demand the increase or decrease of proportions of concentrations, as per the demands of the economy.[55]

The subjects of Emirates Anticompetitive Law are partially different from the above-mentioned jurisdictions, since the exception granted to the Government and its related entities is extended to enterprises operating in some business sectors, such as telecommunications, financial services, cultural activities, oil and gas, pharmaceutical products, postal services, electricity and water, and transportation.[56] A *de minimis* clause covers small and medium enterprises, whose market share or whose agreements may have a negligible effect on the relevant market, fall into this category.[57]

Compared to the other GCC jurisdictions, the Emirates Anticompetitive Law is more specific in enumerating the entities to which exceptions apply. This includes: exemptions for Government-owned entities, the federal or local government; entities established by virtue of a decision or authorization granted by the federal government; entities wholly owned by the federal government or the local government; entities whose ownership by the Federal Government or a local government exceeds 50% or more and individual exemptions.[58] The

[53] See judgment of 9 November 1983, Case 322/810 *Michelin v Commission*, ECLI:EU:C:1983:313, para. 70 'A finding that an undertaking has a dominant position … simply means that, irrespective of the reasons for which it has such a dominant position, the undertaking concerned has a special responsibility not to allow its conduct to impair genuine undistorted competition in the common market'.

[54] Federal Law No. 4 of 2012 on anticompetitive and monopolistic practices Articles 9–11.

[55] See more in the official web-site of the Ministry of Economy under which the Commission for Protection of Competition is operating, https://www.economy.gov.ae/English/Media-Section/Pages/EventDetails.aspx?ItemId=122.

[56] Annex. Sectors, Activities and Businesses Excluded from the Provisions of the Federal Law No. (4) of 2012 on the Regulation of Competition.

[57] Ibid, the last paragraph of Article 5.

[58] Federal Law No. 4 of 2012 on anticompetitive and monopolistic practices, Article 4, Article 14 and Appendix On sectors, activities and businesses exempted from the provisions of Federal Law No. 4 of 2012 On the Regulation of Competition.

new Law provides severe penalties, unprecedented in the country, which range from AED 500,000 up to AED5 million (between around one hundred and twenty thousands Euros to one million and one hundred and twenty thousand Euros).

In cases of judicial review, the court may, upon conviction, order a business to be closed for a period of 3 to 6 months.[59] With respect to criminal proceedings, as mentioned above in relation to Consumer Protection Law, the Emirates Anticompetitive Law stipulates that the Minister's approval is required for initiating any criminal prosecution of acts contrary to the Law. The Law also authorizes the Minister of Economy to reconcile any contravention of the Law before a criminal case is transferred to the Criminal Court in return for a settlement amount equivalent to no less than double the minimum fine. In 2018, the Committee also joined the ICN as mentioned above, one of the greatest networks within Competition Law.[60]

4. Oman: an independent center on competition law

The Omani Competition Law[61] incudes five chapters allocated in 30 articles, covering many activities related to production, trade, services, and any other economic or commercial activity practiced inside and outside Oman. With regard to the first pillar, the law distinguishes two groups, monopolistic agreements and restrictive agreements. Whereas the first category is about those creating or maintaining a monopoly over production, import, distribution etc., being able to negatively affect the market, the second category is more about agreements concluded between two or more companies with a purpose to prevent, eliminate or distorts competition.[62] The second and third pillars are covered with similar provisions to the above-mentioned jurisdictions, although in this country the threshold for clearance goes upto 50 per cent.[63] Again one should examine the applicable exceptions compared to other GCC jurisdictions and the block exemptions granted to agreements or business activities that entail consumer protection and benefit in cases specified by the law. The Law of 2014 states that the same Authority deals with the enforcement of both

[59] All competition court cases have been granted the advantage of expedited cases and the Law allows for interim relief and temporary injunctions pending final court judgment.

[60] See https://www.hoganlovells.com/en/publications/the-uae-competition-committee-has-finally-become-operational-merger-control-in-the-uae-and-the-gcc-region (30.07.2019).

[61] The Law for the Protection of Competition and Prevention of Monopoly, Royal Decree Bearing No. 67 of 2014.

[62] Article 9 of the Law.

[63] Articles 10 and 11 of the Law.

Competition Law and Costumer Protection Law namely the Public Authority for Consumer Protection.[64] Based on Omani Competition Law, the fines include criminal offences and monetary payments. The amount to be paid is the benefit gained calculated as a percentage of the annual sales.

In 2018 the Competition Protection and Monopoly Prevention Center was established based on Royal decree No. 2 of 2018.[65] This was considered a huge step within the region. Its mission is to provide a healthy and informed competition regime in order for competitive markets and innovative businesses to grow within the country. Its objective is to ensure the application of the law so as to establish market rules and free prices. It should be emphasized that the center enjoys a separate legal personality as well as financial and administrative independence from the Public Authority for Consumer Protection.[66] Compared to other jurisdictions, where the powers mainly remain in the hands of the Ministry of Commerce, Oman takes a progressive lead in this direction.

In 2014, Oman was registered among countries that have criminalized cartels[67] and introduced civil penalties.[68]

5. Bahrain and its short complementary law

Bahrain was the fifth GCC country to adopt a separate competition law in 2018. The legal system in Bahrain, similarly to other GCC Member States, is part of the civil law tradition influenced by the Egyptian legal system (mainly based on French Law). The main legislation governing competition, the Law Prohibiting the Restriction of Competition and Protecting Personal Data, was adopted in 2018. As the title of the Law suggests, it covers both competition and personal data law.[69] The Law consists of 'only' 11 short articles

[64] Articles 12–17 of the Law, see also Akman, 2010.

[65] Competition Protection and Monopoly Prevention Center, Oman – www.cmc.com; Royal Decree, Official Gazette, Issue No. 1226, No. 2/2018.

[66] The first awareness workshop was held on December 18, 2018 and the second awareness workshop is scheduled to be held on October 2019.

[67] Cartel activity implies the existence of an anticompetitive agreement, concerted practice or arrangement between competitors to fix prices, restrict output, divide markets or make rigged bids, see also OECD, Recommendation of the Council Concerning Effective Action Against Hard Core Cartels, C(98)35/final, 25 March 1998, [2(a)]. See also Whelan, P. (2014). The criminalization of European cartel enforcement: Theoretical, legal, and practical challenges. OUP Oxford.

[68] See at: https://www.nortonrosefulbright.com/en/knowledge/publications/1c8cd600/the-criminal-cartel-offence-around-the-world (30.07.2019).

[69] Law No. 31 of 2018 Law prohibiting the restriction of competition and protecting personal data.

prohibiting the restriction of competition, including monopolies, noting the manipulation of prices among undertakings and ambiguously touches upon mergers. In addition, it also briefly covers the scope and the responsibilities of a competition authority to be established.

However, it should be noted that restrictive agreements among commercial entities have been regulated earlier under the civil code.[70] Particular rules against unfair competition and monopolistic practices are included in the Commercial Code[71] and other applicable provisions are stipulated within the Consumer Protection Law, which contains a specific chapter named 'Rules of Competition and Monopoly and Manifestations of Breach of their Rules'.[72]

In contrast to other GCC jurisdictions, Bahrain is known for its sectorial regulation. In particular, as part of it accession to the WTO in 2003[73], the telecommunication market was liberalized by promoting effective and fair competition under which the Telecommunication Regulatory Authority (TRA) was established. One of the main reasons to do so was to end the monopoly of Batelco, a company enjoying a dominant position for more than two decades.[74] The telecommunication sector is a solid basis on which a better general Competition Law is to be built in Bahrain.

6. Saudi Arabia: the best example in the region?

Saudi Arabia is the only country in the region that has adopted two laws on the protection of competition so far. The first Competition Law was enacted in 2004, and amended in 2014, including only 21 articles. The current Law was enacted on 29 March 2019 and it should enter into force by the end of September 2019.[75] It is expected that within 180 days from the publication of the Law in the relevant Official Gazette, implementing regulations will be issued. The New Competition Law mandates also the establishment of an independent Authority in charge of the application of the Law, operating under

[70] Law No. 19 of 2001 of Civil Code of Bahrain.

[71] Commercial Code No. 7 of 1987, Bahrain.

[72] Law No. 35 of 2012 on the Consumer Protection, see also Crandall and Winston, 2003.

[73] Law No. 48 of 2002, available at telecommunication Regulatory Authority website, www.tra.org.bh.

[74] In 2003, the Government in Bahrain, by issuing a new Telecommunication Law ended the monopoly status of Batelco by letting a Joint Venture between UK Vodafone and the Bahraini division of Kuwaiti's mobile telecommunication to set up a mobile phone company in the Gulf Arab State under the banner MTC Vodafone Bahrain., see more at: www.telegeography.com (30.07.2019).

[75] Law of 6 March 2019 on Protection of Competition, see more: http://www.elexica.com/en/legal-topics/antitrust-and-merger-control/200519-new-ksa-competition-law (30.07.2019).

the umbrella of the Ministry of Commerce and Industry.[76] The independent nature of this body has not been topic of discussion. The Law will apply to any natural and legal person engaged in economic activities including commercial, industrial, agricultural etc., in Saudi Arabia and those outside the country breaching its Competition Law within the domestic market. The law applies to all firms working in the Saudi Arabia markets, except for public corporations and wholly owned state companies.[77] Governmental companies are excluded from its scope of application.

The Law aims to achieve a number of objectives, including: protecting and encouraging fair competition, monitoring and prohibiting practices that might affect fair competition; enhancing the market and regulate all commercial practices in the investment market; protecting small and medium business; protecting the quality of goods and fair prices etc. In general terms, similarly to other jurisdictions, the Law sets wide prohibitions on the three main pillars of competition law namely [Anti]Competitive Arrangements (Agreements), Abuse of a Dominant Position and Concentrations. Concentrations are under a duty to notify within 90 days prior to the completion date if the total turnover of the participating companies exceeds a specific amount (to be determined by implementing regulations). An interesting novelty is that Saudi Arabia allows private actions for damages but not injunctions.[78]

IV. GCC competition law: an avenue for the future?

As seen so far, companies engaged in business activities within the GCC enjoy certain benefits. These advantages are enshrined in the GCC Economic Agreement. Unfortunately, the GCC Economic Agreement from 1981[79] did not include provisions on Competition Law. This approach is quite different compared to the European Union regarding the exclusive powers the EU embrace on Competition Law.[80] Therefore 'joint projects' within the GCC Economic Agreement, comparable to 'joint ventures' at the EU level, may be considered a potential foundation on which a GCC Competition Law can be established.[81] However, this is not an easy task in a region were lack of

[76] Articles 8–11 of Law on Protection of Competition.

[77] Articles 4–7 of Law on Protection of Competition.

[78] Saudi Arabia Competition Law Art. 18; South Korea Fair Trade Act Art. 56 (allowing private damages); see also Elhaug and Geradin, 2011, p. 71.

[79] The Economic Agreement of 2001, see more at: www.gcc-sg.org.

[80] See Articles 2, 3 and 4 TFEU.

[81] Ibidem.

effective enforcement and absence of information from National Competition Authorities (NCAs), including among others, difficulties in providing information in English language, is evident.[82]

However, in practical terms, a number of well-known companies are already operating at the GCC level. This was the case for example with acquisitions including Amazon and Souq.com, Delivery Hero with Talabat and Carrigae etc.[83] Talabat, as an online delivery service, was established in 2004 in Kuwait and today performs in all GCC Members.[84] Kuwait is also known as a birth country of Carriage, whose acquisition by Delivery Hero was announced in June 2017, operating as an innovative and fast growing ordering platform from one group of users to another characterized as a two or multi-sided market.[85] The acquisition was published in the Delivery Hero financial Annual Report,[86] as the Competition Authority has been silent.[87] The part discussing Kuwait above provides detailed analysis of these cases. However, is important to mention that today GCC and other Arab countries enjoy the servises provided by these undertakings.

The most known acquisition within GCC is Souq.com, considered a breakthrough in the region (Schroeder, 2017). Souq.com was founded in 2005 and in 2011 changed its model to an online shopping site similar to Amazon. Known as the largest e-commerce platform in the Arab world as of 2016, in 2014 it delivered services to all GCC Member States.[88] In 2017, Souq.com

[82] Their lack of efficiencies is also noticeable in not updating their web-sites or publishing the decisions in the official Gazette, although it is prescribed in some countries as a duty, See for example, the Law on Protection of Competition in Oman, Article 27, or the Law for Protection of Competition in Saudi Arabia, Article 21.

[83] GCC region certanly is not also immune from online giants such as Amazon, Google, Apple, Facebook, etc. They all operate in the region but contrary to the 'hot pros and cons' debate in EU and US, their way of doing bussines is considred rather a privilege to the consumers, than a threat to fair competition, see Galloway, S. (2017). The four: the hidden DNA of Amazon, Apple, Facebook and Google. Random House. See also Akman, P. (2019). Online Platforms, Agency, and Competition Law: Mind the Gap. Fordham International Law Journal, Forthcoming.

[84] The case was also mentioned above when discussing Kuwait.

[85] See more at: https://www.menabytes.com/carriage-100-million/ (30.07.2019).

[86] Delivery Hero, financial report see more https://ir.deliveryhero.com/websites/delivery/English/3100/financial-reports.html, see also Delivery Hero Annual Report of 2018 see more https://ir.deliveryhero.com/download/companies/delivery/Annual%20Reports/Final_secured_en.pdf.

[87] The Authority considered that the acquisition of Carriage, which is currently operating in the State of Kuwait and other GCC countries under the Talabat brand, may be harmful to competition in the food delivery market and could potentially result in the monopolization of these services by one operator, see more at Mondaq.com, http://www.mondaq.com/x/636574/Antitrust+Competition/Competition+Law+Developments+In+Kuwait (30.07.2019).

[88] Wall Street Journal Blogs, 'Souq.com, Dubai-Based E-Commerce Site, Retrieved 25 October 2015.

localized operations in Saudi and Emirates. As of January 2018, Souq.com subsidiaries include their delivery arm such as Q-express, payment platform – Payfort, repair and service marketplace – Helpbit, and delivery marketplace Wing.[89] On May 1st 2019, Souq.com was officially acquired by Amazon and became Amazon.ae.[90] Today, Amazon.ae, is the only English-Arabic language e-commerce platform, owned by the Amazon Incorporation.[91]

In addition, GCC is not exempt from other companies conducting business in the digital market including Amazon, Google, LinkedIn and Facebook, which have all been expanding their presence in GCC and notably the Middle East (Schroeder, 2017). Amazon, considered a giant within the competition communities, puts under the test the existence of its subsidiaries, such as souq.com.

Finally, as a general remark, it has been reported that mergers within GCC have been notified to Authorities where competition rules seem more lenient than in others.[92] For example, based on the GCC stock exchanges, while in 2014 45 mergers were registered between GCC countries in the Emirates, the number jumped to 73 in 2018. In Kuwait the number of mergers reached from 16 in 2014 to 42 in 2018. However, the number of mergers in Saudi was 25 in 2014, decreased to 9 in 2017 and then reached 22 in 2018. This fact once more raises the need to think about leveling the rules and develop a GCC Competition Law.

V. Conclusion

Competition law at the EU level at times is considered the heart of the European Union (Nazzini, 2011) as well as the night watchmen of the economy (Slot and Farley, 2017). The directly applicable norms and the institutional infrastructure established within the EU, while far from being perfect, are arguably considered the best developed so far. The model provides a solid foundation for other unions or communities to build the neccessary toolkit towards harmonisation of their competition rules. Having in mind

[89] Megaw, N. (2017) 'Amazon confirms Souq takeover in deal to dominate Middle East'. Financial Times. Retrieved April 3, 2017.

[90] 'Amazon officially launches in UAE, replaces Souq.com'. See also Parasie, N. (2017). 'Amazon to Buy Middle East E-Commerce Site Souq.com'. Wall Street Journal. New York City, New York, United States. Retrieved March 30, 2017; Megaw, 2017.

[91] Montini, L. (2015). 'Meet Souq, the Amazon of the Middle East'. Inc.com. Retrieved 21 July, 2016.

[92] S&P Capital IQ, GCC Stock Exchanges, Local Newspapers, Mergers and Acquisition in GCC, 2014–2018.

that and the potential for further economic growth within the GCC; the further enhancement of competition laws of the individual GCC jurisdictions as well as a potential 'common' GCC Competition Law may be considered paramount in order to maintain and balance these achievements in the region (Pollard, 2014).

Recent developments covering all GCC countries should be commended. All of them have now adopted their respective competition laws. The Competition Law of Bahrain should make progress encouraged by its positive sectorial development. In terms of the institutional framework, Oman in particular should be distinguished with the establishment of the independent Center for Protection of Competition.[93] Saudi shows improvement moving a step forward in enacting the second Law and paving the way for better enforcement. The undisputed enhancement of trade and investing climate in Kuwait, Emirates and Qatar is in greater need for a more competitive atmosphere in order for consumer welfare to grow to a vital principle.

Therefore, competition law is no longer an unknown notion in the GCC Member States. Although the process is gradual, the legislation drafting phase is closed in the region.[94] The natural next step will be to enhance the application, which for the time being is considered very weak (Daudpota, 2015). A successful application may serve as an open gate for the development of competition law at the GCC level.

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[94] Authors note that substantial time is required in order to develop a body of competition law followed by enforcement. The antitrust regime in the United States began with the adoption of the Sherman Act in 1890, enforced by the Department of Justice. This Department needed almost 7 years to successfully defend its application of the Act before the Supreme Court. The Federal Trade Commission on the other hand, formed in 1914, had also a difficult beginning. It did not receive a Supreme Court rulings upholding its broad grant of regulatory authority until the 1960s. See more: Denny, 2017; Kovacic and Lopez-Galdos, 2016, p. 88.

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Competition Law in Western Balkans: Developments in 2018

by

Dragan Gajin*

CONTENTS

Abstract

In 2018, the competition authorities in the Western Balkans (Serbia, Montenegro, Bosnia and Herzegovina, and North Macedonia) have continued with their enforcement activities. The level of their activity varies from year to year, but the trend has continued where the Serbian competition authority is the most active one in the region. Generally, the focus of the enforcement activities of the Balkan competition authorities is on merger control, an exception being Bosnia and Herzegovina, where the emphasis is on antitrust enforcement.

Resumé

En 2018, les autorités de concurrence des Balkans occidentaux (Serbie, Monténégro, Bosnie-Herzégovine et Macédoine du Nord) ont poursuivi leurs activités d'application du droit de la concurrence. Le niveau de leur activité varie d'une année à l'autre, mais la tendance s'est maintenue là où l'autorité serbe de la

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concurrence est la plus active dans la région. D'une manière générale, les activités d'application des règles menées par les autorités de concurrence des Balkans sont concentrées sur le contrôle des concentrations, à l'exception de la Bosnie-et-Herzégovine, où l'accent est mis sur l'application des règles antitrust.

Key words: Western Balkans; Serbia; Montenegro; Bosnia and Herzegovina; North Macedonia; competition law; individual exemption; merger control; antitrust; restrictive agreements; abuse of dominance; enforcement.

JEL: K21

I. Introduction

The previous year was a busy one for the competition authorities in the Western Balkans (Serbia, Montenegro, Bosnia and Herzegovina, and North Macedonia). Across the region, the national competition authorities have had to deal with record numbers of merger filings. In addition, some of the jurisdictions in the region also had their hands full with respect to antitrust enforcement too – this is traditionally the case with Bosnia and Herzegovina and, in 2018, the Serbian competition authority must be singled out for its antitrust efforts as well.

Antitrust investigations against foreign-based entities, started by the Serbian competition authority, were a highlight of competition law enforcement in the Western Balkans in 2018. The Serbian competition authority launched three such cases, two being particularly significant – against MasterCard and Visa, respectively, concerning interchange fees. Will this bring more cross-border antitrust enforcement in this region?

Another highlight of competition law enforcement in the region in 2018 was the continuation of the 'ethnic veto' in the enforcement of competition law in Bosnia and Herzegovina. As will be described below, in its current form, Bosnian competition regulations effectively allow each of the three main ethnic groups in Bosnia and Herzegovina to veto a decision of the country's competition authority. It has been announced that this year we could see amendments to the country's competition legislation; will the 'ethnic veto' survive the planned amendments?

II. Serbia

1. Antitrust: several old cases closed, even more new opened

During 2018, the Serbian national competition authority – Commission for Protection of Competition (hereinafter: Serbian NCA) – was quite active in the field of antitrust. Actually, the word 'hyperactive' would probably be more adequate to describe the level of the watchdog's enforcement activity. This was not reflected as much in the number of cases closed, as in the number of new cases the authority initiated.

Not counting the cases suspended through commitments, during 2018, the Serbian NCA closed four probes – one by terminating the investigation and three by finding an infringement. On the other hand, the number of newly opened cases was much higher. Specifically, in 2018 the Serbian NCA closed the following cases:

- **Serbian Bar Association (terminated).** The authority was not able to conclusively establish that the Serbian Bar Association concluded a restrictive agreement by the way it was setting the fees for the admission to the bar. As a result, the investigation was terminated.[1]
- **Electric Power Industry of Serbia (finding of an infringement in a repeated proceeding).** Back in 2016, the Serbian NCA had found that the electric power incumbent (EPS) had abused its dominance on the market. Eventually, this decision was quashed in court review and in a new decision the NCA repeated its earlier conclusion and imposed a fresh fine on EPS.[2]
- **Price fixing (Škoda motor vehicles).** The authority found that a Serbian importer of Škoda motor vehicles and several of its dealers had engaged in price fixing in public procurement (they agreed to fix the price which the dealers would offer in public procurement bids). The watchdog fined all undertakings involved.[3]
- **Bid rigging (hygiene products).** The authority established that four Serbian companies had colluded in order to fix the terms of their bids in the public procurement procedures organized by the Serbian Ministry of Defense. All parties received a fine.[4]

Apart from closing several investigations, the Serbian NCA also opened a number of new ones. When initiating new cases, the authority mostly

[1] Conclusion of the Serbian NCA No. 4/0-02-101/2018-02 of 23 May 2018.
[2] Resolution of the Serbian NCA No. 5/0-02-336/2018-30 of 18 June 2018.
[3] Resolution of the Serbian NCA No. 4/0-02-64/2018-65 of 20 September 2018.
[4] Resolution of the Serbian NCA No. 4/0-02-61/2018-26 of 26 November 2018.

focused on restrictive agreements, though there were a couple of new abuse of dominance probes too. These were the new restrictive agreement investigations:

- **MasterCard (interchange fees).** Perhaps the highlight of the Serbian NCA's enforcement in 2018 was the launch of an investigation against MasterCard, concerning the interchange fees applicable in Serbia.[5] Eventually, MasterCard offered to the authority certain commitments in exchange for the suspension of the proceedings. At the time of the writing of this article, it is still not known whether the authority accepted these commitments.
- **Visa (interchange fees).** Not long after starting its probe against MasterCard, the Serbian NCA also went after Visa, with basically the same allegations as in the MasterCard case (that Visa was setting the interchange fees in Serbia in contravention of Serbian competition regulations).[6] Visa too offered certain commitments to the NCA, the decision on which is pending.
- **Polanik (sports equipment).** Here, the Serbian NCA for the first time started an antitrust probe against a foreign-based entity (once the ice was broken, the authority also started a case against MasterCard and Visa, respectively). The case is still pending and involves a Polish company Polanik Sp. z o.o., active in the production and wholesale of sports equipment, and its Serbian distributor. The watchdog has alleged that their exclusive distribution agreement is not in accordance with Serbian competition law.[7]
- **Baby equipment.** The market for baby equipment seems to be on top of the Serbian NCA's list of priorities – apart from conducting a sector inquiry into this market, the authority has started proceedings against almost 200 undertakings dealing with baby products. So far, the watchdog is focusing on alleged RPM clauses in agreements between the market players in this sector.
- **Bid rigging.** Apart from baby equipment, another focus of the Serbian NCA is bid rigging. The authority has led several investigations with respect to this type of infringement and this continued in 2018. The watchdog has become more sophisticated when it comes to the assessment of possible bid rigging practices, as it now also discerns the existence of rigging from the patterns of behavior of the colluding parties.[8]

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[5] Conclusion of the Serbian NCA No. 4/0-02-640/2018-01 of 14 September 2018.
[6] Conclusion of the Serbian NCA No. 4/0-02-769/2018-01 of 2 November 2018.
[7] Conclusion of the Serbian NCA No. 4/0-02-305/2018-1 of 28 March 2018.
[8] See Conclusion of the Serbian NCA No. 4/0-02-673/2018-1 of 19 September 2018.

– **Price fixing (technical inspection of cars).** The Serbian NCA is also investigating 11 undertakings active in the market for technical inspections of cars. The authority started the proceedings on suspicion that the undertakings had colluded with respect to the prices at which they offered their services, which may have amounted to a restrictive agreement within the meaning of Serbian competition law.[9]
– **Non-compete (cinemas).** In this case, the Serbian NCA is investigating whether a non-compete clause in an agreement between a cinema operator and an undertaking active in displaying cinematographic works through mobile cinema equipment may have led to a restriction of competition in the relevant market.[10]

In the field of abuse of dominance, the Serbian NCA started two new cases:

– **Abusive pricing (Serbia Broadband).** Back in 2017, the Serbian NCA conditionally approved Serbia Broadband's (SBB) takeover of a competing cable operator. One of the conditions under which the clearance was granted was SBB's obligation to inform the authority of any price hike and explain the reasons behind it. In early 2018, the operator increased the price of cable subscription and the watchdog has alleged this represented an act of abuse of dominance.[11]
– **Abusive pricing (heating plant).** The Serbian NCA has started an abuse of dominance probe against the company operating a heating plant in the city of Niš. Specifically, the NCA is investigating the company's pricing policy from an abuse of dominance perspective.[12]

2. Commitments now regularly implemented in the authority's practice

For a few years now, Serbian competition law has contained a commitments procedure comparable to the one found in Article 9 of Regulation 1/2003. Over time, the Serbian NCA has shown it is ready to implement this procedure in practice, a trend that continued in 2018.

Specifically, in 2018 the watchdog performed a market test of three commitment proposals submitted by undertakings under an antitrust investigation:

– Sirmiumbus, in an abuse of dominance case involving a bus station in a Serbian town;[13]

[9] See news article dated 26 December 2018, available on the website of the Serbian NCA at: http://www.kzk.gov.rs/en/pokrenut-postupak-zbog-sumnje-na-dogov (26.04.2019).
[10] Conclusion of the Serbian NCA No. 4/0-02-786/2018-1 of 8 November 2018.
[11] Conclusion of the Serbian NCA No. 5/0-02-297/2018-1 of 27 March 2018.
[12] Conclusion of the Serbian NCA No. 5/0-02-459/2018-1 of 5 June 2018.
[13] Notice of the Serbian NCA No. 5/0-02-52/2018-5 of 4 June 2018.

– MasterCard, in an interchange fees case;[14] and
– Visa, also in an interchange fees case.[15]

At the moment, it is known that the Serbian NCA has accepted the commitments proposed by Sirmiumbus and suspended the proceedings against this undertaking. It remains to be seen what conclusion the authority will reach concerning the commitments proposed by MasterCard and Visa, respectively.

3. Individual exemptions continue

Serbian competition law still has a system of individual exemptions of restrictive agreements based on an administrative decision of the Serbian NCA, comparable to the one which existed in the EU under Regulation 17/62.[16] Under this procedure, the authority each year individually exempts around 20 agreements. However, it publishes only a small number of these decisions. For instance, during 2017, the NCA individually exempted 21 agreements but published just four exemption decisions.

During 2018, the Serbian NCA published three individual exemption decisions and at the moment we can only guess at the total number of such decisions. A more meaningful analysis of this segment of the authority's enforcement activities will be possible once the watchdog publishes its annual report for 2018, which is not yet available at the time of the writing of this article.

4. Dawn raids: the constitutional challenge does not dent the authority's resolve

The constitutionality of dawn raids in the Serbian legal system remains an unresolved issue, as the Serbian Constitutional Court is yet to rule on whether the current regulation of dawn raids in the Serbian Competition Act is constitutional. In any event, the Serbian NCA has continued to conduct dawn raids, despite the constitutional challenge.

Moreover, apart from raiding parties to the proceedings, the authority has also started performing dawn raids on the premises of third parties. Also, during the course of 2018, the authority published its official guidance on dawn raids,[17] which allows undertakings to prepare in advance for what might await them in an unannounced inspection.

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[14] Notice of the Serbian NCA No. 4/0-02-640/2018-13 of 14 November 2018.

[15] Notice of the Serbian NCA No. 4/0-02-769/2018-06 of 3 December 2018.

[16] On this topic, see more in: Kojovic and Gajin, 2012.

[17] Available on the website of the Serbian NCA at: http://www.kzk.gov.rs/kzk/wp-content/uploads/2018/05/Informacije_o_nenajavljenom_uvidjaju.pdf (26.04.2019).

5. Merger control: more than 150 new decisions

Traditionally, the Serbian NCA is kept busy with merger control, due to the extremely low merger filing thresholds in Serbian competition law. As a result of such low merger filing thresholds, the number of merger decisions of the Serbian competition watchdog has quickly reached 1,000. And the trend of proliferation of such decisions has continued in 2018.

While the exact number of merger decisions will be known with certainty only when the NCA publishes its official annual report, it is likely that 2018 will be a record year when it comes to the number of approved mergers. Specifically, during 2018, the Serbian NCA rendered at least 155 merger decisions and this number is likely to rise once all clearance decisions are published. As a comparison, during the whole of 2017, the total number of cleared transactions was 139.

Only one merger decision rendered by the Serbian NCA in 2018 was issued after a Phase II investigation. This was the acquisition of a Serbian yeast producer by the French company Lesaffre.[18]

A well-known peculiarity of the Serbian merger control system is that the merger filing thresholds often catch transactions which have little or no effect on the Serbian market. The previous year was no exception – almost half (44%, to be more precise) of the cleared mergers were transactions where the target had no turnover in Serbia or such turnover was negligible.

Both equity and asset deals can trigger the merger filing thresholds in the Serbian merger control regime. During 2018, a majority of the cases (126 of them) examined by the Serbian NCA were equity transactions. Apart from the deals which were solely equity or asset, the NCA also dealt with several transactions of mixed nature.

Finally, with respect to the relevant market, as a rule, the Serbian NCA determines the relevant geographic market as national. This was also the case in 2018. Specifically, in almost 90% of the merger decisions the Serbian NCA rendered during 2018, the relevant geographic market was national. Also, during 2018 the Serbian NCA continued with its approach that the geographic element of the relevant market cannot be wider than Serbia.

6. Eight new sector inquiries

To complete its enforcement activities in 2018, the Serbian NCA devoted a lot of its resources to conducting sector inquiries. Specifically, during the

[18] Resolution of the Serbian NCA No. 6/0-03-94/2018-6 of 6 February 2018.

course of the year, the NCA completed as many as eight such analyses in the following sectors: purchase and export of raspberries; software and computer equipment; sportswear and equipment; retail of oil derivatives; tires; food retail (supermarkets); production and sale of cement; baby equipment.

Considering its increased resources compared to the previous period, we can expect a continuation of such market investigations in 2019.

III. Montenegro

1. NCA's jurisdiction extended to State aid

Perhaps the most important development in competition law in Montenegro during 2018 was the extension of the jurisdiction of the Montenegrin Agency for Protection of Competition (hereinafter: **Montenegrin NCA**) to State aid matters.[19] The Montenegrin NCA was previously dealing only with antitrust (restrictive agreements and abuse of dominance) and merger control issues, while State aid matters were the prerogative of a, now abolished, special Commission for the Control of State Aid.

At this moment it is still early to say how this change will affect the practice of the watchdog.

2. Year of sector inquiries

While it does not have the power to impose fines, the Montenegrin NCA does have the power to conduct sector inquiries. And it used that prerogative extensively in 2018. Specifically, during 2018 the Montenegrin NCA examined the following markets:

– **Distribution of media content and sports channels.** The authority performed the analysis based on information obtained from market participants and the relevant sector regulators. Unfortunately, the Montenegrin NCA did not publish its findings, citing the sensitivity of the obtained information.[20]

[19] Law on Amendments of the Law on Protection of Competition ('Official Gazette of Montenegro', No. 13/2018).

[20] See news article dated 16 February 2018, available on the website of the Montenegrin NCA at: http://www.azzk.me/novi/joomlanovi/228-obavjestenje-izvjestaj-o-sprovedenoj-analizi-maloprodajnog-trzista-distribucije-audio-vizuelnih-medijskih-avm-sadrzaja-i-trzista-distribucije-paketa-sportskih-kanala-i-njihove-dostupnosti-kod-pruzalaca-avm-usluga (26.04.2019).

– **Wholesale and retail of sugar and sunflower oil.** The authority sought to establish the relationships between the main competitors on these markets, as well as the vertical relationships between producers, wholesalers, and retailers. During the investigation, the watchdog had turned to undertakings active in the wholesale and retail trade of sugar and sunflower oil, requesting copies of commercial agreements as well as other relevant information. Ultimately, it did not find any foul play.[21]
– **Driving schools.** The authority also probed driving schools in the Montenegrin town of Nikšić. Specifically, the watchdog was checking reports that driving schools in Nikšić had agreed on the prices for driver training in the town. As a result, the Montenegrin NCA preliminarily established that the driving schools had formally agreed on the prices offered to prospective drivers and launched a formal cartel investigation against the schools.[22]
– **Disposal of municipal waste.** The authority also took a look at the conditions on the market for waste disposal across the country. During this market investigation, the watchdog assessed how waste disposal companies in Montenegro form their prices. In the end, the market investigation did not indicate any competition law infringements.[23]

3. Antitrust: two new infringement decisions

The Montenegrin NCA does not have the power to impose fine for antitrust violations. However, this does not prevent the NCA from rendering infringement decisions, based on which the competent misdemeanor court may later issue a fine.

In 2018, the Montenegrin NCA closed two antitrust cases, both in the area of restrictive agreements.

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[21] See news article dated 8 May 2018, available on the website of the Montenegrin NCA at: http://www.azzk.me/novi/joomlanovi/241-obavjestenje-izvjestaj-o-sprovedenim-analizama-trzista-veleprodaje-i-maloprodaje-secera-i-jestivog-suncokretovog-ulja (26.04.2019).

[22] See news article dated 8 May 2018, available on the website of the Montenegrin NCA at: http://www.azzk.me/novi/joomlanovi/242-obavjestenje-izvjestaj-o-sprovedenoj-analizi-trzista-pruzanja-usluga-obuke-kandidata-za-sve-kategorije-vozila-od-strane-auto-skola-na-teritoriji-opstine-niksic (26.04.2019).

[23] See news article dated 8 May 2018, available on the website of the Montenegrin NCA at: http://www.azzk.me/novi/joomlanovi/243-obavjestenje-izvjestaj-o-sprovedenom-ispitivanju-uslova-konkurencije-na-trzistu-pruzanja-usluga-odvozenja-i-deponovanja-komunalnog-otpada-na-teritoriji-crne-gore (26.04.2019).

As noted, during a sector inquiry into the driving school market in a Montenegrin town, the watchdog found indications of collusion between the driving schools active in the town. Upon conducting an antitrust investigation, the authority found evidence that the driving schools had indeed agreed on uniform prices for their services, by a written decision adopted by the parties involved.[24] Such evidence surely made the authority's job of establishing an infringement easier.

In the other infringement decision, the Montenegrin NCA found that an agreement on joint participation in a public procurement procedure concerning medical devices had amounted to a restrictive agreement. Since it does not have the power to impose fines, the watchdog could only declare the joint bid agreement null and void.[25]

4. Individual exemption: two agreements exempted

Similarly to Serbia, Montenegro also has a system of individual exemptions of restrictive agreements based on prior notification to the authority. In other words, in the Montenegrin competition law system there is no self-assessment concerning the conditions for individual exemption from the prohibition.

It seems that the undertakings active on the Montenegrin market are not using this procedure extensively, as during 2018 the Montenegrin NCA granted only two individual exemptions. Perhaps this number would rise if the authority later published additional individual exemption decisions; in any case, it should not be expected for the rise to be significant. This situation is the same as last year, when the Montenegrin NCA also granted two individual exemptions (only one of which was partially published).

Be that as it may, the first individual exemption granted in 2018 concerned a request by three insurance companies active on the Montenegrin market. The exemption pertains to joint participation in a tender organized by the Montenegrin electric power company and was granted for a period of one year.[26]

In the second individual exemption decision, the Montenegrin NCA exempted, for a period of three years, a distribution and promotion agreement between the Dutch company Merck, Sharp and Dohme B.V. and a Montenegrin distributor.

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[24] Resolution of the Montenegrin NCA No. 02-UPI-8/65-18 of 15 October 2018.
[25] Resolution of the Montenegrin NCA No. 02-UPI-11/129-16 of 23 March 2018.
[26] Resolution of the Montenegrin NCA No. 02-UPI-59/10-18 of 12 November 2018.

5. Merger control: another year of Phase I clearances

Similarly to Serbia, Montenegrin competition law also contains very low merger filing thresholds, which catch even transactions which have no connection with the Montenegrin market. As a result, the largest part of the authority's workload pertains to merger control.

As described, in the previous year the Montenegrin NCA rendered only two antitrust infringement decisions. On the other hand, it issued at least 44 new merger decisions – and this number may still rise once all merger decisions from 2018 are published. All 2018 merger decisions were unconditional Phase I clearances.

IV. Bosnia and Herzegovina

1. A new way of calculating merger filing fees

During 2018 there were no significant legislative changes in Bosnian competition law. The only notable novelty is a change in how the merger filing fees are calculated in this jurisdiction.

Earlier, the merger filing fee was always determined in a fixed amount. Specifically, the total fee for a Phase I clearance was approx. EUR 2,250. On the other hand, if the Bosnian NCA would have cleared a transaction only after Phase II, the total fee would have been approx. EUR 13,500.

After the latest changes,[27] the total fee for a Phase I clearance has been raised to approx. EUR 3,500. This is still significantly less than, for example, Serbia, where the standard fee for a Phase I clearance is EUR 25,000.

As for the fee for a Phase II clearance, there is no longer a fixed fee – the amount is now linked to the turnover of the parties.

2. 'Ethnic veto' in competition law enforcement again in application

The competition law of Bosnia and Herzegovina includes what could be characterized as an 'ethnic veto' in competition law enforcement (Gajin, 2018, p. 295). Specifically, due to the way in which the country's competition

[27] Decision on the amendment of the Decision on administrative fees in relation to the procedural actions before the Competition Council of Bosnia and Herzegovina, 'Official Gazette of Bosnia and Herzegovina', nos. 30/06, 18/11, and 75/18.

authority – Competition Council (hereinafter: Bosnian NCA) is set up, and also considering the deliberation procedure within the authority, each of the three 'constituent peoples' (Croats, Bosniaks, Serbs) could effectively block the work of the competition authority. At least two such instances occurred in 2017[28] and the trend continued in 2018.

According to the information available on the website of the Bosnian NCA, during 2018 the watchdog failed to reach a decision due to the use of the 'ethnic veto' on at least four occasions. Concretely, the authority had to abandon the enforcement of one of its decisions, could not decide on a notified concentration, and could not adopt two official opinions since the support of the representatives of all three 'constituent peoples' was lacking.

3. High level of antitrust enforcement continues

Compared to the other Balkan jurisdictions, in which merger control dominates the enforcement agenda, competition law enforcement in Bosnia and Herzegovina is characterized by an emphasis on antitrust. On the one hand, this is due to the procedural rules in Bosnia and Herzegovina, which allow complainants to be a party in antitrust proceedings, and, on the other, due to relatively high merger filing thresholds in this jurisdiction.

This high level of antitrust enforcement is, however, mainly reflected in a higher number of cases, not in a higher number of infringement decisions.

According to preliminary data, during 2018 the Bosnian NCA established abuse of dominance in two cases and found an infringement in the form of restrictive agreements in another two instances. Contrast that with the number of incoming cases: three in the area of restrictive agreements and 11 in the area of abuse of dominance.

Apart from finding an infringement, the Bosnian NCA also has the power to impose fines, in the amount of up to 10% of the infringing undertaking's annual turnover. In 2018, the NCA imposed fines in the total amount of approx. EUR 300,000. In addition, the authority also collected approx. EUR 100,000 in administrative fees. The proceeds from both belong to the country's budget.

4. Individual exemption: one agreement given antitrust clearance

Same as the competition laws of Serbia and Montenegro, respectively, the competition law of Bosnia and Herzegovina also has a system of individual

[28] Ibidem.

exemptions from prohibition based on prior notification to the competition authority.

During 2018, the Bosnian NCA individually exempted one notified agreement. The agreement was only cleared following an in-depth investigation.

5. Merger control: An unusually busy year

Due to the relatively high merger filing thresholds in Bosnia and Herzegovina, merger filings in this jurisdiction are not as common as in some of the other Balkan jurisdictions. In this context, 2018 can be characterized as fairly busy for the Bosnian NCA in the area of merger control.

Specifically, the Bosnian NCA received 35 merger notifications – 24 transactions were cleared in Phase I, in one case the NCA could not decide on the notified transaction due to the 'ethnic veto', and the remaining 10 cases remained pending at the end of the year.[29] With respect to the cleared transactions, only one was given the green light after a Phase II probe, while all others were cleared in Phase I.

Also notable about competition law enforcement in Bosnia and Herzegovina is a relatively high number of dismissed merger filings. Precisely, in 2018 the Bosnian NCA dismissed at least 11 transactions. From a practical point of view, this is because one of the merger filing thresholds in the Bosnian Competition Act refers to market share and the parties are not always sure in advance whether their transaction is notifiable or not.

6. Three sector inquiries conducted

Apart from its antitrust and merger control activities, the Bosnian NCA also conducted three sector inquiries: in the oil and oil derivates, taxi transportation, and water supply sectors, respectively. The oil and oil derivates sector was examined on the national level, taxi transportation in the Sarajevo Canton, and water supply was looked at in the largest cities in Bosnia and Herzegovina.

7. Amendments to the Competition Act coming up?

In its plan of activities for 2019,[30] the Bosnian NCA *inter alia* noted how it intends to initiate the procedure of amendments of the Competition Act with

[29] Annual report of the Competition Council of Bosnia and Herzegovina for 2018, Document no. 01-50-1-395-11/19 of 4 March 2019.

[30] Work programme of the Competition Council of Bosnia and Herzegovina for 2019, Document no. 01-02-3-390-9/18 of 31 January 2019. Available on the website of the Bosnian NCA at: http://bihkonk.gov.ba/datoteka/1056_001.pdf (26.04.2019).

the Ministry of External Trade and Economic Relations. Since this is not the first time that changes in competition law have been announced, we can only wait and see whether they will actually come to fruition this year.

V. North Macedonia

1. New Competition Commission appointed

The biggest news from Macedonia is that the country has changed its name to North Macedonia.

In the area of competition law, the highlight is that the country's competition authority – Commission for Protection of Competition (hereinafter: **North Macedonian NCA**) – has a new President and four other members of the authority's governing body. The appointees are:

- Vladimir Naumovski (President);
- Dimitrija Vrevezoski (a member of the Commission and the head of the body which imposes fines for competition law infringements);
- Naser Zharku (a member of the Commission);
- Aleksandar Davchevski (a member of the Commission); and
- Ana Vitkova (a member of the Commission).

According to the North Macedonian Competition Act, the mandate of the President and members of the Commission is five years, with the possibility of re-appointment.[31]

2. Focus on merger control

As was also the case last year, during 2018 the focus of the North Macedonian NCA was on merger control. This is no wonder, considering the very low merger filing thresholds in Macedonian competition law.

According to information published on the website of the North Macedonian NCA, during 2018 the authority received as many as 57 new merger notifications. Based on the watchdog's previous practice, it can be reasonably expected that their vast majority, if not all of the notified transactions, will be cleared in Phase I. As a comparison, based on unofficial data, during 2017 the North Macedonian NCA dealt with 44 transactions in total.

[31] Law on Protection of Competition, 'Official Gazette of the Republic of North Macedonia', issues 36/11, 41/14, 53/16, and 83/18, Article 27, para. 1.

Due to the way the merger filing thresholds are set, a majority of transactions notified to the North Macedonian NCA have little or no connection with the North Macedonian market. However, if it's any consolation, the merger filing fee is at least much lower than in Serbia or Montenegro: it amounts to approx. EUR 600.

3. All is quiet on the antitrust front

And while there were a plenty of decisions in the merger control sphere, North Macedonian competition law had a quiet year on the antitrust front, with no reported new cases.

What probably contributes to lessening the NCA's workload in the area of antitrust is the fact that, unlike in the other Balkan jurisdictions, in North Macedonian individual exemptions of restrictive agreements are governed by self-assessment. Naturally, the North Macedonian NCA did not render any individual exemption decisions in 2018.

4. State aid

Apart from antitrust (restrictive agreements and abuse of dominance) and merger control matters, the North Macedonian NCA is also in charge of State aid. However, the most recent State aid decision available on the authority's website dates back from 2016. Based on this, State aid is not a priority in the NCA's enforcement activities.

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B O O K R E V I E W S

Mateusz Błachucki,
Ponadnarodowe sieci organów administracji publicznej oraz ich wpływ na krajowy porządek prawny (na przykładzie ponadnarodowych sieci organów ochrony konkurencji)
[*Transgovernmental networks and their impact on domestic legal order (case study of competition authorities networks)*],
The Institute of Law Studies of the Polish Academy of Sciences, Warsaw 2019, 688 p.

Networks are very much in vogue, and rightly so, since the world we live in is more connected than ever (Pulford, 2018, p. 212). The academia is not an exception in this respect. The ubiquitous, but still fuzzy term 'network' has been used (sometimes overused) in a variety of ways spanning a number of academic disciplines (Wijen et al., 2012, p. 511). Within the social sciences there has been an increasing interest in network analyses in the past few decades. Not only political science and economics, but also the law have been directing their attention to network phenomena to a great extent (Streck and Dellas, 2012, p. 511). As a result, a 'Babylonian' variety of policy network concepts and applications can be found in the literature (Börzel, 2002, p. 253). Notwithstanding certain problems for jurisprudence created by the term 'network' itself, and even if – according to Richard Buxbaum's apodictic judgement – a network is not a legal concept at all, a new legal scholarship on networks is apparently emerging (Buxbaum, 1993, p. 704; Teubner, 2011, p. 73; Terhechte, 2011, p. 14). The growing literature in law and political science points to the prominence of transgovernmental networks as a subset of the larger phenomenon of 'government networks'. Although defined differently depending on the writer and the context, this particular form of international cooperation exhibits patterns of regular and purposive relations among like government units working across the borders, and is based on loosely-structured, peer-to-peer ties developed through frequent interaction rather than formal negotiations (Slaughter, 2004, p. 14; Raustiala, 2002, p. 5). While the phenomenon is not wholly new, in the past few decades intergovernmental networks have become a defining feature of contemporary global governance (Bach, Newman, 2010, p. 505). They have proliferated in almost every area of government regulation, in a plethora of issue-specific fields stretching from the environment to the financial world and everything in between, including antitrust (Slaugher and Hale, 2010, p. 51; Slaughter and Zaring, 2006, p. 216).

For some, they herald a new and attractive form of global governance or an institutional innovation that can help to optimise the trade-offs between benefits and problems of centralisation and decentralisation, as well as to enhance the ability of states to work together to address common problems without the centralized bureaucracy of formal international institutions (Slaughter, 2001a, p. 347; Kerber and Wendel, 2016, p. 110). Proponents believe that transgovernmental networks are becoming so widespread and important that they constitutes, in Anne-Marie Slaughter's famous ascertainments, 'the optimal form of organization for the Information Age', 'a blueprint for the international architecture of the 21st century', and eventually 'a new world order' (Slaughter, 2001b, p. 204; Slaughter, 1997, p. 197; Slaughter, 2004, p. 261–272).

The enthusiasm of advocates of transgovernmental networks is matched by the scepticism of doubters. For the latter, these networks present significant accountability and legitimacy concerns, and portend a vast technocratic conspiracy – a shadowy world of regulators bent on 'de-politicizing' global issues in ways that will inevitably benefit the rich and powerful at the expense of the poor and weak (Slaughter, 2001, p. 347; Slaughter, 2003, p. 1043).

The ambiguities and ambivalences that affect the issue of transgovernmental networks make them an even more important and intriguing topic for scholars and policymakers. This sentiment seems to be echoed also by Dr. Mateusz Błachucki, the Author of the book entitled *Transgovernmental networks and their impact on domestic legal order (case study of competition authorities networks)*, published recently by The Institute of Law Studies of the Polish Academy of Sciences (hereinafter: PAS). Dr. Błachucki, as a scholar (professor *in spe* of the PAS) and an expert (*inter alia* at the Office of Competition and Consumer Protection), specializing in competition and administrative law, is particularly well-placed to undertake such an ambitious project. The result of his vast knowledge, experience and effort is an exceptional piece of scientific work, based on a large-scale study. This timely, eloquently written and hefty monograph (spanning over 600 pages) makes a very welcome, thoughtful and thought-provoking contribution to administrative law science. The book aspires to fill a gap in existing literature by explaining the legal nature of transgovernmental networks, classifying them and, most importantly, evaluating their impact on the national legal order and the functioning of Polish administrative authorities involved in the networks. Especially the last point renders the book unique. Given that competition policy represents a prime example of supranational governance, where among the most paradigmatic and instructive instances of transgovernmental networks are those from the area of antitrust, formed universally by competition authorities. Given also that contemporary competition (or antitrust) law has been developed to a large extent through and by such networks, they were rightly chosen as a representative exemplification of the subject problem.

The overall structure of the book is generally well conceived and neatly organized. For ease of reading and reference, it comprises twelve chapters, which can be segmented into four main parts. Each chapter is further subdivided into thematic subchapters, reflecting a sequence of research steps. As a minor remark, perhaps

some subtitles in the table of contents could have been a little more polished. For example, State aid appears to be located outside the competition protection area, whereas the competition-policy-related reasoning for establishing State aid control is deeply embedded especially in the World Trade Organization subsidy law and EU State aid law, the latter forming a constituent (and an increasingly important) part of EU competition law (Hofmann, 2016, p. 6; Jacobs, 2004, p. vii).

The first four chapters serve as a tool for the development of the theoretical concept of network administration, as used in the legal and social sciences scholarship, both Polish and foreign. In line with the methodological guidelines, the background introductory chapter sets the stage conceptually and methodologically for the entire study. It outlines in detail the classic components of the opening chapter, by describing the scope of the research undertaken and the book's aims and objectives, as well as by discussing the research methodology employed. Additionally, we will find there compelling reasons for the choice of the research subject, the main argument and thesis of the study with the list of accompanying research questions, bibliographic tips (or rather quite extensive overview of the subject literature), as well as several terminological and technical remarks. For some readers, such an elaborated and unconventionally lengthy (nearly 30 pages) introduction might look a bit too wordy, nonetheless it demonstrates a high level of the Author's methodological proficiency and care.

The book is impressive in its scope of coverage and in the wide range of jurisdictions consulted. However, contrary to what it might seem from the wording of the book's main title, this range does not appear to be unlimited. Hence, for the sake of accuracy it should be noted that the title phrase 'domestic legal order' (on which transgovernmental networks do have impact), actually refers mainly to the 'Polish legal order', what seems to be clear even after an initial analysis of the table of contents and the introductory chapter.

As regards the research methods employed in the book, one should mention a legal and dogmatic (or formal-dogmatic) method (as a basic one), as well as historical and comparative methods (as subsidiary ones). These methods, typical for legal science, are appropriate for the research undertaken. As implicated by the particular nature of the studied phenomenon, the book is the result of a multi-layer analysis, yet with the natural preponderance of administrative law science. Such a methodological approach deserves praise, even more so given the originality of the presented inquiries, which stems from the research attitude looking at transgovernmental networks from the bottom up, or from the perspective of the national legal order. Bearing in mind the interdisciplinary nature of the substantial part of the research, it should be appreciated that extensive scholarship from a variety of legal disciplines was employed in the book, including specifically competition law, public international law and administrative law, enriched by the findings of political science and economics on transgovernmental networks.

After the introductory chapter the Author contemplates the 'phenomenology'[1] of transgovernmental networks. At the beginning, all research efforts are oriented toward

[1] This term is borrowed from A.M. Slaughter, D. Zaring, 2006, p. 215.

identifying the legal character and formulating a legal classification of the networks in question. Afterwards, these findings are confronted with the Polish doctrine of administrative law and international law scholarship. Specifically, traditional forms of cooperation between public authorities and traditional forms of interstate cooperation are discussed in the context of transgovernmental networks. This part of the study is followed by the identification of general means and forms of international cooperation between competition authorities, and by an evaluation of all the international activities undertaken by the Polish competition authority. Thanks to these studies, the role and significance of transgovernmental networks in international cooperation of the Polish competition authority can be better understood.

The second part of the book, consisting of chapters five and six, contains a careful description and evaluation of a broad spectrum of transgovernmental networks, both involving competition authorities and others. The latter ones, involving consumer protection and regulatory authorities respectively, were chosen as an illustration serving to comprehend whether competition networks are distinctive or represent typical solutions in administrative cooperation at a transgovernmental level.

In the third and largest part of the book, comprising chapters seven to ten, the Author offers a detailed and methodical discussion of various issues identified during the exploration of transgovernmental networks. In particular, he provides a comprehensive analysis of the regime and the jurisdiction of national authorities involved in transgovernmental networks. This is followed by a thorough examination of the forms of cooperation within the networks and how they affect national administrative authorities in exercising their jurisdiction. This analysis leads to the identification of spheres and the scope of influence of transgovernmental networks over the domestic legal order and the function of public administration in Poland. In discussing the problem of multilevel governance, national administration is analysed through the prism of emerging European and global levels of governance. Other issues contemplated include legal mechanisms for administrative and judicial supervision over the activities of transgovernmental networks and participating national authorities, as well as legitimacy and accountability of transgovernmental networks.

The last part of the book has two chapters and contains conclusions drawn in the earlier parts. In particular, it examines the prospects for the development of transgovernmental networks. On the basis of general conclusions, areas for further research are identified. In the final pages of the book, the Author offers interesting legislative recommendations.

Since it is not possible to cover in a short review all of the themes, arguments, and insights of this important book, I shall comment on just a few of them.

The book's core argument is that notwithstanding the heterogeneous character of transgovernmental networks, they increasingly influence the functioning of the administrative authorities involved, leading in turn to institutional, substantial and procedural changes within the Polish legal order and administrative authorities. At the same time, as is further demonstrated, the provisions of Polish administrative law are not sufficiently developed to create an adequate regulatory framework for the proper functioning of Polish authorities within transgovernmental networks. Essentially, there

are no adequate regulations allowing the chief organs of Polish administration to supervise the international activities of other Polish authorities, which in consequence are very autonomous in nature, and are generally not subject to any supervision. Hence, as the Author justly observes, the development of transgovernmental networks poses a challenge for Polish administrative science, and for Polish administration itself. In my view, the main thesis of the book is sound, and Dr. Błachucki succeeds in vindicating it. His numerous important (albeit not entirely novel) observations and conclusions on various implications of transgovernmental networks provide a substantial contribution to the field.

Turning to more specific questions, particularly remarkable are the Author's findings confirming the widespread belief that even if transgovernmental networks are already playing a crucial role, and will likely become increasingly common, they are by no means the ideal institutional arrangement for every setting and cannot solve all the challenges of governing the globe. To put it metaphorically, they have a Janus-face image, and are not a 'silver bullet' to the world's problems (Eberlein and Newman, 2008, p. 28; Slaugher and Hale, 2010, p. 49; Eberlein, 2002, p. 136). Particularly instructive in this context are the Author's reflections on the networks to enforce EU law (with the European Competition Network as a prime example). On the one hand, as was demonstrated, such bodies were established for a more consistent, mutually concerted implementation and application of EU law, to the benefit of all stakeholders, including businesses. According to the Author's analysis, this innovative tool to 'govern' EU law proved to be very effective in its role. On the other hand, however, this success comes with certain costs in terms of legitimacy, accountability and due process. In particular, as is further exemplified in a broader (worldwide) context, network-based governance unfolds through a two-step process. First, domestic regulators – often without close supervision by elected officials – engage in international policymaking via networks to harmonize standards and technical rules across borders. Subsequently, these regulators implement these standards, rules, and best practices at home (Bach and Newman, 2014, pp. 395–396). This phenomenon was similarly described elsewhere in literature in the context of EU enforcement networks, which may have a paradoxical 'boomerang effect' on the distribution of power at the supranational level (Eberlein and Newman, 2008, p. 28; Poncibò, 2012, p. 191). Admittedly, in most areas member states have resolutely resisted the formal delegation of regulatory powers to EU agencies in order to retain national control. However, now they may find that horizontal delegation to domestic regulators might result in a similar loss of control as national regulators collectively leverage domestic authority to advance supranational harmonization(Eberlein and Newman, 2008, p. 28; Poncibò, 2012, p. 191). Therefore, Dr. Błachucki quite rightly raises a deeply significant question whether the activity of domestic regulators within transgovernmental networks has gotten out of democratic and administrative control. Moreover, he also provides a flagrant example of the instrumentalization of transgovernmental network for the strengthening position of international organisation, and the weakening influence of national governments on national antitrust administration. According to the Author, a clear manifestation of this anomaly is the, at that time, proposal for a Directive to empower the competition

authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market (the ECN+ Directive).[2]

The book under review reveals not only the Author's high level of expertise, but also his passionate, polemical temperament, especially when he firmly criticises certain aspects of the competition law and policy regime in Poland. Some of these critical assessments invite further reflection, which I will offer not necessarily to defend the status quo, but to better understand the reasons behind it, and mindful of the value of a more nuanced understanding of competition authorities' interdependencies. Incidentally, the Author's critique, while fairly balanced overall, for some readers may seem a little overdone occasionally, especially when on rare occasions he falls into a quasi-journalistic tone, in the otherwise elegantly written and deeply scholarly work.

The Author quite correctly points out that the current (and even some anticipated) rules do not adequately secure the independence of the Polish national competition agency (the President of the Office of Competition and Consumer Protection), indicating, inter alia, the lack of security of tenure for the agency's head as one of the key issues. It could be added here that setting a term of office would certainly be helpful, but definitely insufficient and prone to capture, as evidenced by recent research on the politicisation of regulatory agencies (Ennser-Jedenastik, 2016, p. 507–518). The problem in question seems to be exemplified also by the Author's radical but justified critique of a bill to reintroduce security of tenure and irremovability for the head of the competition agency, as well as to cancel the current, quasi-competitive procedure for her appointment. Indeed, the controversial bill could give rise to the speculation that it was designed as an attempt to politicise the competition agency. However, it should be also noted that this critique, retaining its educational value, proved to be objectless due to the ephemeral nature of the questioned provisions (they were dropped from the bill prior to the start of the actual legislative process). In any case, it always pays to remember that the regulation introducing an appropriate tenure guarantee can be changed at any given time, so in general any independence written into the law may be more apparent than real (Martyniszyn and Bernatt, 2019, p. 13).

Yet another aspect, which affects the issue of independence of the Polish competition agency, is worth considering. It concerns a systemic weakness of the current legal regime in Poland, represented by a lack of a narrowly construed right of executive override (a systemic safety valve), which would allow to accommodate these rare instances where the state's key strategic interests surmount competition concerns, without undermining the agency's credibility (Martyniszyn and Bernatt, 2019, p. 27). Note that according to Polish law, the Prime Minister has no competence to interfere in the on-going work of the competition agency, preserving its decisional autonomy. Moreover, the government does not have tools to change the agency's decisions. In such circumstances, even if the agency head's independence was not

[2] Directive (EU) 2019/1 of the European Parliament and of the Council to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market was signed into law on 11 December 2018, OJ L 11, 14.01.2019, p. 3–33.

formally safeguarded, she was able, for instance, to block a merger between state-owned PGE and Energa – the flagship project of the then government[3]. To compare, for example under German and Dutch competition law, government ministers have powers to intervene even in individual merger control cases, to meet public interest or welfare objectives (van de Gronden and de Vries, 2006, p. 64). Remarkably, in Germany, in the large and controversial E.ON/Ruhrgas case, the merger involved, which was originally blocked by the competition agency (the Federal Cartel Office) with a reputation of being one of the most independent, if not the most independent of all national competition agencies, was finally permitted by political authority (the then Federal Minister for Economic Affairs and Technology) (van de Gronden and de Vries, 2006, p. 64; Wils, 2019, p. 24).

According to the last Author's opinion, to which I will refer briefly, competition law is not especially charged politically, because it is based on universal economic concepts. My perception is somewhat different. I believe that, whether we like it or not, politics exerts enormous influence over nearly every aspect of competition law, most notably its goals and enforcement (including, but not limited to mergers control), particularly where this law becomes an instrument of strategic competition policy or antitrust protectionism (Budzinski, 2008, p. 53; Kerber and Budzinski, 2004, p. 41; Molski, 2015, p. 197). A vast amount of contributions by academics and practitioners, both supporting and objecting to the political dimension of competition law, bear witness to this. Due to the space limit, I will quote just a few of them, starting from the seminal warning of Robert Pitofsky: 'It is bad history, bad policy, and bad law to exclude certain political values in interpreting the antitrust laws' (Pitofsky, 1979, p. 1051). Other scholars admit that '[e]very antitrust orientation has a political side to it' (Podszun, 2016, p. 383), and that '[t]he substantive areas of antitrust law […] illustrate well the enduring political character of this body of law' (Bowman, 1996, p. 168), which 'subject matter, the regulation of corporate power, is primarily a political matter in the constitutional sense' (Bowman, 1996, p. 169), therefore '[p]olicy-making becomes unavoidable in antitrust decisions' (Bowman, 1996, p. 169). Yet other commentators are of the opinion that 'the harmonization of global antitrust laws is imbued with a broader political dimension'(Manne and Weinberger, 2012, p. 490), and view political externalities of antitrust policy as impediments to the adoption of a worldwide antitrust standard (Manne and Weinberger, 2012, p. 505; Sugden, 2002, p. 994).

In concluding of this review I can only express my great appreciation for Dr. Mateusz Błachucki for his deep, erudite, rigorously documented and intellectually stimulating study of a very topical and important subject. I highly recommend his impressive book not only to qualified audience within legal academia and practice, but also to anyone interested in the subject.

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[3] Decision of 13 January 2011, DKK 1/2011.

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Helene Andersson,
Dawn Raids under Challenge.
Due Process Aspects of the European Commission's Dawn Raid Practices
Hart Publishing, 2018, 286 p.

The year 2018 brought about another important publication that approaches the issue of the European Commission's dawn raid practices in competition cases from a fundamental rights perspective. *Dawn Raids under Challenge* constitutes the doctoral dissertation of Helene Andersson, postdoctoral researcher and lecturer at the University of Stockholm who formerly worked for almost 12 years in a Swedish law firm. Thus, the Author's experience as practitioner and, in particular, her extensive expertise in cartel issues, undoubtedly constituted an added value to her academic research.

At the heart of this study lies the question whether it is possible to strike a balance between ensuring adequate fundamental rights protection and effective competition law enforcement. Each of the opposing interests carries a certain weight.

On the one hand, fundamental rights protection has been elevated to primary EU law through the Lisbon Treaty, and companies facing the Commission's investigations have a legitimate interest in safeguarding their rights. Indeed, dawn raids may cause irreparable damage to the companies inspected, in particular, measures undertaken by the officials in an abusive or arbitrary way may have a long-lasting and adverse impact on the companies' right to defence.

On the other hand, competition policy forms one of the cornerstones of the EU legal system and a successful dawn raid is quite often key to a successful investigation. Due to the speed of technological development, and the increasingly sophisticated methods applied by companies to conceal any unlawful contacts, the Commission is actually forced to constantly adjust and develop its investigatory methods. Thus, extending the scope of the protection of companies' rights, to go beyond what is necessary, may unduly hamper the work of the Commission and, consequently, significantly hinder the effectiveness of competition law enforcement.

The book is composed of three main parts that are further divided into chapters.

The first part – *Overview* (46 p.) consists of an introduction of the relevant background of the study. After having briefly identified the scope of the study, Andersson presents two 'weights on the balancing scale'. An overview of the EU competition law enforcement system (Chapter 2) is followed by a presentation of the framework for fundamental rights protection in the EU (Chapter 3). At the end of the first part, the Author ponders

over the question of a criminal nature of the sanctions imposed for infringements of EU competition rules (Chapter 4). In the original text of Andersson's doctoral dissertation, *Overview* also included a chapter on the principle of proportionality. The principle of proportionality constitutes a supreme guideline limiting the Commission's powers and its immense importance in the context of dawn raids is incontestable (a fact further confirmed by the case-law of relevant courts). Thus, I find it unfortunate that the original chapter was eventually removed from the book.

After having highlighted the inherent tension between the need for a well-functioning and effective competition law system and the necessity of safeguarding fundamental rights, the Author moves to the examination of the Commission's dawn raid practices in order to determine whether they meet the standard of the European Convention on Human Rights (hereinafter: ECHR) as required by Article 52(3) of the Charter of Fundamental Rights of the EU. Indeed, the second – part *The Inspection: Is There a Clash between EU and Convention Systems?* (183 p.) constitutes the core of the book in which Andersson provides a step by step analysis of several selected due process issues that arise in relation to dawn raids, that is, the right to enter (Chapter 6), including the right to privacy, (lack of) ex ante review of inspection decisions and standard of the ground for suspicion, dawn raids in sector inquiries (Chapter 7), measures taken during the inspection (Chapter 8), privilege against self-incrimination (Chapter 9), legal professional privilege (hereinafter: LPP) (Chapter 10), access to courts (Chapter 11) and dawn raids at non-business premises (Chapter 12). The analysis is based on a careful examination and comparison of the case-law of the European Court of Human Rights (hereinafter: ECtHR) and the Court of Justice of the European Union (hereinafter: CJEU).

With regard to the right to privacy, in the Author's view, the EU and ECHR systems appear to afford an equivalent standard of protection, acknowledging that legal persons do enjoy protection, but not necessarily to the same extent as natural persons.

In relation to the issue of ex ante review, neither the ECtHR nor the CJEU consider an ex ante review to form an absolute requirement as long as there are other procedural safeguards in place, in particular subsequent judicial review.

One of further safeguards available under the EU system is namely the obligation on the part of the Commission to state the reasons for an inspection. The conducted analysis shows that as long as the Commission has reasonable grounds to suspect an infringement, then the use of dawn raids will be regarded as meeting the suitability, necessity and proportionality *stricto sensu* tests. And a dawn raid carried out without reasonable suspicion, equaling to a so called fishing expedition, would constitute a breach of both Article 8 of ECHR and Article 7 of the Charter.

The examination of the question of dawn raids conducted within sector inquiries leads to the conclusion that absent any suspicion of wrongdoing, such dawn raids carried out based on a Commission decision are abusive and constitute an infringement of companies' right to privacy. The Author notes further that since the Pharma Sector Inquiry there has only been one sector inquiry (e-commerce) and finds that it would be unfortunate if the uncertainty regarding the lawfulness of such dawn raids led namely to the Commission's powers being on the brink of disuse.

Andersson discusses next the scope of the Commission's powers during the course of dawn raids and marks that, first, while it appears necessary to allow the Commission to carry out a rather broad search for information during the course of an inspection, the inspectors are not allowed to actively search for evidence of infringements unrelated to the subject-matter of the inspection and, second, the Commission is allowed to copy to file only material that relates to the subject-matter indicated in the inspection decision. As to the question of conformity of the EU system with the ECHR standard, the Author points out that despite the different approaches, both courts appear to take a rather flexible view and acknowledge that authorities may need broad, although by no means unrestrained, powers to access information and peruse documents. However, the ECtHR is willing to accept even far-reaching measures (like making IT copies of a company's servers and other storage media for subsequent review in Brussels) only provided that the safeguards against abuse or arbitrariness are considered effective and adequate, in particular the right to a proper judicial review of the measures taken during the dawn raids and application of the sealed envelope procedure. Neither of these is guaranteed under the EU system. Thus, the Author believes that while the Commission's practices appear both balanced and reasonably restricted, limited access to courts constitutes a weakness of the EU system that may affect the legitimacy of the Commission's enforcement practices.

The subsequent analysis of the scopes of the privilege against self-incrimination, being of relevance in antitrust cases due to the acknowledged criminal nature of fines imposed in antitrust proceedings, leads to the conclusion that the EU standard of protection appears to be slightly lower than the one enshrined in the ECHR. Nevertheless, prudent in her considerations, Andersson notes that – save for the limited possibilities to obtain a judicial review of questions posed in the course of an inspection – the EU standard might be accepted by the ECtHR since competition cases relate to legal persons (not natural) and fall outside the core meaning of 'criminal offence'. In the Author's view, the protection afforded by the CJEU strikes '*an acceptable, if not perfect, balance between the need for effective competition law enforcement and the protection against having to incriminate oneself*'. The existence of an absolute protection would go beyond what is necessary to safeguard the companies' right to defence and would unjustifiably hinder the performance of the Commission's duties under Regulation 1/2003.

The further examination of the protection of LPP in the EU leads Andersson to a firm conclusion that the scope of LPP granted by the CJEU is unjustifiably narrow, since it covers neither correspondence with non-EU lawyers (even those admitted to the bar) nor correspondence with external lawyers but unrelated to the investigation at stake. On the other hand, the Author believes that limitation of the privilege to cover only correspondence between a company and its independent counsels is both rational and logical. Furthermore, Andersson points at an important weakness in the ECHR system revealed in *Vinci Construction*, that is, the fact that the ECtHR, instead of being concerned by the sole fact of privileged documents being copied by the authority, focuses actually on the standard of judicial review of such a measure and the possible restitution of the contested documents. I fully agree with the Author's

view that ordering the restitution of any documents covered by LPP cannot constitute an effective remedy, since this would mean that the authorities would already have had time to peruse the privileged documents. And, as repeated after the president of the General Court in *Akzo, 'the mere disclosure of privileged documents may cause irreparable harm'*.

Access to courts appears to be a due process issue of key importance in the context of dawn raids. This chapter reveals significant discrepancies between the standard of protection afforded under the EU and the ECHR systems. In the current EU system, first, companies do not have a right to a timely, certain or effective judicial review of measures taken during the course of a dawn raid, and, second, EU Courts lack jurisdiction to direct the actions of the Commission. The ECHR standard in this regard should not be considered too high, since it would not result in unjustified hindrance to the performance of the Commission's duties under Regulation 1/2003. On the contrary, it actually allows a very flexible approach towards the investigative methods adopted by competition authorities.

Last but not least Andersson briefly examines the possibility to conduct dawn raids at non-business premises. The Author notes that the procedural safeguards regarding dawn raids of non-business premises are higher than those related to company premises (in particular the requirement of an authorization from a national court). Otherwise, considerations presented in the previous chapters are also applicable to cases regarding non-business premises, in particular as many of the ECtHR rulings have concerned natural persons.

In the third part of the book – *Summing up* (31 p.) the Author not only summarizes the conclusions presented at the end of earlier chapters relating to the identified due process issues but also *'joins the dots'*, that is, provides the answer to the main question of the study. Andersson concludes namely that, yes, it is possible to strike a balance between the conflicting interests of adequate fundamental rights protection and effective competition law enforcement. However, due to a number of concerns identified in the study, and some hurdles that have to still be overcome, such a balance does not exist currently/already. Having emphasized that striking a balance does not necessarily equate '*establishing conformity with ECHR law*', the Author divides the main concerns into two categories, namely those regarding, first, the limited access to courts, and, second, the scope of the LPP.

Since the Commission's powers to adopt intrusive investigatory measures need to be effectively counterbalanced by adequate safeguards against abuse or arbitrariness, in the Author's view, the sole limitation for companies to have measures taken on the basis of inspection decisions reviewed by the court (in particular making image copies of storage media for review at Commission headquarters) risks affecting the legitimacy of the entire dawn raid system.

As to the second category relating to LPP, the Author points out two limitations which do not serve the interest of proper administration of justice, and therefore result in the right of defence of companies being unjustifiably limited. Those are the exclusion of correspondence with external lawyers admitted to non-EU bars and of correspondence which is unrelated to the subject matter of the investigation.

Andersson presents her study in a scrupulous and objective way, acknowledging the importance of both interests concerned. Emphasizing the need of proper procedural safeguards being available to inspected undertakings, Andersson adds that *'it is equally important that they are not overprotective and constitute an unjustified hindrance to the Commission's work'.* In the Author's belief, that I fully agree with, founding and striking the requested balance will actually lead to a greater efficiency of the EU competition law enforcement system. By ensuring adequate fundamental rights protection, the enforcement system will not only gain further legitimacy, it will also be more effective as the Commission's actions will be less contestable on procedural grounds.

Having discussed the merits of the Andersson's study, some minor comments on the formal aspects of the book are to be made. For the sake of coherence, it would be preferable to unify, first, the order of the subchapters presenting the courts views, and, second, the names of such subchapters. In relation to some issues the Author starts her analysis with the ECtHR approach while in relation to others Andersson begins with the CJEU approach. However, it would be more logical to have a fixed order when it comes to the presentation of the case-law. Likewise, the Contents would have been more transparent and reader friendly if the titles of the subchapters presenting the courts' views and conclusions had been unified in all chapters of the second part of the book. Lastly, one may wonder why, on the one hand, three important due process issues – right to privacy, ex ante review and ground for suspicion, were combined into one long chapter (51 p.) and, on the other hand, the issue of dawn raids in sector inquiries (closely linked to the issue of ground for suspicion) was put into an individual chapter (of only 8 p.).

Those minor comments do not, however, compromise the high quality of the presented study which is followed by an important selection of Anglophone literature and relevant jurisprudence as well as a very useful index. I definitely recommend the reviewed book to both practitioners and researchers specializing in competition law.

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Alexandr Svetlicinii
Competition Law in Moldova
Kluwer Law International, 2018, 182 p.

The book *Competition Law in Moldova* represents the first in-depth analysis of competition law enforcement in Moldova. The volume was published in 2018 by Kluwer Law International in the context of the *International Encyclopedia of Laws* collection.

After its independence from the Soviet Union, Moldova adopted its first anti-monopoly law in 2000. The legislation was amended in 2012 – that is, the act that is in force at the moment. During the past twenty years, Moldova has progressively aligned its competition law with the EU standards, both in terms of primary legislation and soft law adopted by the Moldova Competition Council. The latter documents, in fact, closely resemble the guidelines adopted by the European Commission in different fields of application of EU competition rules. Two main differences between Moldova and EU competition law are highlighted in the volume: first of all, like most of the countries in Easter Europe, Moldova has a strong tradition of presuming dominance on the basis of the undertaking's market share within the relevant market. While the presumption of dominance based on 35% market share included in the first anti-monopoly law has been deleted in the current version of the competition act, the Competition Council still places an important emphasis on market share in its competition law analysis. Such approach diverges from the case-by-case approach followed under EU competition law to determine dominance, where market share is one of the indicators taken in considerations to presume dominance in the market. In addition, Moldova competition law provides for criminal sanctions for individuals, mostly in the form of fines and disqualification from certain professions. Although criminal sanctions exist in the competition law of a number of EU Member States in relation to cartel violations, in Moldova, criminal sanctions are also applicable to a number of acts concerning unfair competition. These divergences, however, are minor: as mentioned above, Moldova has aligned its competition law with EU standards first in the context of the EU-Moldova Eastern Partnership, and later due to the EU-Moldova Association Agreement, which entered into force in 2016.

The book analyzes in detail the substantive provisions of Moldova competition law in relation to anti-competitive agreements, abuse of dominance and merger control, and it draws a comparison with the applicable EU *acquis.* In addition, the volume discusses the procedures followed by the Moldova Competition Council in

enforcing the competition act, as well as the role of national courts both in review of Competition Council decisions (that is, public enforcement) and in potential damage claims (that is, private enforcement). It is worth noticing, in particular, that besides the analysis of the applicable legislation and soft law, the book discusses the main decisions adopted by the Competition Council and court rulings during the past years. The book thus provides an exhaustive overview of how competition law has been enforced in Moldova in the past decade.

The author is a well-known competition law academic, born in Moldova. During the past years, Dr. Svetlicinii has published several academic articles on trends in competition law enforcement in Eastern Europe, in particular in Moldova. The present volume builds upon the extensive knowledge acquired by the author in this field during the past years.

To conclude, the book represents the first comprehensive analysis of Moldova competition law. The book is very informative: due to its focus on the decisions of the Competition council and court rulings, the book is suitable for practicing lawyers, and in general for those who are interested in the enforcement of competition law in Eastern Europe.

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CONFERENCE REPORTS

The Competition Law and Policy Roundtable Series – Ex-post Economic Evaluation of Competition Policy Enforcement, University of Zagreb-Faculty of Economics and Business, 12 February 2019

The Competition Law and Policy Roundtable Series (https://pptn-tribina.net.efzg.hr/) started in early 2018 as a joint project of the University of Zagreb-Faculty of Economics and Business (EFZG), the Croatian Competition Agency (AZTN), the newly formed Croatian Association of Competition Law and Policy (HDPPTN), and the European Documentation Centres at the University of Zagreb Faculty of Law and EFZG. The roundtables take place at EFZG, and around four roundtable events annually are being organised, focusing on hot topics in competition law and policy. Jasminka Pecotić Kaufman (EFZG) acts as the moderator. The first meeting was held in April 2018 with a focus on the issue of minority shareholdings and merger control, and its possible impact on the intensity of market competition in the context of increasing market concentration. The second meeting, held in October 2018, was on the standard of proof in cartel cases as defined by Croatian courts, organised as a reaction to several controversial judgements adopted by the Croatian Constitutional Court and the High Administrative Court. The third roundtable took place in November 2018, with Dr Marek Martyniszyn presenting his research on three decades of competition system development in Poland.

The fourth roundtable, held in February 2019, focused on *ex-ante* economic analysis of antitrust enforcement, and is the object of this report. The panellists were Dr Marko Družić (EFZG) and Dr Velibor Mačkić (EFZG), two microeconomists; Dr Vladimir Arčabić (EFZG), macroeconomist; and Mr Dejan Garić, economist case handler from AZTN.

In his introductory presentation, Dr Mačkić pointed out that, from a political economy point of view, *ex-post* economic evaluation of competition policy enforcement is an essential part of the architecture of a successful economic model of a contemporary economy. Namely, it provides incentives and constraints for the economic agents operating on the market. Since productivity is a *condicio sine qua non* of a competitive economy, it requires a market that has freedom of entry, low level of crony relationship with public officials, and going after abuses of market dominance and cartels. Analysing regulations and interventions, which ensures right incentives

in a market economy, requires constant evaluation of ongoing public policies as the main goal of *ex-post* economic evaluation of competition policy enforcement. As Dr Mačkić pointed out, two sub-goals can be identified: (1) assessment of the effect of public policies (desired vs achieved) and (2) development of better regulations and policies.

Defining the evaluation as a systematic identification of the effects of a specific intervention or policy, Dr Mačkić distinguished between *ex-ante* and *ex-post* evaluation. An *ex-post* evaluation, or a retrospective economic evaluation, looks at the economic effects of competition policy enforcement in terms of prices, mark-ups (microeconomic effects) and ultimately productivity and growth (macroeconomic effects). It is evidence based, critical and looks at causality links. Dr Mačkić emphasised that its quantitative importance can be summarized as the estimation of (1) the change in market behaviour of economic agents, (2) expected changes on the market and (3) unintended and unexpected changes on the market. The impact on the conditions of competition can be either direct (merger control and anti-trust decisions) and/or indirect (deterrent effects that prohibit cartels and similar illegal agreements). There are three channels by which the effects of competition policies are translated into the economy: (1) allocative, (2) productive and (3) dynamic efficiency, thus leading to change in prices/costs of production and the change in quality and variety of goods and services in the market. These are, in essence, the price and non-price aspects of the competitiveness of contemporary economies. If one of them is operating sub-optimally, the competitiveness level of the economy will not ensure convergence.

Dr Mačkić said that, since *ex-post* economic evaluation implies the existence of competition agencies and their decisions, there are three main outputs of the evaluation. First, the definition of the competition policy regulatory framework (legislation, guidelines, notice, etc.). Second, decisions taken in the different areas of competition policy (mergers, cartels, abuse of dominance and state aid control). Third, market studies or sector inquiries, advocacy actions and international collaboration with other competition agencies. He furthermore pointed out that *ex-post* economic evaluation activities can be assessed at the level of the market (the impact of a specific decision or competition policy rule on the functioning of a well-specified market), the sector (performances of particular sectors) and the macroeconomic level (welfare, productivity and growth). Having that in mind, one can distinguish between microeconomic (the effect on prices, mark-ups, market power, entries on the market) and macroeconomic (e.g. the customer's benefits of all merger decisions) *ex-post* economic evaluation. Most of the existing work has been done in microeconomic evaluation due to demand, available data and empirical methods available.

Finally, Dr Mačkić noted that, with respect to the practice, literature points out that the optimal approach is continuous evaluation as opposed to evaluation triggered by an omission in competition policy. Three main steps can be distinguished in an *ex-post* evaluation project: preparation, execution and exploitation of the

results. These, however, depend on the resources available since not all competition agencies have them at their disposal and, more importantly, not all governments see competition policies as a tool in boosting the competitive position of their respective economies.

For the next speaker, Dr Družić, the goal of his presentation was to give an introduction to the lens through which microeconomists view *ex-post* analysis, or more generally, the job that Competition Authorities (hereinafter: CAs) do. Specifically, the goal was to answer two main questions: 1) why is the topic of *ex-post* analysis interesting from a microeconomic point of view, and 2) what type of work has recently been done by microeconomists on this topic, and what conclusions did it reach. The answer to the first question is that *ex-post* analysis of CAs' decisions provides a very interesting testing ground for microeconomic theories, and also for methods frequently used in microeconomic analysis. Furthermore, *ex-post* evaluations simultaneously benefit CAs by providing feedback on the quality of decisions. They also have 'reputation enhancing' qualities for CAs, by making them more transparent and giving them the ability to communicate positive results. In conclusion, *ex-post* analysis provides an environment in which microeconomic theory and regulatory practice can both thrive in synergy with each other.

Furthermore, Dr Družić pointed out that the majority of *ex-post* evaluations done by microeconomists in the last ten years were on the subjects of mergers and cartels. Mergers present a problem because in theory the effects of mergers can be positive or negative, depending on the relative strength of efficiency-enhancing effects (economies of scale etc..), and price-raising effects (too much market power gained by the merged entity). The research done suggests that the answer to 'which effect prevails' varies from sector to sector, and even from case to case.

He noted that when looking at mergers with remedies, it was found that structural remedies are found to be far more efficient than behavioural remedies. An interesting conclusion arrived at by some papers suggests that CAs, by defining and executing a transparent, consistent and predictable policy, create a very powerful deterrent effect (a study done in the UK suggests that 4/5 harmful mergers are stopped without the need for the CA's intervention).

As he pointed out, when looking at cartels, the main problem is detection, as studies suggest that as much as 4/5 cartels remain unnoticed. The main detection tool is the comparison between the observed and competitive price (a price that simulations suggest would prevail if the market was competitive). Finally, he noted that it was found that in cartels the average observed price is 15–20% higher than the competitive price, and that the difference between the prices is substantially higher outside the USA and EU.

Speaking on macroeconomic effects of competition policy, Dr Arčabić, noted that the purpose of macroeconomic evaluation of competition policy was twofold. First, the positive effects of competition policy on the aggregate level justify the legitimacy and purpose of competition authorities. Second, *ex-post* evaluation and measuring is

useful for quality control and provides important feedback for competition authorities. Macroeconomic effects of competition policies can be measured using a bottom-up approach, measuring the direct benefits of competition policy for consumers. This is a simple and direct measuring method usually used by competition authorities. The benefit is calculated as price decrease times duration of the decrease. This approach varies substantially across different competition authorities and the OECD made a proposal to unify the measurement. The main benefit of this approach is its simplicity and the fact that it starts from actual cases. The disadvantage of this approach is that it shows only direct benefits, so results are always very modest. The second method is measuring both direct and indirect effects of competition policy at the aggregate macroeconomic level. This approach is usually used by the academic community. It is more complex, but also more precise. The research in this area is not very wide, but in general competition policy increases completion which, in turn, positively affects economic growth. This way of measuring typically shows larger benefits of competition policy.

He pointed out that, in that regard, it is very important to measure the strength of competition policy. Usually, it consists of two parts: competition policy laws and institutions, and competition policy enforcement. The stronger the competition policy, the bigger the effect on competition. The biggest challenge here is measuring the strength of competition policy where different indicators are used. Indicators are based on surveys or on objective indicators such as competition authority budget and staff.

Dr Arčabić furthermore noted that, in empirical literature, the effect of competition policy on the competition itself is positive, but it is not very strong, and there is a pronounced endogeneity problem in measurement. Competition policy also has a positive effect on macroeconomic performance, but the endogeneity problem persists. In empirical literature, it is possible to identify a positive effect of competition policy on GDP growth, productivity, investment, and a number of firms, while it also decreases mark-ups. These results are beneficial.

Finally, he noted that higher competition stimulates economic growth via three main transmission mechanisms. First, it increases *allocation efficiency* by increasing business dynamism and decreasing mark-ups. This channel is empirically confirmed. Second, it increases *productive efficiency* by stimulating management quality. This channel has been empirically confirmed as well. Finally, the third mechanism is dynamic efficiency related to innovation. This mechanism is hard to analyse empirically, and results are inconclusive. Typically, an inverse U-shaped relationship is found, where both low and high competition have a negative effect on innovation. A medium level of competition is beneficial for innovation.

In the last presentation, Dejan Garić discussed in more details the qualitative and quantitative methods for *ex-post* analysis of merger and cartel decisions, in particular surveys and peer reviews, event studies, estimations and simulations, and quasi-experimental methods. He noted that the Croatian Competition Agency informs the public on its enforcement efforts through its annual reports, and that smaller agencies,

with scarce resources, are limited in engaging in *ex post* evaluation exercises of their own decisions.

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Judicial Deference in Competition Law, University of Warsaw, 11 October 2018

This conference report captures a one full-day programme of presentations and discussions within the conference on Judicial Deference in Competition Law, organised by the Centre for Antitrust and Regulatory Studies (CARS) hosted by the University of Warsaw (Faculty of Management) on 11 October 2018.[1]

The conference aimed at discussing the place for judicial deference in the area of law that requires expert knowledge and involves policy questions: competition law. The discussion included the theoretical and axiological aspects of judicial deference in administrative law, the place for judicial deference to a competition authority's economic assessment and determinations regarding fines, as well as the link between the institutional and the procedural organisation of the proceedings before the competition authority and the intensity of judicial review. The event brought together academics, judges, national competition authorities' members and practitioners from the EU and the US willing to discuss judicial review in competition and administrative law.

First, the Dean of the Faculty of Management of the University of Warsaw, Alojzy Z. Nowak, gave a welcome address to the attendees and conveyed his enthusiasm in having the University of Warsaw hosting such a conference.

Opening the scientific programme of the conference, Maciej Bernatt (University of Warsaw, CARS) highlighted the need to discuss judicial deference, also considering the times we live in, and the crisis of democracy Central Europe is facing. The crucial question of the conference was what is an appropriate model of judicial review of administrative actions and, more generally, how to balance the powers of courts and administration.[2] It is indeed important to discuss how intense should be the judicial review and what are the conditions to be satisfied to allow a court to defer to the administration's assessment. According to Maciej Bernatt, judicial deference relates

[1] The conference was organised in the frame of the research project 'The Limits of Judicial Assessment in Competition Law' funded by the Polish National Science Centre (UMO-2014/15/D/HS5/01562). The conference was supported by Clifford Chance, Gessel and Modzelewska&Paśnik law firms. See the conference web page: http://www.cars.wz.uw.edu.pl/konferencje_gb-40.html This report has been written within the mentioned research project.

[2] See also M. Bernatt, *Transatlantic Perspective on Judicial Deference in Administrative Law*, Columbia Journal of European Law, nr 22(2), 2016, 275–325, available: http://ssrn.com/abstract=2648232.

to the intensity of judicial review; it is not about areas that are beyond judicial review but rather about respect to the choices made by expert administration (out of the permissible ones) after effective judicial review is provided. Judicial deference is permissible once certain variables are present to a sufficient extent. They include due process guarantees during administrative proceedings, impartiality of administrative decision-makers, and expertise of the authority. Maciej Bernatt presented the conference programme which was planned to start with general issues of judicial review and judicial deference (keynote speech and session 1), move to the competition law field with specific regard to intensity of judicial review of the economic assessment (session 2) and the intensity of judicial review of administrative determination of fines (session 3) and then discuss the link between institutional organisation of a competition authority and the intensity of judicial review (session 4).

After the opening remarks, the conference continued with the keynote speech of Paul Craig (Oxford University) who provided the audience with an insightful explanation of the foundations of judicial deference, focusing both on issues of law and fact.[3] In particular, Paul Craig began his speech stressing the importance of locating deference (that is, different contexts differently deal with judicial deference). Then, he focused on the issues of law arising from deference, stressing the differences between the existing models (adopted by civil law countries, common law countries and by the Court of Justice of the European Union). In this context, Professor Craig remarked the tensions with the US Chevron Test. After having dealt with the legal issues, Professor Craig moved to the analysis of the issues of fact (in particular, interpretative discretion) explaining their consequences, qualification and exemplification.

After this solid theoretical background on judicial deference, the conference continued with the mentioned four sessions.

Session 1: Judicial Deference: General Aspects

The chair of the session, Mirosław Wyrzykowski (Judge Emeritus, Constitutional Tribunal of Poland) took the opportunity to make some reflections on the current situation in Poland, which is facing a deep constitutional crisis. Therefore, Mirosław Wyrzykowski remarked how important it is for such a conference to happen in Poland.

The first speaker of the session, Kent Barnett (University of Georgia), after having stressed the relevance of a comparative debate on judicial deference, framed the main categories of deference. Next, the speaker concentrated on challenges that concern *Chevron* deference (as opposed to *de novo* review with or without *Skidmore* review). The challenges, in his view, arise largely from *Chevron*'s questionable primary justification (legislative delegation to agencies) and its failure to account for how secondary justifications fit with the doctrine (expertise, uniformity, and political accountability). He discussed the need for these justifications and their tension with one another. In conclusion, he considered how a more orderly, searching inquiry

[3] Paul Craig presentation is available at http://www.cars.wz.uw.edu.pl/konferencje_gb-40.html.

into whether statutory ambiguity or vagueness exists might leave a smaller, yet more legitimate space, for an agency's institutional advantage in statutory interpretation.

After the US picture, Rob Widdershoven (University of Utrecht) focused on judicial deference and the Court of Justice.[4] He then selected two key categories: the intensity of judicial review of EU acts exercised by the Union Courts as administrative courts and the EU influence on the intensity of judicial review by national courts of national acts within the scope of EU law. Rob Widdershoven then identified a convergence between the two, considering that the CJEU increasingly exports its standards of judicial review of EU acts to judicial review by national courts of acts within the scope of EU law.

Miroslava Scholten (University of Utrecht) was asked to focus on judicial deference from a broader perspective, within the system of the rule of law.[5] She observed that different jurisdictions use different logics and arrive at different tests developed by the courts to set the 'rule of the game' for judicial deference, but notwithstanding these differences, the function of the mechanism is the same. It is to prevent abuse/misuse of public power by public authorities while preserving the effective operation of the executive machinery. To determine/assess to what extent judicial deference ensures this function in a particular jurisdiction, one needs to look at the broader system of control. This broader picture requires mapping out the availability and effective operation of other relevant types of controls, such as administrative review and political accountability, as well as the balance between ex-ante and ex-post procedural safeguards. The availability and operation of these other mechanisms will impact the need for and scope of judicial deference to create an effective system of controls and the rule of law without undesirable gaps in control and excesses which could jeopardize the effectiveness of decision-making.

The debate which followed well framed the theoretical points of the session's presentations in the current scenario and, in particular, within the democratic crisis we are dealing with. More in general, a pathway between theory and practice has been traced, both from an EU and a US perspective. Last, the discussion underscored the importance of the expertise requirement and several understandings of it have been shared.

Session 2: Judicial Deference and Competition Authorities' Economic Assessment

Małgorzata Modzelewska de Raad (Modzelewska&Pasnik Law Firm) – who chaired the second session – first explained its scope. Having heard and discussed the general categories both in abstract and in concrete, the session had the goal to apply

[4] Rob Widdershoven presentation is available at: http://www.cars.wz.uw.edu.pl/konferencje_gb-40.html.

[5] Miroslava Scholten presentation is available at: http://www.cars.wz.uw.edu.pl/konferencje_gb-40.html.

the notion of judicial deference in the competition law field, stressing that competition law, by its very nature, requires economics.

Ioannis Lianos (University College London) framed the use of economics and econometric evidence in EU competition law.[6] He stressed that the review made by the CJEU toward the Commission is limited and concerns manifest errors. He argued that if we overly limit deference through some heavy scrutiny of the economics applied by the agency, in particular non-mainstream economics, this will ossify the economic thinking used by the authority. He observed that there should be some balance in making sure the Commission respects the rule of law but also in providing it with the policy space to shift to new economic theories if it so decides. He then discussed the recent Dow/Dupont and Bayer/Monsanto mergers and the focus on innovation as a possible test case for less mainstream economic positions.

Andriani Kalintiri (City University London) argued that the Commission's economic assessment should not be beyond judicial review. She stressed that economic assessments underpinning the construction of the law are subject to *full* – not marginal – review. On the other hand, once the Commission performs economic evaluations, that is, when it applies the law to the facts of a specific case, the authority seems to enjoy some margin of appreciation: it is free to decide which theory or theories of harm to pursue, how to investigate the case and what tools to use. In this respect, the General Court may not substitute its own economic assessment for that of the Commission. Nevertheless, in practice, marginal review is far less marginal than what one might initially think. A look at the case law suggests that 'manifest errors of assessment' may take four different forms: a failure to correctly assess the material facts underpinning the Commission's evaluations; a failure to take into account a relevant factor; taking into account an irrelevant factor which distorted the outcome of the analysis; and a failure to satisfy the standard of proof. Accordingly, thinking of 'manifest error of assessment' as a single object category is inaccurate.

Annalies Outhuijse (University of Groningen) then moved the discussion to judicial review of national competition authorities.[7] She argued that the Member States apply different systems of judicial review of national competition authorities' economic assessment with a particular focus on cartel fines. National courts, both first and second instance courts, take different positions concerning the opportunity of reviewing the economic assessment and the intensity of the review. There are also clear differences in whether the agencies, according to the courts, are supposed to pursue detailed market analyses to assess if a specific conduct is anti-competitive or if the use of legal presumptions of the anti-competitiveness of a given behaviour is sufficient. In addition, other factors lead to differences in judicial review. They include, among others, the degree of specialisation of the courts.

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[6] Ionnnis Lianos presentation is available at: http://www.cars.wz.uw.edu.pl/konferencje_gb-40.html.

[7] Annalies Outhuijse presentation is available at: http://www.cars.wz.uw.edu.pl/konferencje_gb-40.html.

The discussion that followed dealt with the definition of the standard of review and with the role that should be given to economic expertise.

Session 3: Judicial Deference and Competition Authorities Fining Policy

Iwona Terlecka (Clifford Chance) opened the discussion of the judicial review of fines from an EU, Polish and Hungarian perspective: each of the panellists had a market to cover.

As far the EU is concerned, Krystyna Kowalik-Bańczyk (Judge of the General Court) first identified the jurisdiction of the General Court as a clear example of a non-specialized court.[8] After having framed the notion of unlimited jurisdiction, she explained why, in practice, it is not so unlimited. She focused on three aspects of control within the EU General Court: the scope, the intensity and the quality, providing several cases in support.

Dawid Miąsik (Judge of the Polish Supreme Court, Polish Academy of Sciences) dealt with the intensity of judicial review of fines in Poland starting with an overall background which clarified the peculiarities of the Polish situation.[9] In the light of this overview, it is difficult to identify specific drivers and rationales of the judicial review of fines in Poland. Several examples have been given to explain the different scenarios that can arise.

Csongor Nagy (Szeged University) moved to the Hungarian context, explaining the peculiarities of the Hungarian competition authority and the trends of its activity.[10] In particular, he identified two fundamental changes: the decrease in deference accorded by Hungarian courts to the finding of the competition agency and the application of more stringent standards by courts

Iwona Terlecka then put on the table the question if judicial review could provoke an increase of the fines, collecting answers from different perspectives. Discussed furthermore were the requirements that authorities should satisfy to have a good reputation.

Session 4: Institutional Structure of a Competition Authority and the Intensity of Judicial Review

Bernadeta Kasztelan-Świetlik (Gessel law firm), framed the relevance of understanding the intensity of judicial review and, in this context, she commented on the recent changes in the procedure at the Polish level.

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[8] Krystyna Kowalik-Bańczyk presentation is available at: http://www.cars.wz.uw.edu.pl/konferencje_gb-40.html.

[9] The abstract of Dawid Miąsik presentation is available at: http://www.cars.wz.uw.edu.pl/tresc/konferencje/40/11_10_2018_Abstrakty.pdf.

[10] Csongor Nagy presentation is available at: http://www.cars.wz.uw.edu.pl/konferencje_gb-40.html.

Starting from the EU framework, Renato Nazzini (King's College London) provided the audience with his view and, in particular, he explained that we still have problems to be resolved with regard to judicial deference within the EU, notwithstanding the case-law.[11] He developed his reasoning, commenting on the relevant case-law (of the ECHR and the CJEU) and placing the problem in a comparative context, looking at the US and Canadian systems. Then, Renato Nazzini stressed the need for a clear taxonomy of discretion and stated that full jurisdiction is both about the scope and the intensity of judicial review.

Moving to the UK competition law institutional model, David George (UK Competition and Market Authority) dealt with the intensity of judicial review by the UK Competition Appeal Tribunal (CAT).[12] After having framed the role of the CAT, David George focused on the relevant discipline and explained the standard of review.

Maciej Bernatt's presentation focused on the intensity of judicial review in several member states (Poland, Slovakia, Czech Republic and Hungary), comparing this scenario with the US one.[13] The speaker compared models of judicial review of NCAs decisions: cassatory in the Czech Republic and Slovakia (legality review) and reformatory in Poland and Hungary (*de novo* review). After distinguishing the competences of courts, he discussed whether the review (whatever the model) is in practice effective. Next, he analysed if national courts tend to defer to the expert findings of the NCAs and whether such an approach (if existent) is based on the courts' acknowledgement of the competition authority's superior expertise. Finally, he discussed whether proceedings before the NCAs ensure sufficient due process guarantees, the impartiality of decision-makers, and the overall expert character of the decision-making process. On this basis, he examined whether there are grounds for the reviewing courts to defer to NCAs expert findings. He concluded that, currently, the review undertaken by national courts is often superficial and formal and thus ineffective. At the same time, the review by higher courts is rarely deferential towards the NCAs findings. These courts – often because of expertise of judges in the antitrust field – tend to substitute the NCAs expert determinations with their own. However, according to Maciej Bernatt, in the majority of the analysed countries, there are currently no grounds to argue for greater judicial deference. Proceedings held before the NCAs still do not provide for sufficient division between investigatory and decision-making functions (case of Poland, Slovakia and the Czech Republic); also, due process guarantees should be broadened. In addition, NCAs' expertise may be insufficient for both institutional and practical reasons; in particular, it is put at risk due to the political model of appointment of NCAs' presidents.

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[11] Renato Nazzini presentation is available at: http://www.cars.wz.uw.edu.pl/konferencje_gb-40.html.

[12] David George presentation is available at: http://www.cars.wz.uw.edu.pl/konferencje_gb-40.html.

[13] Maciej Bernatt presentation is available at: http://www.cars.wz.uw.edu.pl/konferencje_gb-40.html.

Katalin Cseres (University of Amsterdam) continued the discussion on the variables of judicial deference already mentioned, that is, she dealt with the role of consumers in competition proceedings and linked this to judicial review in general, and to judicial deference in particular.[14] She first identified scenarios where consumers access EU competition procedures and then referred to relevant recent EU cases. She argued that despite the fact that consumers' participation could, in fact, strengthen the ways in which competition authorities collect the information that is needed to establish the relevant factual and legal aspects of a given case, and could thus justify courts' deference to the competition authorities' discretion, it is this very discretion and its marginal review that stands in the way of such 'improvement' of administrative decision-making.

Summary of the Conference

Spencer Waller (Loyola University Chicago) summarized the conference.

First, he provided the audience with a useful frame, put forward by Maciej Bernatt, to think about all the presentations and to check the activity of all competition law authorities which is based on three variables: independence, expertise and due process. These three are essential tools to understand how far deference should and should not go.

From a definitional point of view, Spencer Waller highlighted that the labels different jurisdictions use for discretion and the related actions do not fit. Therefore, he stressed the need to develop a better taxonomy within judicial deference in order to be sure we refer to the same meaning when we use words such as discretion.

Another key aspect of the debate concerning judicial deference is the democracy issue, also considering that agencies have to be democratic bodies. In this context, Spencer Waller discussed democracy in the antitrust system, showing that the latter should be seen as an evaluative process based on democratic values.

Last, Spencer Waller framed challenging hypothetical scenarios – at the US and EU level – aimed at leaving open the question on what judges should do in terms of degree of deference and at showing that the conference fulfilled its stated goals.

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[14] Katalin Cseres presentation is available at: http://www.cars.wz.uw.edu.pl/konferencje_gb-40.html

The European Electronic Communications Code – implementation in Polish law, Faculty of Management of the University of Warsaw, 24 June 2019

On 24 June 2019, a conference on 'The European Electronic Communications Code – implementation in Polish law' was held at the Faculty of Management of the University of Warsaw. The conference was organized by the Centre for Antimonopoly and Regulatory Studies (CARS) and the Center for Research of Legal and Economic Issues of Electronic Communications (CBKE). The conference consisted of two sessions and a panel discussion.

Professor Tadeusz Skoczny, the Director of CARS, and Professor Stanisław Piątek, the Deputy Director of CARS, opened the conference. Professor Skoczny welcomed the participants on behalf of the Dean of the Faculty of Management. Professor Piątek elaborated on the goal of the conference, which was to establish whether the implementation of the European Electronic Communications Code (hereinafter: EECC) requires an update of the existing Polish Telecommunications Law or rather the preparation of a completely new law.

The first session was moderated by Adam Jasser, Deputy Director of CARS.

Assistant Professor Ewa Galewska spoke about co-investment from a regulatory perspective. New infrastructure is needed in the EU to create a digital single market. The experience thus far in Europe has indicated that infrastructure develops best in Member States such as Spain, Portugal and France, which promote moving up the investment ladder, rather than in countries relying on highly regulated access obligations, such as Germany. There exist two models of co-investment. In the regulated model, the National Regulatory Authority (hereinafter: NRA) may influence the agreements entered into by undertakings to a considerable extent, while the commercial model allows for much more flexibility, even though it does not rule out an intervention by the NRA to remedy concerns relating to a market subject to co-investment. Both models work quite well in practice. The 2002/2009 regulatory framework did not rule out co-investment, however it was directly addressed only in the EECC. There is no definition of co-investment in the EECC, which allows the concept to be interpreted rather freely. The existence of co-investment agreements must, as a rule, be taken into account by NRAs, which must constantly monitor such agreements in order to determine whether a given market requires regulatory remedies. Co-investment may justify the withdrawal of regulatory remedies; however, such remedies may be put in place when co-investment proves problematic. The speaker considers co-investment to

be a de-regulatory feature, which comes with the risk of market consolidation, creating oligopolies and weakening regulation based on the existence of an undertaking with significant market power.

Professor Sławomir Dudzik spoke next talking about the management of radio spectrum under the EECC. The EECC consolidates the directives constituting the 2002/2009 regulatory framework, introducing some new concepts. The proper management of radio spectrum is necessary to create a digital single market in the EU. Radio spectrum policy aims at harmonization, the promoting of efficient use of spectrum, creating a stable investment environment, and a quick deployment of 5G networks. Harmonization should be achieved with the participation of the Radio Spectrum Policy Group (hereinafter: RSPG), which has no authority to issue binding decisions, but the reports and opinions of which may influence how individual Member States manage spectrum. Under the EECC, spectrum remains a national good and the profits from granting access to spectrum remain the profits of the national budgets. The EU authorities provide coordination only, with the exception of the binding Commission decision on resolving a dispute between Member States over the use of spectrum. The new concept of shared use of spectrum, necessary for the development of innovative solutions such as autonomic cars, will serve the effective and efficient management of spectrum. Periods for which rights to spectrum will be granted have been extended, which will improve investment stability. In Poland, 5G networks will not be implemented quickly because of issues relating to coordination between Poland and Russia, which were communicated to the Commission. Since the regulation of spectrum in the EECC is evolutionary rather than revolutionary, a new Telecommunications Law need not be created in Poland.

The third speaker was legal advisor Jakub Woźny, who considered the categories of electronic communications services (hereinafter: ECS). The general characteristics of ECSs did not change under the EECC, and involve their standalone character, provision for remuneration, and the responsibility of the provider for the effectiveness of the transmission of signals. The EECC recognizes three types of ECSs: Internet access services, as defined in Regulation 2015/2120; interpersonal communications services (which include traditional voice communication, VoIP services, internet communicators, and e-mail, but exclude social networking services, communication functions in games, and websites); and finally, other services, for example for the purpose of broadcasting, and machine-machine communications. While the changes to the categories of ECSs are not revolutionary, the new concepts, such as over-the-top interpersonal communications services, and machine-machine services will have to be regulated in Polish law.

Wojciech Krupa (legal advisor) was the fourth speaker in the first session talking about the evolution of the regulation of the electronic communications market. Four distinct periods in the history of European Union telecoms regulation may be identified. The first period, of liberalization, began in the late 1980s and lasted through the 1990s. The goal then was to introduce competition to the market, by removing special and exclusive rights of national operators, and ensuring interoperability between the network of the incumbent and the networks of competitors. The second period

(of developing competition) began with the entry into force of the 2002 regulatory framework, which took into account changes in the market, including the convergence of services. Competition became the means of securing end-user benefits. Market analysis was introduced and the use of *ex ante* regulation. Remedies were generally aimed only at undertakings with significant market power. Licensing was simplified, and radio spectrum management was regulated. The third period (of the creation of a single market) began with the 2009 review of the regulatory framework. The EU recognized that while competition was developing in all Member States, approaches to regulation were very different in various countries. The Commission was given new powers, and the Body of European Regulators for Electronic Communications (hereinafter: BEREC) was created in order to facilitate the creation of a single market. Risk associated with investment in next generation networks was recognized as a factor to be taken into account when deciding on market remedies. Consumer protection was strengthened by improved transparency and disclosure obligations. The cost reduction directive of 2014 marked the beginning of the fourth period (one of investment). The Commission recognized that markets had become mature and competitive, and thus it is time to move onto investment in very high capacity networks. The current paradigm is to secure end-user benefits through the construction of such networks. Competition concerns are no longer paramount.

Associate Professor Maciej Bernatt, the Scientific Secretary of CARS, was the moderator of the second session.

The first to speak was Doctor Artur Salbert, who talked about the rights of end-users and the universal service. He remarked that the EECC protects consumers rather than all end-users, however it seems that individual Member States may regulate as they see fit the relations between the providers of electronic communications services and end-users who are not consumers. Disclosure obligations of ECS providers have been extended to include not only consumers but also enterprises, excluding large ones, which will require implementation in national law. A readable contract summary provided to consumers is a completely new feature, one which will be subject to specification by the Commission, which may greatly reduce the provider's ability to shape contracts. It has become obligatory to offer free access to a tool allowing the comparison and evaluation of Internet access services, including their quality and prices. The speaker also mentioned the automatic extension of contracts, the possibility to limit the maximum duration of consumer contracts, informing end-users about the best tariffs at least once per year, the lack of the right to terminate the contract in the case of a reduction in price, switching Internet access providers, and bundled offers. Speaking about the universal service, Doctor Salbert mentioned that it now encompasses adequate broadband Internet access, and voice communications. All providers may be obligated to provide these services at affordable prices although to consumers only, rather than to all end-users. Only designated undertakings may be required to provide those services where there is no access to them under normal commercial circumstances. The financial model of providing the universal service remains the same as it was before.

Doctor Andrzej Nałęcz spoke next about the construction of very high capacity networks. Such networks consist wholly of optical elements at least up to the

distribution point at the serving location. Technologies other than optical may also be used, however only if they offer the same quality parameters. The EECC sets the goal of making Internet access services in such networks available to all households and enterprises in the EU. This goal is a political one, and its objective grounds are questioned in economic literature, which indicates low demand for such services, justified by the lack of Internet content requiring very high transmission speeds in the foreseeable future. Investments in very high capacity networks come with high risk, therefore the EECC aims to lower that risk, mostly through promoting early stage co-investment. It should be more profitable to enter into a co-investment agreement than to demand access to a network that has already been built. Very high capacity network investors may benefit from reduced regulation, both symmetrical and asymmetrical, which should encourage investment. The implementation of the EECC in this respect does not require the preparation of a new law. The speaker proposed concrete changes to the existing Telecommunications Law. He also remarked that the bill on the partial implementation of the EECC in Polish law, recently proposed by the government, does not put adequate emphasis on transparency, nondiscrimination and the reduction of uncertainty relating to the NRA's approach to investment.

The third to speak was Doctor Mateusz Chołodecki, who talked about the NRA and its cooperation with EU authorities. He summarized the regulation of the NRA's position in the 2002/2009 regulatory framework, and then he proceeded to describe the same issues under the EECC. Significant changes have not been introduced. The NRA's independence has been strengthened by regulating the appointment and dismissal procedures of its chief, and by ensuring it has proper regulatory capacity, relating for example to its budget. BEREC may now issue an opinion on the resolution of cross-border disputes by NRAs. The procedure for consolidating the internet market remains largely the same, however, the Commission has been equipped with new powers to require a NRA to withdraw a draft measure concerning access to ducts or authorizing co-investment. The harmonization procedure is completely new. The speaker remarked that the Commission has become a super-regulator of sorts, and even though the NRAs are supposed to be independent, that is not true of their relations with the Commission. The speaker is of the opinion that the EU aims at creating supranational markets and a Pan-European regulatory authority.

The fourth to speak in the second session was counsellor Xawery Konarski, who talked about the relationship between the EECC, the regulations on e-privacy, and the General Data Protection Regulation (hereinafter: GDPR). He commented on how complicated the legal system has become, with all the directives and regulations referencing one another. The EECC will influence the protection of privacy by regulating interpersonal communications services. Ultimately, the e-privacy regulation will replace the current e-privacy directive and it will serve as *lex specialis* to GDPR. There are significant discrepancies between the components of interpersonal communications services under the EECC and under the provisions on e-privacy, particularly with respect to minor ancillary features, such as the communications modules of dating applications. After the e-privacy regulation comes into force, the ability to process movement and location data of end-users will be considerably

limited. It is also of importance that the EECC has its own definition of the security of networks and services.

The two sessions were followed by a panel discussion with the participation of: Wanda Buk (Undersecretary of State in the Ministry of Digitization); Iwona Różyk-Rozbicka (Director of the Legal Department of the Electronic Communications Office); Jolanta Tropaczyńska (Director of the Legal Bureau of Orange Polska S.A.); Dariusz Trzeciak (representative of the National Economic Chamber of Electronics and Telecommunications (KIGEiT)); Professor Maciej Rogalski (Rector of Łazarski University); and Tadeusz Piątek (legal advisor, the DZP law firm). The panel discussion was moderated by Professor Piątek, who encouraged the participants to comment on the necessity of either updating or replacing the Polish Telecommunications Law. One of the options would be to consolidate into one new Code the many matters thus far regulated in separate laws, including the Telecommunications Law and the law on supporting the development of telecommunications services and networks. Relevant issues include how to work on a new bill and how to consult with stakeholders. Controversial issues must be identified. The need to take into account the many recommendations and other documents to be issued by the Commission may prove to be a challenge.

Wanda Buk remarked that creating a whole new law would be more challenging from a legislative point of view, and it might prove risky, since in the legislative process unexpected changes might be introduced to well established features of the telecommunications regulations. The Telecommunications Law and the law on supporting services and networks should not be combined. An update of the Telecommunications Law will serve as the main means of implementing the EECC in Poland.

Iwona Różyk-Rozbicka said she is not sure the decision on either updating or replacing the Telecommunications Law has to be made right away. However, the remaining time for implementation seems too short to prepare a completely new law, which would also need a proper period of *vacatio legis*. If we agree that implementation may be postponed then a new law becomes a possibility. There is indeed the risk noted by Wanda Buk. A simplistic implementation by copy-pasting the EECC should be avoided, even though it may be tempting, considering the difficulty of introducing the convoluted language of the EECC into a national legal system, as has become apparent by now in other Member States that are already working on the implementation.

Jolanta Tropaczyńska remarked that electronic communications providers in Poland would prefer an update of the existing Telecommunications Law rather than its replacement. It is important to include undertakings in the legislative process by properly hearing them out. The larger the undertaking, the harder it is for it to adjust its operations to a new law. Undertakings will probably require as much time to implement the law as the state authorities require to prepare it.

According to Dariusz Trzeciak, an update of the existing law is the best option. The form of a new Code should be avoided for reasons relating to legislative complexity.

Marcin Rogalski began by indicating that he intended to be controversial. He proposed the creation of a new, revolutionary law, recognizing the full convergence

of electronic media, putting an end to disjointed regulations, and taking into account current developments, such as artificial intelligence. It is important to prepare a proper concept for the new law, aiming at establishing whether we want to update the existing market or create a whole new market.

Tadeusz Piątek proposed the creation of a new law, the Law on Electronic Communications. It may seem a daunting task, but it is not – after all, the Law of 2004 was no mean feat either, and yet it was successfully prepared, even if with some delay. The new law will not be perfect, but if the people leading the work on it are determined and sure of its aims, they will succeed. The preparation of the concept of the law should be outsourced to a party not itself a stakeholder in the matters to be regulated.

The panel discussion was followed by a short open discussion. Wojciech Hałka positively commented on the idea of outsourcing the preparation of the concept of the new law. Doctor Mateusz Chołodecki remarked that even though the EECC is a directive, it closely resembles a regulation, many of its provisions requiring copy-paste implementation. However, it may be possible to include in the new law some national priorities. Assistant Professor Ewa Galewska commented that the EECC does not provide enough room for such prospects. Professor Skoczny advocated the creation of a new law, especially in the form of a comprehensive Law on Electronic Communications, proposed by Tadeusz Piątek. He also endorsed the idea of outsourcing the preparation of the law's concept.

Professor Piątek closed the conference thanking the participants, speakers, and members of the panel discussion.

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