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Independence of the Egyptian Competition Authority: Assessment and Recommendations

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There is a wide understanding that independence is significant for the success of national competition authorities. This article synthesizes the literature on independence and by focusing on the Egyptian Competition Authority as a case study it proposes comprehensive criteria to measure such independence of competition authorities.

1. INTRODUCTION

The adoption of competition laws has been receiving much attention at the national, regional and international levels. During the last decade, many developing countries have moved towards the adoption of national competition laws[1]. Egypt has not been outside this trend and accordingly it has issued its competition law in 2005[2].

The adoption of competition law - despite its importance - is just one pillar among other equally important pillars for achieving effective competition in the market. Certainly, competition in the market will not be achieved by the mere adoption of competition law, i.e. the existence of a perfectly drafted competition law without its effective enforcement is useless.

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[1] This was recognized by Whish; he emphasized that 'Competition law has grown at a phenomenal rate. The expansion of the law has been geographic: there are now at least 100 systems of competition law in the world, in all continents and in all types of economies, several others are in contemplation'. See Whish, Richard, *Competition Law*, LexusNexis UK, Fifth Edition, 2003, at page 1.

[2] Law No. 3/2005 on the Protection of Competition and the Prohibition of Monopolistic Practices (hereinafter referred to as 'Egyptian Competition Law'). The law was issued on February 15, 2005 and has been entered into force on May 16, 2005.

Effective enforcement of competition law is largely dependent on the institution that is entrusted with its implementation. There is a wide understanding that independence is one of the most significant pre-conditions behind the success of national competition authorities. In fact, the effects of competition law can be neutralized or offset after its enactment, through denying or limiting the independence of the competition authority.

Despite the wide comprehension that competition authorities should be independent, there is far less understanding of the definition of 'independence', what constitutes such 'independence' or how such 'independence' could be optimally accomplished as an organizational matter.

The purpose of this article is to highlight the importance of independence of competition authorities and the possible adverse consequences that may occur as a result of its absence. The article synthesizes the literature on independence of a competition authority and proposes comprehensive criteria against which the independence of such an authority should be measured.

The notion of 'independence of competition authority' is divided into two main concepts, namely the 'Institutional Independence' and the 'Personal Independence'. On the one hand, 'Institutional Independence' refers to the competition authority's freedom in undertaking its day-to-day tasks, without interference or supervision from the government. On the other hand, 'Personal Independence' means the freedom of the members of the decision-making body of the competition authority to decide cases merely on the merit (i.e. based on the law and the facts of the case) and not under the influence of political considerations or their individual interests.

This article will focus on the assessment of the extent of the institutional and personal independence of the Egyptian Competition Authority (hereinafter referred to as 'ECA'), according to the proposed criteria and recommends amendments to the competition law in order to enhance such independence.

2) INDEPENDENCE OF COMPETITION AUTHORITIES

A) Importance of 'Independence'

Over the last decade, there was a wide understanding that independence is one of the most significant factors behind the success of national competition authorities. Khemani & Dutz are among the earliest scholars who propose that transition economies create independent competition authorities that have no links to existing government ministries . Also, Khemani has stressed the fact that .the best watchdog of competition is an impartial, independent competition law enforcement agency'[4].

Furthermore, the UNCTAD Model Law on Competition advocates that 'the most efficient type of administrative authority is one which is a quasi-autonomous or independent body of the Government with strong judicial and administrative powers for conducting investigations, applying sanctions, etc., while at the same time providing for the possibility of recourse to a higher judicial body. Note that the trend in most of the competition authorities created in the recent past (usually in developing countries and countries in transition) is to award them as much administrative independence as possible. This feature is very important because it protects the Authority from political influence'[5] .

In the same light, the World Bank recommends that governments need to ensure the independence of the competition authority[6]. Moreover, the OECD and the majority of its participating countries have acknowledged the importance of having a competition agency independent from the government[7]. Also, the CUTS Centre on Competition, Investment and Economic Regulation (hereinafter referred to as 'CUTS Centre') has identified independence as one of the most important factors underpinning the development of successful national competition institutions. The CUTS Centre has described independence as a key ingredient to build credibility[8].

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[3] Khemani, R. Shyam and Mark A. Dutz, *Instruments of Competition Policy and their Relevance for Economic Development,* in Claudio R. Frischtak (ed.), *Regulatory Polices and Reform: A Comparative Analysis,* Washington D.C., The World Bank, 1995, at page 16, paragraph 28.

[4] Khemani, R. Shyam, *Competition Policy and Economic Development,* Policy Options, (1997), at page 26. Available online at: www.irpp.org/po/archive/oct97/khemani.pdf

[5] Article 8, paragraph 121, UNCTAD Model Law on Competition, United Nations, Geneva, (2000), at page 33.

[6] World Bank, *Building Institutions for Markets,* World Bank Development Report, Oxford University Press published for the World Bank, 2002, at pages 141-142.

[7] OECD Centre for Cooperation with Non-Members, Directorate for Financial, Fiscal and Enterprise Affairs, Third Global Forum on Competition, Session I on the *Optimal Design of Competition Agency* held on 10-11 February 2003.

[8] Mehta, P. S., Friends of Competition – *How to Build an Effective Competition Regime in Developing and Transition Countries*, paper published under the '7-Up Project', CUTS Centre, (2003), paper # 0301, at page 22. The 7-Up project is a comparative study of competition regimes of seven developing countries of the Commonwealth, namely: India, Kenya, Pakistan, South Africa, Sri Lanka, Tanzania and Zambia.

The UNCTAD Intergovernmental Group of Experts on Competition Law and Policy attempts to explain the reason why competition authorities have to be independent, by stressing the necessity of separation between policy implementation and policy making. The Group advises that governments should broadly formulate competition policy and afterwards entrust its enforcement to an independent agency. This is important because governments may be influenced by interest groups (that have either elected them or have provided them with campaign funds). As a direct consequence of entrusting the enforcement of regulations to autonomous institutions, the private interest groups are denied the possibility to lobby ministers and lose the means for gaining favourable treatment. Accordingly, this will lead to decisions that are essentially technical and not subjected to political interference or pressures of interest groups[9].

Additionally, the business community needs a considerable degree of certainty about the enforcement of government policies that directly affect them. Therefore, 'in order to decrease the regulatory uncertainty or transform it to a manageable risk, implementation of those policies should be entrusted to an independent regulator with a specific mandate and predictable decision-making that does not change with the change in government'. If national competition authorities are influenced by political pressure, 'with a more 'pro-business' party in power the authority will approve mergers in highly concentrated sectors and with a more 'pro-consumer' party in power the authority will impose structural remedies to break up those mergers'. This creates serious inconsistency in policy implementation[10] .

Another reason that explains why a competition authority should be independent and not affiliated to the government is that such an affiliation will lead to a natural conflict. This conflict exists because, unlike the competition authority, the ministry's interests are not necessarily directed to achieve the long-term goal of a competitive market, but rather the short-term success of the economy, to gain publicity and support[11].

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[8] Mehta, P. S., *Friends of Competition – How to Build an Effective Competition Regime in Developing and Transition Countries*, paper published under the *'7-Up Project'*, CUTS Centre, (2003), paper # 0301, at page 22. The 7-Up project is a comparative study of competition regimes of seven developing countries of the Commonwealth, namely: India, Kenya, Pakistan, South Africa, Sri Lanka, Tanzania and Zambia.

[9] UNCTAD Secretariat, *Independence and Accountability of Competition Authorities,* a note submitted on the ninth session of the UNCTAD Trade and Development Board, Commission on Investment, Technology and Related Financial Issues, Intergovernmental Group of Experts on Competition Law and Policy, TD/B/COM.2/CLP/67, 15-18 July 2008, at page 3, paragraph 4.

[10] Mateus, Abel M., *Why Should National Competition Authorities Be Independent? And How Should They Be Accountable?*, paper presented at the 10th Anniversary of the Romanian Competition Council, Bucharest, April 26th, (2007), at pages 4-5.

[11] Kalbfleisch, P., *On Independence and Influence: The Netherlands Competition Authority,* in Barry E. Hawk (ed.), *International Antitrust Law & Policy,* Fordham Competition Law Institute, Juris Publishing Inc., 2008, Chapter 9, at page 234.

There is a consensus among a number of Egyptian scholars on the necessity of conferring independence on the ECA. In particular, Ali El Dean & Mohieldin stated that a competition agency in Egypt must have as a prerequisite 'a transparent, independent and impartial administrative structure'. Moreover, they explained that achieving this 'will be difficult for several reasons, including the novelty of the institution'[12]. Furthermore, Ghoneim argued that 'to ensure effectiveness of the competition law, the competition authority must enjoy independency and shielding from political and other vested interests' influence'[13]. Also, independence was seen as one of the key elements and principles of the ECA advocacy policy and process standards[14].

The possible negative consequences from lack of independence are exemplified in the case of *Kibo Breweries v. Tanzania Breweries Limited (1998)*. The Commissioner of Trade Practices in Tanzania found that Tanzania Breweries with a market share of over 80% to be abusing its dominant position by barring agents and mini-wholesalers from stocking competitors' beer brands and threatening to punish them by not selling to those who did not obey on the same terms as to those who obeyed. The Tanzanian Commissioner of Trade Practices directed Tanzania Breweries to cease its anticompetitive practices. Tanzania Breweries argued that the Tanzanian Competition Act was not in place when those practices were committed and therefore the Tanzanian Commissioner of Trade Practices lacks jurisdiction to review those practices. The Permanent Secretary of the Ministry of Industry and Trade, who was a member of the Tanzania Breweries Company's board, supported the company's stand. The Tanzanian Commissioner of Trade Practices, being under the Ministry of Industry and Trade, could not do much to alter such a decision [15].

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[12] Ali El Dean, B and Mahmoud Mohieldin, *On the Formulation and Enforcement of Competition Law in Emerging Economies: The Case of Egypt,* Egyptian Centre for Economic Studies, working paper no. 60, (2001), at pages 11-12.

[13] Ghoneim, A. Farouk, *Competition Law and Competition Policy: What does Egypt Really Need?,* paper submitted for the Economic Reform Forum, 9th Annual Conference, Working Paper No. 0239, (2002), at page 17..

[14] Yassine, M., Farida Tawdi, Haytham El Gammal and Ibrahim Ahmed, *The Independence of Competition Agencies – Case of Egypt,* in Barry E. Hawk (ed.), *International Antitrust Law & Policy,* Fordham Competition Law Institute, Juris Publishing Inc., 2008, Chapter 12, at pages 285- 294.

[15] CUTS Center, *Competition Law & Policy - A Tool for Development in Tanzania,* (2002), paper # 0207, table 6.

Another example is Pakistan, where the independence of the Monopoly Control Authority was seriously restricted by political interference. In one case, the decision of the authority was overturned due to the intervention of a minister who was on the board of the company under review[16]. In another case, the Monopoly Control Authority has intended to start prosecution in cement cartel but the government intervened and made an 'amicable' settlement, where prices were fixed at a 'mutually acceptable' level[17].

B) What Constitutes 'Independence'?

Despite the wide understanding that competition authorities should be independent, there is far less comprehension with regard to the definition of 'independence', what constitutes such 'independence' or how such independence could be optimally accomplished as an organizational matter[18].

William Kovacic, a current Commissioner and a former Chairman of the United States Federal Trade Commission (hereinafter referred to as 'FTC') suggested that 'the requisite independence most often is to be achieved by creating a new commission modelled along Western lines. The new commission should have no links to existing government ministries and should possess the power to issue binding decisions subject to judicial review. In principle, this structure is seen to be the most effective enforcement mechanism because independence gives the new agency a single-minded focus on promoting competition. By divorcing the agency from government, bodies that oppose or are indifferent to reform independence would provide a stronger platform for challenging government impediments to competition'[19].

[16] Holmes, Peter M., *Some Lessons from the CUTS 7-Up Comparative Competitive Policy Project,* 2003, unpublished manuscript in G, Michal, *The Ecology of Antitrust: Preconditions for Competition Law Enforcement in Development Countries,* UNCTAD Conference on Competition, Competitiveness and Development , June (2004), at pages 20-38.

[17] CUTS Centre, *Competition Regime in Pakistan - Waiting for a Shake-Up,* (2002), paper # 0210, section 4.2.6. Also See Jensen, Olivia, *Towards a Healthy Competition Culture,* paper published under the 7-up Project, CUTS Centre, (2003), paper #0304, at page 49.

[18] United States, *Optimal Design of a Competition Agency,* OECD Third Global Forum on Competition, Session I, held on 10-11 February 2003, at page 6.

[19] Kovacic, William E., *Getting Started: Creating New Competition Policy Institutions in Transition Economies,* Brooklyn Journal of International Law, vol. 23, (1997), 403-453, at page 10, paragraph 424.

The OECD has conducted a questionnaire relating to the design of 37 national competition authorities from those who were participating in the Third Global Forum on Competition. The questionnaire was divided into four main parts, namely the position of the competition authority in the public administrative structure, its tasks and powers, relations to other governmental bodies and, finally, questions relating to influence and independence. With regard to the position of competition authority in the public administration structure and its actual and perceived independence from political influence, many factors were identified, such as the structural independence from other branches of government or separation from the ministerial structure, the implications of institutional design on transparency and public confidence in the competition authority, the budget of the competition authority, appointment of the head of the competition authority and how the head can be dismissed from office[20]. However, the OECD concluded that independence and influence 'are factors that are difficult to define in quantitative terms, and consequently also difficult to measure' and it stated that 'the concept of independence in a more profound sense would need to be analysed and defined'[21].

On the other hand, the World Bank suggests that, to achieve independence, the competition authority should be independent of a government ministry and should have its own budget. The World Bank stressed that competition agency should have the authority to lodge suits, because, if the government is the only agent with this authority, the effectiveness of competition law can be undermined. Another suggestion is that the head of the authority should be appointed by a committee or the parliament rather than by the president or the prime minister[22].

The UNCTAD Intergovernmental Group of Experts on Competition Law and Policy (hereinafter referred to as 'UNCTAD') defines independence of competition authorities in terms of their distinct legal personality and structural separateness from government. The UNCTAD referred to institutional (also known as functional) independence, which includes the functions, the powers and the manner in which management and staff are appointed, their tenure and dismissal, and how the body is financed. These attributes are supposed to assure organizational autonomy[23].

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[20] OECD Secretariat Note on the *Optimal Design of Competition Agency,* 20 January 2003, OECD Centre for Cooperation with Non-Members, Directorate for Financial, Fiscal and Enterprise Affairs, Third Global Forum on Competition, Session I, held on 10-11 February 2003, at page 10, paragraph 37.

[21] Ibid, page 6, paragraph 26.

[22] See above note 6, at pages 141-142.

[23] UNCTAD Secretariat, op.cit above note 9, at page 4, paragraph 5.

The UNCTAD explains that a competition authority that has independence is usually established as an independent institution not physically located in a government ministry. Institutional independence refers to the degree of freedom, which the competition authority has in its daily decisions. It is usually interpreted that the competition authority is not subject to routine direct supervision by government. Such an authority would thus have the discretion to set its own priorities as to the identification and investigation of competition cases and the pursuit of competition complaints. It would also have the discretion to decline to investigate cases where it suspects the grounds on which the complaint was made. In this context, ministerial departments are constrained because they would be subject to ministerial priorities and political interference[24].

The UNCTAD clarified that the appointment of competition officials by a minister is less conducive to independence than appointment procedures that provide for the participation of representatives of more than one government branch. Furthermore, it is assumed that competition officials, whose terms are not renewable and cannot be removed from office, except by legal procedure, have less incentive to please with their decisions those who appointed them[25]. The ability of a competition authority to freely comment on and recommend improvements in public policy, regulation and legislation was identified by the UNCTAD to be another attribute, by which the institutional independence of competition authorities is assessed[26].

The CUTS Centre also agrees that 'independence' means that the competition authority is a legally independent body and not part of any government department. It further agrees that the government cannot simply remove members without proper justifications. Moreover, the authority should also be financially independent. A combination of funds allocated by the legislature and those received from filing fees seems to be the best solution. A danger with having funds allocated by a government department is that they become subject to political influence[27].

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[24] Ibid, at page 6, paragraph 16.
[25] Ibid, at page 8, paragraph 21.
[26] Ibid, at page 9, paragraph 27.
[27] CUTS Centre, *Pulling up our Socks: A Study of the Competition Regimes of Seven Developing Countries of Africa and Asia: The 7-up Project,* (2003), paper #0303, at pages 53-54.

In another study, the CUTS Centre has characterized as the most independent institutions those that are not only administratively separate from the government, but they are staffed by competition professionals and do not rely on the government for a budget allocation. The least independent authorities were considered to be those that form part of a government ministry and are also subject to civil service restrictions on recruitment and on central budget allocations for the administrative services[28].

The ICN Advocacy Working Group has conducted a questionnaire among 53 countries on advocacy activities. Answers to the said questionnaire have revealed interesting findings in relation to independence of competition authorities. The findings identified three elements, important for measuring the degree of independence of competition authorities, i.e. (a) the appointment mechanism of the head and higher officials of the competition agency, (b) the easiness with which they can be removed and (c) the budget allocation mechanism. The budget allocation mechanism was one element frequently brought up by the respondents to the questionnaire when assessing their autonomy. With regard to budgetary independence, 40% of the respondents found that parliament or congress allocation mechanisms provide them in practice with more autonomy than having the budget allocated by the ministry[29].

Different means to enhance budgetary independence have been identified. For example, some authorities are empowered to discuss and negotiate the budget directly with the legislative powers. This power makes them better off than those who only have access to their head ministry. Additionally, the liberty to dispose of the assigned budget was seen to be enough in order to offset dependency. Furthermore, independence can be achieved whenever the appointment mechanism for the authority's members guarantees their independence and there is institutional autonomy guaranteed by the legal framework[30].

[28] Jensen, Olivia, op.cit above note 17, at page 49.
[29] Advocacy Working Group of International Competition Network, *Advocacy and Competition Policy,* ICN Conference, Naples Italy, (2002), at page 40.
[30] Ibid, at pages 56-58.

Accordingly, the ICN Advocacy Working Group concluded that budgetary considerations could hinder institutional autonomy of the competition authority only to the extent that the institutional activities have to be limited by the lack of financial resources. The budgetary dependence would have little effect on the independence by which the competition authority takes its decisions or imposes sanctions, because no matter how the budget allocation mechanism is carried out, several countries consider that budgetary autonomy can be enhanced[31].

Voigt has conducted a comparison of 57 competition laws, whereby he synthesizes various variables into indicators; among those indicators is the independence of competition authorities[32]. Voigt attempts to measure the independence of competition authorities by referring to the following variables:

- Whether the agency is under the direct supervision of the government. Agencies under the direct supervision of the government are less independent.

- Whether the sole task of the agency is to safeguard competition. Agencies pursuing other goals deflect the attention from competition.

- Whether the agency has sufficient competences to fulfil its' tasks independently. The less competences, the less the agency can perform its tasks independently.

- Whether decisions of the agency can be appealed to the court. The possibility of appealing decision both on procedural and substantive aspects increases the incentives to apply the competition law independently.

- Whether the appointment of leading members of the agency is by ministry or by the parliament. Appointment by one member of the executive is less conducive to independence than appointment by more than one government branch.

- Whether the appointment term is open or fixed. Officers are more independent if they are appointed for life or up to a mandatory retirement age and cannot be removed from office, save by legal procedure.

[31] Ibid, at page 57.
[32] Voigt S., The *Economic Effects of Competition Policy – Cross-Country Evidence Using Four Indicators,* Working Paper, University of Kassel, (2006), at pages 9-19.

- Whether the appointment term is renewable. Officers are less independent if their terms are renewable because they will tend to please those who can reappoint them.

- Whether officers can be easily removed. The more difficult it is for government to remove officers, the more independent the agency can be.

- Whether one of the government branches enjoys discretion in determining the salaries of officers. If one of the government branches enjoys discretion in determining the salaries, this raises incentives to take the preferences of government into account.

- Whether case allocation within the agency is determined by general rules or is left to the discretion of officers. If allocation of cases is at the discretion of officers, the outcomes of cases can be potentially influenced by allocating cases to those who are expected to reach favourable decisions. Independence is larger if there is a general rule according to which cases are allocated.

- Whether the executive has the power to give instructions to the agency. The agency will be less independent if the executive has the power to give instructions.

- Whether the executive has the power to override the agency's decisions. If the executive has the power to override the agency's decisions, this will lead to less independence.

- Whether the agency has an obligation to publish its decisions. Publications of decisions allows others to scrutinize these decisions and the reasoning can become subject to public debate. This will make it more difficult for officers to have irrelevant considerations influencing their decisions.

Other criteria used for measuring the status of independence of competition authorities are developed by Mateus. In particular, he developed a five-level criteria measuring independence[33]:

- Level 1 – The Board is nominated by the government with fixed term appointment, without any possibility of being dismissed, except in cases of 'caus majeur' or serious breach of the institution's performance.

- Level 2 – The Board is appointed by the government or president after a parliamentary hearing and cannot receive any directions from the government as in level 1.

[33] Mateus, Abel M., op.cit above note 10, at page 3.

- Level 3 – as in level 2, plus administrative autonomy and own revenues.
- Level 4 – as in level 3, plus the capability of defining the details of the applicable competition policy.
- Level 5 – as in level 4, plus the possibility of issuing non-binding recommendations to the government, the ability to be consulted on competition assessment matters in the legislative process and the right to judicially challenge governmental decisions which are in conflict with competition law.

Mateus stressed the importance of appointing the board members of a regulatory agency to be designed in a careful manner, because the board enjoys a high level of discretionary power in applying the competition law provisions in each case. In fact, the board members are like judges and therefore consideration should be given to candidates with high level of integrity. Mateus argues that the process is too important to be left only to the government and that at least a parliamentary hearing should be carried out. He further argues that it is not advisable that the appointment process should be left only to the parliament, since this tends to reproduce the representation of political parties, which leads to a highly politicized board[34].

Mateus's criteria can be criticized, since some competition authorities may possess some of the characteristic of more than several levels. Thus, it poses difficulty on positioning those competition authorities according to the five-level criteria. The approach followed by Voigt is therefore more appropriate, by identifying the list of elements that indicate whether or not the competition authority is independent. Accordingly, the most independent institutions are those, which comprise a number of those elements, and the least independent authorities are those which lack these criteria. Authorities that possess some – but not most – of those elements can be characterized, as semi-independent[35]. It is clear that a competition authority's independence depends on a combination of factors and that each of these factors individually does not guarantee it.

[34] Ibid.

[35] The OECD questionnaire on the Optimal Design of Competition Agency conducted on 37 countries, from those who were participating in the Third Global Forum on Competition, revealed that around 33% of the competition authorities are independent from the Government, 45% are incorporated into a ministry and 22% are in-between. See OECD Centre for Cooperation with Non-Members, Directorate for Financial, Fiscal and Enterprise Affairs, Third Global Forum on Competition, Session I, held on 10-11 February 2003

C) Our Proposed Criteria

Based on the above, for the purpose of this article, the notion of 'independence of competition authority' will be divided into two main concepts, i.e. the 'Institutional Independence' and the 'Personal Independence'.

The 'Institutional Independence' refers to the freedom of a competition authority to undertake day-to-day tasks, without the interference or direct supervision from the government. We propose that the criteria for assessing the institutional independence of competition authorities can be summed up in the four main points below:

1. The Competition Authority's Relationship vis-à-vis the Government, i.e. whether or not the competition authority forms part of government ministry or it is under the direct supervision of the government or whether it reports directly to the parliament.

2. The Competences of Competition Authority, i.e. whether the competition authority has sufficient competences to fulfil its role of promoting competition. Competences that can enhance the institutional independence of the competition authority can be recapped into the following main competences, namely:

    a. The Power to Initiate Competition Cases.

    b. The Power to Issue Binding Decisions.

    c. The Power to Impose Sanctions.

    d. The Discretion to Decline Review of Competition Cases.

    e. The Power to Comment on and Recommend Improvements in Public Policy, Regulation and Legislation.

3. Government Powers in Relation to Competition Law. Government powers may take several forms including giving instructions to the competition authority or overruling the competition authority's decision.

4. The Competition Authority's Budgetary Independence, i.e. whether the competition authority's budget is part of that of the government or whether the competition authority has independent budget allocated by the parliament.

It is important to recognize the fact that even though the competition authority may enjoy full institutional independence, such independence will be jeopardized if institutional independence is not associated with 'Personal Independence' as well. By 'Personal Independence' we refer to the freedom of the members of the decision-making body of the competition authority to decide cases merely on the merit (i.e. based on the law and the facts of the case) and not being influenced by political considerations or their individual interests[36]. The criteria proposed for assessing the personal independence of competition authorities can be summed up in seven main points:

1. Appointment Mechanism, i.e. whether appointments of members of the management and decision-making body of the competition authority are made by government or parliament.

2. Appointment Criteria, i.e. whether the appointment is based on a member's individual experience and background or is based on the representation of the government or interests groups and whether the competition authority has sufficient rules to control any possible conflict of interests which may arise thereof.

3. Appointment Term, i.e. whether the appointment term is short or long and whether it is renewable.

4. Appointees' Remuneration, i.e. whether or not the salaries of the members of management and of the decision-making body are determined by the government and whether salaries can be increased or decreased by the government.

5. Dismissal of Appointees, i.e. whether the law sets out conditions for dismissing the members of the management and of the decision-making body, whether such conditions are easy or difficult of be met and whether dismissal decisions have to be reasoned.

6. Judicial Review of Competition Authority's Decision, i.e. whether the competition authority's decision is subject to judicial review and whether such review is on the merit or only on procedural issues.

7. Publication of the Competition Authority's Decision, i.e. whether the competition authority has an obligation to publish its decisions and whether the rules governing the publication guarantees transparency.

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[36] The term 'Intellectual Independence' was used by the Chair of the Board of the Netherlands Competition Authority to reflect the concept of 'Personal Independence'. *See* Kalbfleisch, P., op.cit above note 11, at page 241.

3. ASSESSMENT OF THE ECA'S INSTITUTIONAL INDEPENDENCE

A) The ECA's Relation Vis-V-Vis The Government

The ECA is not a part of the government ministry but instead it is considered as a separate institution from any such ministry. The ECA is not physically located in an office within any government ministry, but it has its own separate premises. However, the ECA as an institution is affiliated to the Prime Minister, who has delegated his competences in relation to the ECA to the Minister of Trade and Industry (hereinafter referred to as the 'Minister')[37].

It is argued that the reason behind the affiliation of the ECA to the Minister is to make its actions politically accountable before the parliament, since by virtue of the Egyptian Constitution only the Prime Minister, his deputies, the ministers and their deputies are responsible before the parliament[38]. However, the requirement of political affiliation, as set out in the Constitution, could be fulfilled without granting the Minister the vast competences in the enforcement of competition law, as explained below. Additionally, the ECA is responsible to submit an annual report on its activities, future plans, and recommendations to the Minister, even if the law stipulates that the ECA has to send a copy of such a report to the Parliament and the Shura Council (Consultative Council)[39]. Accordingly, even though the ECA is principally responsible to report to the Minister, it is also responsible to directly communicate such report to the Parliament and the Shura Council. The ECA does not need to acquire the Minister's prior approval on the content of the annual report and the Minister does not have the right to request an amendment of the annual report prior to its submission to the Parliament and the Shura Council.

[37] Article 2 of the Preamble of the Egyptian Competition Law and Prime Minister's Decision No. 571 as of 2006.
[38] Article 124 of the Egyptian Constitution. See Yassine, M., Farida Tawdi, Haytham El Gammal and Ibrahim Ahmed, op.cit note above 14, at page 290.
[39] Article 11(9) of the Egyptian Competition Law.

B) The Competences Of The ECA

I) ECA's Power to Initiate Competition Cases

The Egyptian competition law provides that the ECA has the right to conduct the necessary studies and researches to discover cases of anti-competitive effects and to prepare a comprehensive database on the economic activity in the market in order to serve the authority in its work in all aspects, relating to the protection of competition[40].

Conversely, the executive regulations are clearer and they state that the ECA has the right to start procedures of inquiry, inspections and fact findings on its own initiative, without receiving a complaint[41]. Accordingly, the ECA can independently initiate cases, without the prior approval or interference from the government. Since its establishment, the ECA has initiated only two studies related to the sugar and fertilizers industries[42].

The implementing regulations of the Egyptian competition law further state that the ECA's personnel shall have the status of law-enforcement officers and as such may review records and documents, as well as obtain any information or data from any governmental or non-governmental entity[43]. They may enter – during official working hours – the workplaces or headquarters of the persons under examination in order to obtain the necessary information. Moreover, they may – when needed – call for the assistance of the police. The Egyptian competition law defines persons as natural or juristic persons, economic entities, unions, financial associations and groupings, groups of persons, irrespective of their means of incorporation[44]. Nevertheless, the personnel having the status of law enforcement officers must be, specified by virtue of a decree from the Minister of Justice, in accordance with the Competent Minister (i.e. the Prime Minister or whoever the Prime Minister delegates) and with the recommendation of the ECA's Board[45]. However, once nominated by the decree, the personnel would have the right to use its competences as law enforcement officers only by having the written permission of the ECA's Executive Director and without needing any further confirmation or approval from the Minister of Justice or the Competent Minister. In fact, such a decree was issued conferring the status of law enforcement officer on the ECA's executive director, head of legal department, head of economic department, legal researchers, economic researchers and information technology specialists[46].

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[40] Article 11(3) of the Egyptian Competition Law.
[41] Article 33 of the Executive Regulation of the Egyptian Competition Law.
[42] Egyptian Competition Authority Annual Report for 2006-2007, at page 29.
[43] Article 38(1) of the Executive Regulation of the Egyptian Competition Law.
[44] Article 38(2) of the Executive Regulation of the Egyptian Competition Law. Article 2 of the Egyptian Competition Law.
[45] Article 17 of the Egyptian Competition Law.
[46] Minister of Justice Decree No. 8483 as of 2006.

II) The ECA's Power to Issue Binding Decisions

The ECA has the right to issue administrative decisions by the majority of its board members, i.e. 8 members. The ECA's decisions determine whether a violation of competition law has taken place and such decisions are issued without any need for approval or ratification from the government[47]. Moreover, the government does not have the right to give instructions to the ECA as to what decisions it should reach.

The ECA's decision may require the violator to cease the violation immediately or within a given period as determined by the ECA. The ECA's decision may also include an order for the violator to remedy the violation and to adjust its position in accordance with the law[48]. The ECA's decisions are binding and cannot be repealed by the government. Also, the ECA's decisions can only be appealed before the administrative court.

III) The ECA's Power to Impose Sanctions

The ECA cannot impose any penalties on violators of the law, because violations of competition law are considered to be of criminal nature, since the Egyptian Criminal Law states in Article 11 thereof that 'misdemeanour are those crimes that are penalized by prison or by fine exceeding hundred pounds'. The competition law provides that a fine of no less than Egyptian pounds 100,000 (approximately the equivalent of USD 17,857) and not exceeding Egyptian pounds 3,000,0000 (approximately the equivalent of USD 53,571,428) should be imposed for violations of competition law[49]. Therefore, the ECA as an administrative body cannot impose criminal penalties on violators of the law. Penalties can only be imposed through the final decision of the Economic Courts[50].

[47] Article 13 of the Egyptian Competition Law.
[48] Article 20 of the Egyptian Competition Law.
[49] Law No. (190) as of 2008, amending the Egyptian Competition Law. Prior to the amendment, the penalties for competition law violation were lower, namely: a fine in the amount of more than Egyptian pounds 30,000 (approximately the equivalent of USD 5,357) and not exceeding Egyptian pounds 10,000,000 (approximately the equivalent of USD 1,785,714).
[50] Egyptian Law Establishing the Economic Courts Law No. 120 as of 2008.

The ECA cannot initiate a criminal lawsuit in relation to a violation of competition law. Instead, it should refer its decision to the Minister, who has the exclusive right by virtue of competition law to request in writing the initiation of a criminal lawsuit[51]. Therefore, by making the initiation of such lawsuits conditional upon the Minister's written request, the real enforcement of competition law remains at the Minister's hands and discretion.

Additionally, the public prosecution – not the ECA – defends competition lawsuits before the court; this is because the Egyptian Criminal Procedures Law in Article 1 thereof states that the public prosecution is the only competent entity to defend criminal lawsuits.

Currently, however, the public prosecution lacks the necessary expertise in competition to be able to defend the case. For this reason, the ECA's officers are usually called upon, as expert witnesses before the court, as they are more specialized in competition as well as economics; accordingly they will be able to better present and explain complex competition and economic issues to the court, than the public prosecution[52].

IV) The ECA's Discretion to Decline Review of Competition Complaints

In principle, the ECA is obliged to review all competition complaints submitted to it. This is because competition law violations are criminal in nature and therefore, they cannot be declined.

[51] Article 21 of the Egyptian Competition Law.
[52] Interview with Dr. Khaled Hamdy, the Executive Director of the Egyptian Competition Authority, dated August 9, 2009, text on file with author.

However, the ECA may decline the review of complaints, if the information or the documents required to be submitted under competition law were incomplete[53]. The required information and documents include the following:

- The name of the complainant, address, profession, capacity and interest in filing the complaint and the supporting documents. Accordingly, the ECA will decline anonymous complaints or complaints were personal interest is not established.

- The identity of the firm against which the complaint is made, its address and the nature of its activity. Thus, the ECA may decline general complaints specifying only the industry or the market. In this case however, the ECA may initiate a study into that market or industry if the complaint included information that suggests that there are anti-competitive practices.

- The type of the breach. However, the ECA will not be limited to the complainant characterization of the breach and its inspection may conclude that different violations were committed.

- The supporting indications on which the complaint is based and related documents. However, if this information is not available, it would not mean that the complaint is incomplete.

- The damage incurred by the complainant should be indicated. However, if there is no clear indication of the damage, this should not make the complaint incomplete, since most of the competition law provisions are *per se* rules, i.e. some acts are considered illegal without the need to prove damage or harm inflicted as a result of those acts.

The ECA has the discretion to establish whether a complaint is complete or not and therefore it has the discretion to decline its review. The ECA exercises this discretion of pursuing or declining complaints without any intervention or instructions from the government. Nevertheless, such discretion is subject to judicial review.

However, if the ECA considers that the complaint is complete, it has to review it and conduct the necessary inspection, inquiry and fact finding related thereto[54]. The ECA shall then prepare a report with its opinion and submit it to the board within ninety days[55]. The board shall issue a reasoned decision either to close the case or to continue

[53] Article 32 of the Executive Regulations of the Egyptian Competition Law.
[54] Article 37 of the Executive Regulations of the Egyptian Competition Law.
[55] Article 39 of the Executive Regulations of the Egyptian Competition Law.

the inspection, inquiry and fact finding procedures[56]. Such a decision is made without any intervention or instructions from the government. However, the ECA's decisions in this regard are subject to judicial review.

Furthermore, the Minister may request the ECA to conduct competition studies. The ECA cannot decline such a request and must therefore pursue such studies.

V) The ECA's Power to Comment on and Recommend Improvements in Public Policy, Regulation and Legislation

Whish stresses the importance of the right given to the competition authority 'to scrutinise legislation that will bring about, or is responsible for, a distortion of competition in the economy. The reality is that states and international regulatory authorities are capable of harming the competitive process at least as seriously as private economic operators'[57].

The ECA has the right, by virtue of law, to give its opinion on draft laws and regulations relating to competition[58]. Draft laws could include the drafting of either 'new' laws or of amendments in 'existing' laws. However, the ECA cannot present its opinion directly before the Parliament. Nevertheless, the Internal Rules of Procedures of the Parliament (hereinafter referred to as the 'Rules') created Specialized Committees and entrusted them with the duty to study and give their opinion on draft laws that fall within their areas of specialization. Competition falls within the specialization of the Economic Affairs Committee[59]. The Committee then prepares a report and presents it before the Parliament. The Rules give to the Specialized Committees and to the Minister the right to invite the ECA to have its opinion and clarifications on draft laws[60]. In this way, the ECA's opinion will certainly reach the Parliament, because the Committee's report must include all the opinions that were expressed in its sessions, even if different from the Committee's opinion[61].

[56] Article 40 of the Executive Regulations of the Egyptian Competition Law.
[57] Whish, Richard, op.cit above note no. 1, at page 23.
[58] Article 11(5) of the Egyptian Competition Law.
[59] Article 44 of the Egyptian Parliament Internal Rules of Procedures decided in its session dated 16 October 1979.
[60] Article 63 of the Egyptian Parliament Internal Rules of Procedures.
[61] Article 76 of the Egyptian Parliament Internal Rules of Procedures.

The ECA cannot influence the legislative process in an independent manner because its role depends largely on whether or not the Committee or the Minister invites the ECA to attend the Committee's sessions. Accordingly, if such an invitation is not made, the ECA's opinion will not reach the Parliament and the ECA will not have any other alternative but to present its opinion to the Minister, which – unlike the Committee - has no legal obligation to present its opinion to the Parliament.

Additionally, by virtue of the competition law, the ECA's function is more reactive than proactive, meaning that the ECA's right is restricted only to giving its opinion on 'already proposed' draft laws or amendments and does not have the right to independently propose new laws or amendments to existing laws relating to competition.

However, in practice, the latest amendments made to the Egyptian Competition Law were initially proposed by the ECA to the Minister, who has forwarded them to the Parliament.

The ECA held meetings with the Parliament's Economic Affairs Committee in order to discuss the proposed amendments and the Minister participated in the parliamentary session discussing the proposed law and expressed his support for the proposed amendments. The Parliament, however, did not approve all the proposed amendments[62].

Considering the above, there are two obvious issues:

- In reality, the ECA has acquired a *de facto* competence of proposing legislative amendments; this competence is not set out in the law.

- Despite the support of the Minister, the effectiveness of the ECA's participation in the legislative process might be undermined by the Parliament where competition culture is apparently lacking.

With regard to the ECA's influence on public policy, even though the law does not expressly provide the ECA with the right to comment or make recommendations for improvements to the public policy, in reality the ECA was requested by the Minister to study various markets in order to discover problems in accordance with the competition law and propose recommendations to remedy those problems. Moreover, the Minister of Investment has requested the ECA to give its advisory opinion on the privatization of various public companies and their effect on the market[63].

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[62] Press Release by the Egyptian Competition Authority dated June 17, 2008.
Available online at:www.eca.org.eg

[63] Egyptian Competition Authority Annual Report for the year 2006-2007, at pages 28-32.

However, the ECA should not limit itself to requests submitted to it by the government. Indeed, there are other proactive ways available for the ECA to influence public policy. One way, is through its advocacy activities, i.e. press releases and informal contacts with the government. Another way is by including its recommendations in its decisions, studies and annual reports, which are published and available to the public.

C) Governmental Powers In Relation To Competition Law

I) Minister's Power to Request the ECA to Conduct Studies

The Minister has requested the ECA to study various markets in order to discover problems pursuant to competition law and propose recommendations to remedy those problems. Those studies initiated by the government represent the majority of the workload of the ECA[64]. This means that the activities undertaken by the ECA are largely influenced by the government's agenda[65].

It appears that the Minister is using his power to request the ECA to conduct studies. This leads to the shift of public pressure and public blame from it to the ECA, since most of the studies initiated by the Minister relate to public opinions with regard to markets where prices are high or are in continuous increase. The steel, cement, imported red and processed meat, edible oil and milk market studies were all requested by the Minister.

II) The Minister's Power to Request the Initiation of Competition Lawsuits

The Minister has the exclusive right to request in writing the initiation of criminal lawsuits[66]. As previously mentioned, penalties for violation of competition law cannot be imposed by the ECA's decision and must be imposed by a court's decision. Therefore, the real deterrent of implementing the competition law provisions is vested with the Minister.

[64] Ibid.
[65] Yassine, M., Farida Tawdi, Haytham El Gammal and Ibrahim Ahmed, op.cit above note 14, at page 292.
[66] Article 21 of the Egyptian Competition Law.

III) Minister's Power to Settle Competition Lawsuits

The Minister has the exclusive right and discretion to settle any violation of competition law before the court renders its final judgment. The only condition provided by law for settling violations, is that the defendant makes a payment in the amount of no less than the double of the minimum limit of the fine and not exceeding the double of its maximum limit[67].

Unfortunately, the ECA is not granted a similar competence in this regard and the law does not require the Minister to consider the ECA's opinion before the conclusion of such a settlement. Furthermore, the law does not provide for sufficient guidelines or rules according to which the Minister shall decide whether or not to settle a violation and under what conditions.

IV) Cabinet of Ministers' Power to Fix Prices of Essential Products

Even though price-fixing is considered one of the hardcore restrictions of competition, the Cabinet of Ministers, after considering the ECA's opinion, may issue a decree determining the selling price for one or more essential product for a specific period of time[68]. The ECA shall assist the Cabinet of Ministers in determining the sale price of the essential products by conducting the necessary studies[69]. However, the ECA's opinion is of recommendatory nature only.

But what is exactly meant by referring to an 'essential product' remains elusive. The law should have set criteria for assessing the essentiality of a product. Indeed, such provision if it remains vague, it may be used by the government to curb the effectiveness of the competition law.

The law further provides that any agreement made by the government for the purposes of implementing these prices shall not be considered as an anti-competitive practice[70].

[67] Article 21 of the Egyptian Competition Law.
[68] Article 10 of the Egyptian Competition Law.
[69] Article 19 of the Egyptian Competition Law.
[70] Article 20 of the Executive Regulations of the Egyptian Competition Law.

This suggests that the prices of essential products will be fixed only with regard to the agreements where the government is a party and will not be fixed for the whole market [71].

Therefore, according to the considerations set out above, the Minister has broad powers in relation to the implementation of the law. Hence, this fact makes the enforcement of law not entirely independent of political influence.

D) The ECA's Budgetary Independence

The ECA's budget is not part of the ministerial budget. In particular, the ECA has an independent budget allocated directly from the State's general budget[72]. Also, the ECA has the right to directly discuss and negotiate its budget with the parliament. Furthermore, the ECA has the freedom to dispose of its budget as it may see fit and without any intervention from the ministry.

The ECA may generate its own funds through: (a) grants, donations and any other resources accepted by the board that do not conflict with its goals and (b) revenues from the fees paid to the ECA according to the law[73].

However, the law does not set any clear criteria to determine when exactly the 'grants, donations and other resources' will not contradict with the ECA's goals. The absence of clear criteria for monitoring the acceptance of grants, donations and other resources opens the door for corruption and conflict of interest situations, because pressure groups may use the grants and donations as a gateway to influence the implementation of competition law within the ECA.

The Executive Director of the ECA stated that the ECA does not have internal rules for regulating the acceptance of grants, donations and other resources in order to ensure their non-contradictions with the ECA's goals. The acceptance of any proposed grants, donations or other resources is made on a case-by-case basis. The Executive Director of the ECA clarified that the latter does not accept any financial grants or donations and that since its establishment it has only received donations and grants in kind, i.e. such as training, books, computers, printers, etc [74].

[71] Interview with the Executive Director of ECA, op.cit above note 53.
[72] Article 14 of the Egyptian Competition Law.
[73] Ibid.
[74] Interview with the Executive Director of ECA, op.cit above note 53.

Concluding, in some aspects, the ECA may be viewed to have institutional independence, while in reality there are other factors, which heavily undermine such independence. The ECA's institutional independence can be demonstrated by the fact that it has a separate budget from the government.

Furthermore, the ECA's institutional independence can be evidenced by the fact that a copy of its annual report – which comprises its activities, future plans, and recommendations – is submitted to the Parliament and the Shura Council. The ECA does not need to acquire the Minister's prior approval on the content of the annual report and the Minister does not have the right to amend the annual report prior to its submission to the Parliament and the Shura Council.

Moreover, the ECA has the right to independently initiate inquiries, issue binding decisions as well as decline the review of incomplete complaints based on the ECA's sole discretion and without any intervention from the government. In particular, the government neither can give instructions to the ECA as to what decisions it should reach, nor can it amend or repeal its decisions.

Nevertheless, the budgetary independence, the reporting to the Parliament as well as to the Shura Council and the ECA's right to initiate inquiries, to issue binding decisions or to decline the review of incomplete complaints are not sufficient to guarantee the ECA's institutional independence.

On one hand, the ECA does not seem in practice to fully use its competences in initiating inquiries. In particular, since its establishment in 2005 and until 2009, the ECA has only initiated two market inquiries; the majority of the ECA workload–studies is requested by the government. Therefore, the agenda and directions of the ECA are not entirely independent and are heavily influenced by the political agenda and priorities of the government[75]. Reaching a majority decision within the ECA's board is very hard to achieve due to the large number of board members and their diverse affiliation and interests (as explained below).

[75] Yassine, M., Farida Tawdi, Haytham El Gammal and Ibrahim Ahmed, op.cit above note 14, at page 292.

On the other hand, the ECA is affiliated to a governmental ministry, where the Minister has the exclusive right to initiate competition lawsuits and the exclusive right to settle any violation. Thus, the real deterrent implementation of the competition law is made dependent upon the Minister and not the ECA.

Therefore, in light of the broad powers of the Minister in the implementation of the law, the ECA is left with its advocacy efforts as the only means to curb the Minister's political influence in the implementation of the law. Through the publication of the ECA's decisions and advocacy activities with the media and the public, the Minister could face pressures if he did not initiate lawsuits in cases where the ECA's decision concluded that there was a violation of competition law. Also, the ECA's annual report can serve as an important advocacy tool for the ECA and a way to exert pressure on the Minister, since the annual report submitted to the Parliament and the Shura Council includes all its decisions.

The Egyptian competition law provides the Cabinet of Ministers with the right to fix the selling price of essential products and to enter into agreements to apply those prices, without setting the criteria for assessing the essentiality of a product. This creates a possibility for the government to misuse the concept of essential products in order to curb the effectiveness of competition law.

Currently, the Egyptian competition law does not secure the access of the ECA's opinion on draft laws or the possibility to propose legal amendments to the Parliament. Moreover, at present, the Egyptian competition law does not provide the ECA with a formal channel through which it can voice its opinion on public policy. The fact that the ECA's influence on legislation and public policy are not guaranteed by virtue of law, makes the success of such an influence to be largely dependent on the ECA's advocacy efforts and on the degree of the government's cooperation.

4. ASSESSMENT OF THE ECA'S PERSONAL INDEPENDENCE

The independence of the competition authority will not be complete by merely giving institutional independence to such an authority. Indeed, full institutional independence will be ineffective if the head of the authority, members of top management and the decision-making body do not make use of such institutional independence or when making such use they are influenced by political considerations or individual interests. Thus, even though the competition authority may on the surface seem to enjoy full institutional independence, such independence will be jeopardized if it is not associated with 'Personal Independence'.

'Personal Independence' refers to the freedom of the members of the decision-making body of the competition authority to decide cases merely on the merit (i.e. based on the law and the facts of the case) and not being influenced by political considerations or their individual interests. The extent of the *'de jure'* and the *'de facto'* institutional independence of the ECA are assessed below, in light of our proposed criteria.

A) Appointment Mechanism Of The ECA's Board

The members of the Board of Directors of the ECA (hereinafter referred to as the 'Board') are appointed by virtue of a Ministerial Decree[76]. The Board consists of fifteen members; only the Chairperson is appointed on full-time basis, while the other board members convene at least monthly and whenever it is necessary.[77]. The Board may assign one of its members or a committee formed by its members in order to carry out a specific assignment or to supervise any aspect of the ECA activities[78].

Eight of the fifteen members (including the Chairperson) are appointed by the sole discretion of the Minister, while the other seven members are appointed based on nominations from their respective organizations[79]. The Executive Director of the ECA is also appointed by virtue of a Ministerial Decree, based on a nomination from the Chairperson[80].

[76] The current Board is appointed by virtue of Prime Minister Decree 1342/2005.
[77] Articles 12 and 13 of the Egyptian Competition Law.
[78] Article 27 of the Egyptian Competition Law.
[79] The counsellor from the State Council is chosen by the president of the State Council as per Article 12(2) of the Egyptian Competition Law. Also, federations and unions set out in Article 12(5) chose their own representatives inside the Board of ECA.
[80] Article 15 of the Egyptian Competition Law.

B) Appointment Criteria Of The ECA'S Board

The Egyptian competition law does not set any minimum requirements or qualifications for the ECA's Board members, with the exception of the State Council's Counsellor, who has to be of a vice-president rank and the Chairperson, who has to be of a 'distinguished experience'[81]. Conversely, the law does not provide any further details or guidance on what constitutes 'distinguished experience'. In the same light, the law does not set any minimum requirements or qualifications for the Executive Director of the ECA. Moreover, the law does not specify which field of specialty or expertise should the Executive Director have. As an illustration, the current Executive Director has a judicial background[82].

It is important here to mention that Egypt has only started to move towards liberalization of its markets in 1995, by joining the WTO, and has issued its competition law only four years ago. Until today, competition law is not taught in undergraduate courses in the Egyptian Universities. Therefore, lack of expertise in the area of competition is a logical consequence. Accordingly, the fact that the law does not require the appointees to have background and experience in competition is understandable.

The law does not require a minimum representation of particular fields of specialty or expertise within the Board. The majority of the current Board members are of non-legal background, mainly revolving around economic (the area of expertise of the Chairperson), finance and business backgrounds. Only four out of the fifteen Board Members have a legal background.

The majority of the Board members are appointed based on their occupational capacity or their membership in federations or unions and not based on their individual background and qualifications. This means that if their occupational capacity or membership may be terminated for any reason, their membership in the ECA Board will also cease automatically.

[81] Article 12(1) and (2) of the Egyptian Competition Authority

On the one hand, five Board members are appointed in their occupational capacity, namely a counsellor from the State Council and four members representing the relevant ministries. On the other hand, six members are appointed based on their membership in industry associations or unions. The remaining four members are the Chairperson and three experts and specialists, who are appointed in their individual capacity based on their background, experience and qualifications[83].

The law does not specify which ministries are the 'relevant ministries'. In the first appointment in the Board, the four ministries' representatives were the First Assistant of the Minister of Trade and Industry, the Chairman of the General Authority For Investment and Free Zone (subordinated to the Ministry of Investment), the Chairman of the Commercial Registration Authority (subordinated to the Ministry of Supply and Internal Trade) and the Assistant of the Minister of Finance.

Until the end of 2005, the Ministry of Trade and Industry was responsible for external trade, whereas the Ministry of Supply and Internal Trade was responsible for domestic trade. However, by virtue of a presidential decree, trade – whether internal or external – comes under the control of the Ministry of Trade and Industry. Accordingly, the Commercial Registration Authority is moved and is currently under the jurisdiction of the Ministry of Trade and Industry[84]. This increases the number of representatives from the Ministry of Trade and Industry in the ECA Board to two instead of one. The Counsellor for Legal and Legislative Affairs for the Minister of Trade and Industry later replaced the Chairman of the Commercial Registration Authority[85].

In theory, having four members representing government ministries does not heavily influence decision-making within the ECA's Board. This is attributed to the fact that the decisions in the ECA Board are taken by the absolute majority of eight members, provided that the other eleven members are completely insulated from the government. However, this rule is not applicable, because two of the members appointed under the category of 'experts and specialists' also work for the government[86].

[82] Interview with the Executive Director of ECA, op.cit above note 53.
[83] Article 12 of the Egyptian Competition Law.
[84] Presidential Decree No. 420/2005 on Regulating the Ministry of Trade and Industry.
[85] Minister of Trade and Industry Decree No. 642 as of 2006.
[86] One member is appointed as Expert, but he is in reality the Assistant of the Minister of Trade and Industry and another member is appointed as Expert, but he is also the Senior Financial Advisor to the Minister of Investment.

The Egyptian competition law does not set any rules controlling the political affiliations of the members of the Board; particularly, there is no limitation on the number of Board members representing one political party. Four members of the Board are members in the National Democratic Party ('NDP'), i.e. the ruling party in Egypt[87].

Therefore, in reality there are six members representing the government (three from the Ministry of Trade and Industry one of which is a member of the NDP, two from the Ministry of Investment and one from the Ministry of Finance) and another three members, who although do not work for the government, are members of the NDP. Thus, nine members out of the fifteen board members (60%) have some political affiliation to the government.

Furthermore, the Egyptian competition law does not place any restrictions on the freedom of Board members to pursue economic activities while they are serving on the ECA Board. Indeed, two of the current board members are active businessmen[88]. However, the Egyptian Competition law does provide that a Board member should not participate in the deliberations or voting concerning a case presented to the Board, if: (i) that member has an interest in the case, or (ii) any of the member's relatives up to the fourth degree is a party to the case, or (iii) that member currently represents or has represented any of the parties to the case. The law does not provide any explanation of what constitutes an interest in the case. It is unclear whether the term 'interest' is construed broadly or strictly.

The Egyptian competition law provides that relevant government ministries representation, inside the ECA's Board, undermines the personal independence of the

[87] One of the representatives of the Ministry of Trade and Industry is a member of the High Council for Policies of the NDP, the representative of the General Federation of the Chambers of Commerce is a member in the Business Sector Committee of the NDP, the representative of the Egyptian General Union of Labour is a member in the NDP and the representative of the General Federation for Consumer Protection is a member in the Moral and Legal Affairs Committee of the NDP; available online in Arabic at **www.ndp.org.eg**

[88] The representative of the General Federation of the Chambers of Commerce is the Managing Director of Henkel Company Egypt, See Euromonitor Major Market Share Companies: Eastern Europe, Middle East and Africa, Volume 6, Global Market Share Planner 4th Edition (2006). The representative of the General Federation of the Chambers of Commerce is the Chairman of Mac Company for Drum Break Production, available online in Arabic at http://www.fei.org.eg/comittees/Membership_Development_Resources_board.pdf. The former representative of the General Federation of the Chambers of Commerce is the Chairman and CEO of Hero Nutritional Food Industries Egypt, available online at http://www.businesstodayegypt.com/article.aspx?ArticleID=6699

latter. Obviously, members representing government ministries cannot reach a diverse decision to the position of the ministry that they are representing. The situation is worsened by the fact that government representation within the ECA is not limited to the four members set out in the law but is extended to include members appointed as experts and specialists but who are in reality also governmental employees.

Moreover, the Egyptian competition law allows interest groups to secure seats in the ECA Board, thus providing them with the opportunity to affect the personal independence of the decision making in the ECA, by lobbying for their own interests. Hence, instead of taking decisions from a competition perspective, the emphasis will divert to take account of other considerations, such as trade, industry, banking, NGOs, consumer protection and labour.

There are no sufficient rules restricting the political affiliations of the Board members. The Egyptian competition law does not set any constraints on the number of Board members affiliated to one political party (especially the ruling party). By having four members of the Board belonging to the NDP, the decision making of the ECA may be affected by such political affiliation.

Finally, the fact that the Egyptian competition law does not place any limitation on the freedom of Board members to pursue economic activities may compromise the personal independence of the ECA. The rules set out in the Egyptian competition law to prevent situations of conflicting interests are very basic and might not be sufficient to ensure personal independence. Even if a Board member's business is completely unrelated to the case reviewed before the ECA, there will always be a tendency for that member to compare the behaviour of the company under review to his own business. If his business undertakes similar behaviour, the member will be reluctant to set a precedent that such particular behaviour is in fact anti-competitive.

In light of the above considerations, it is important to mention that in Egypt, the business and political elites are intertwined. A considerable percentage of members in the Egyptian Parliament and in the NDP are indeed prominent businessmen. This reality makes it more difficult for Board members to undertake independent decisions without

being influenced[89]. A clear example is the steel case, in which the ECA ruled that there was no violation pursued by the dominant firm[90]. The owner of the dominant firm is the Chairman of the Budget and Planning Committee in the Parliament and he is the Secretary of the NDP's Committee for Organizational Affairs. Numerous media commentators perceived the ECA's decision as being influenced by the political ties of the owner of the dominant firm to close the case. As a consequence of this case, the image of the ECA as an independent institution has been heavily undermined in the eyes of the public.

C) The ECA'S Board Appointment Term

The appointment term for the Board members is four years; conversely, there is no fixed term for the appointment of the Executive Director. The term of four years is a considerably short duration. By contrast, the term for appointing the commissioners in the US FTC is seven years and it is eight years in U.K.'s Competition Commission.

The appointment term of the ECA Board can be renewed only once for another term[91]. However, this possibility might give an incentive to some Board members to please the Minister in order to be reappointed. Therefore, the Board members interested in reappointment may be keen to adopt votes for decisions that are not against the directions of the government.

D) Remuneration Of The ECA's Board

The remuneration of the Chairperson, Board members and Executive Director are all determined by the Minister without any need for endorsement from any other government branch[92]. This fact undermines the independence of the Chairperson, of the Board members and of the Executive Director in relation to the Minister.

[89] In 1995, 20.7 per cent of the 179 deputies elected in the Parliament were businessmen. The Assembly included 66 businessmen, 59 of whom belonged to the NDP and one to the Liberal Party; the other six were independents. Businessmen totalled over 16.5 per cent of all Parliament members. However, this percentage declined in 2000 since only 25 businessmen joined the Parliament (15 of which are NDP and 10 are entrepreneurs running as independents). Businessmen amount to approximately 9 per cent of the overall number of deputies. See Abdel Latif, O., *Why Would a Successful Entrepreneur Want to Play Politics?*, Al-Ahram Weekly Newspaper, Issue No. 537, 7-13 June (2001).

[90] Steel Report decided by ECA in Board Meeting dated 27 January 2009.

[91] Article 12 of the Egyptian Competition Law.

[92] Articles 12 and 15 of the Egyptian Competition Law.

E) Dismissal Mechanism Of The ECA'S Board

The Egyptian competition law is silent on the dismissal of the Board members. The law does not provide for any conditions needing to be fulfilled in order to dismiss a Board member. This could be interpreted as meaning that the Board members cannot be removed from their appointment prior to the completion of their term, unless they lost their occupational capacity or membership as explained before. For example, the Chairman of GAFI has been replaced within the ECA's Board by the new Chairman, as being the representative for the Ministry of Investment[93].

However, one of the Board members representing the Ministry of Trade and Industry was replaced by virtue of a ministerial decree after one year of his appointment[94]. The decree does not provide any reasons for removing a Board member prior to the completion of the appointment term.

The ambiguity of whether and on what basis, the Minister has the power or not to remove Board members, prior to the completion of their terms, adds another incentive for the Board members to consider government directions when voting for the adoption of decisions within the ECA.

F) Judicial Review Of The ECA'S Decisions

All final administrative decisions are subject to the judicial review of the Administrative Judicial Court. Individuals and entities may request the court to annul final administrative decisions if such a request is based on any of the following grounds: (a) non-jurisdiction, (b) violation of laws and regulations, (c) misapplication or

[93] Egyptian Competition Authority Annual Report for 2006-2007, at page 6.
[94] Minister of Trade and Industry Decree No. 642 as of 2006.

misinterpretation of the law or (d) abuse of power[95]. Judgments of the Administrative Judicial Court can be challenged before the High Administrative Court. However, in order for the request to be accepted by the court, the plaintiff must have a personal interest in the case[96].

Accordingly, the ECA decisions can be judicially reviewed not only on procedural matters but also on the merit, this supposedly increasing the incentives of the ECA's Board members to properly apply the competition law provisions, based on the facts of the case and not to take into account any other political or personal considerations so as to prevent their decisions from being revoked.

In order for the judicial review to act as a real pressure on the ECA's Board members, the judiciary itself should also be impartial and independent. Generally, in Egypt the judiciary has always maintained a good reputation of being independent. Furthermore, it is important that administrative judges are trained in competition law and economics, in order to effectively scrutinise the ECA's decisions.

G) Publication Of The ECA'S Decisions

The law provides an obligation on the ECA to publish periodical reports comprising the decisions, recommendations, procedures and measures adopted by the ECA[97].

The public, media and academia will be able to scrutinise and criticise the ECA's decisions. If there is an obligation on the ECA to publish its' decisions, this could make it more difficult for the Board members to have irrelevant considerations influencing their decisions.

However, in order for the publication to be effective, it must include full details on the facts of the case and the rationale behind the decision, so as to enable a real debate over the ECA decisions. In reality, the ECA's publications are, to a very large extent summarised, brief and do not include sufficient details to allow for a synthesis or criticism of its decisions.

[95] Articles 10 and 13 of the Egyptian Law No. (47) of 1972 on State Council.
[96] Article 23 of the Egyptian Law No. (47) of 1972 on State Council.
[97] Article 11(8) of the Egyptian Competition Law.

In conclusion, according to the above-mentioned considerations, it is apparent that the ECA, by virtue of the law but also in practice, lacks most of the elements that would make its board members independent. The fact that the law requires publication of the ECA's decisions and that it allows for judicial review thereof, does not compensate for the lack of the other elements mentioned above.

5. RECOMMENDATIONS

It is important to firstly highlight some facts that would greatly affect any recommendations that attempt to enhance the independence of the competition authority in Egypt.

Hence, the adoption of competition law in Egypt was highly controversial. It took the Egyptian Parliament almost fourteen years to finally approve the competition law since the legislation was first proposed[98]. For any legislation to be adopted there must be support from the government, the public and the business sector and there must be conviction of the benefits that such legislation can yield; apparently such support and understanding were lacking. Therefore, the reasons behind the delay in the adoption of competition law in Egypt can be summed up as follows:

1) Consumers in Egypt are not well aware of the extent of benefits that competition can yield to them. In general, non-governmental organizations (NGOs) concerned with consumer protection are weak, they have no significant role in policy advocacy and lack collective action initiatives[99]. The law on consumer protection has been recently enacted and definitely it needs time to start changing consumer culture[100]. For this reason, consumers in Egypt played no role at all in enacting the competition law.

2) There was a general fear and resistance from the business community in Egypt against the promulgation of competition law and due to the active involvement of

[98] Said, S., Anti-monopoly law passes go, The American Chamber of Commerce in Egypt Business Monthly, March 2005.
[99] Ghoneim, A. F., op.cit above note 13, at pages 5-6.

businessmen in the political life and their influence towards the Parliament, they succeeded to lobby for their interests and affect the legislation process, resulting in a delay and a weak law. The reaction of the business community was the following[101]:

a. Fear of government intervention in a new form under the name of protection of competition.

b. Possible abuse of the law by particular firms that may use it unjustifiably to charge competitors with anti-competitive practices.

c. The law will cover only registered firms, leaving informal activities and smuggling intact.

d. Those who will be responsible for implementing the law may not have sufficient knowledge of idiosyncrasies and peculiarities of particular segments of the market.

e. Just implementing the law may be hindered by corruption and profiteering.

3) The lack of pressure from consumers as regards the issuance of the law and the existence of resistance from the business community against the law makes the government reluctant to push for the adoption of the law. Even if the government believes that the adoption of a competition law is economically desirable, both the legislature and the government may be motivated to please the business community in return for political support[102].

Moreover, the Egyptian Parliament is highly dominated by the ruling party (NDP) and does not represent a sufficient balance of different segments of the society. The supreme dominance of the NDP within the Parliament makes it difficult for other political parties to succeed in affecting the decision-making contrary to the government's direction[103].

[100] Law No. 67 as of 2006.
[101] Ali El Dean, B., and Mahmoud Mohieldin, op.cit above note 12, at page 27.
[102] Kaplow, L., *Transition Policy: A Conceptual Framework,* Harvard John M. Olin Centre for Law, Economics and Business, Discussion Paper No. 412, 2003.
[103] In the 2005 Parliament elections 68.5% of seats were won by the NDP, in addition to 2.2% unelected members that are appointed directly by the president.

It is important to evidence that the above reasons, leading to the delay in the promulgation of the law and its' promulgation with weak contents, did not vanish. On the contrary, most of the above reasons still exist and are likely to affect any future attempts to amend the current competition law.

It is necessary to learn from the experience of the competition law amendment that took place in 2008. The Parliament stripped the key provisions proposed by the ECA and approved, instead, a watered-down version, which critics say failed to strengthen the law. On one hand, it is believed that powerful business interests influenced the outcome of the case. On the other hand, Mohamed Talaat, a partner in Baker & McKenzie law firm believes that 'the concept of the antitrust law is still new in Egypt, and the government didn't properly educate the parliament [before introducing the amendment for a vote]'[104].

Accordingly, it is important for the ECA to undertake more vigorous advocacy activities, before proposing any new amendments. In the presence of the business community's influence inside the Parliament, the only way for the ECA to move forward with any amendments, is to activate advocacy, in order to raise the level of understanding of the proposed alterations, to explain in detail the intended benefits behind them and support its proposed amendments with data and information from other jurisdictions.

A) Recommendations To Enhance The ECA's Institutional Independence

I) The ECA's Relation Vis-A-Vis The Government

In order to make the ECA totally independent from any government ministry and directly accountable to the parliament, constitutional amendment is needed, since by virtue of the Egyptian Constitution only the Prime Minister, his deputies, the Ministers and their deputies are responsible before the parliament[105]. However, the amendment of the constitution is a long process and it is very difficult to achieve.

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[104] Craig, Geoffrey, *Lawmakers Soften Antitrust Provisions*, American Chamber Business Monthly, August 2008.

[105] Article 124 of the Egyptian Constitution. See Yassine, Mona, Farida Tawdi, Haytham El Gammal and Ibrahim Ahmed, op.cit above note 14, at page 290.

Nevertheless, the mere affiliation to the Minister does not in itself affect the independence of the competition authority; it is the powers that are granted to the Minister that matter. For this reason, taking into consideration the difficulty of constitutional amendments, the affiliation to the Minister may remain, provided that:

- the powers of the Minister are diminished and in return the powers of the ECA are enhanced, as recommended below. This is quite important because while the current Minister is a reform-oriented person who has not abused his competences and powers, this might not be the same in the future, with a different person who might be adhering to a more conservative policy.

- the personal independence of the ECA's board members is ensured, as recommended below.

II) The Competences Of The ECA

The ECA's Power to Initiate Criminal Lawsuits

The right to initiate criminal lawsuits should not be conditional upon the Minister's request and should be vested only with the ECA. This right will enable the ECA to operate independently and without any form of governmental interference. In order to give to the ECA the right to file and defend competition lawsuits, only the competition law should be amended. No amendments are required to the Egyptian law regarding criminal procedures, since Article 1 thereof states that 'the public prosecution is the only competent entity to file and defend criminal lawsuits unless otherwise provided for in the law'.

The Executive Director of the ECA agrees that the competition law must be amended in order to grant to the ECA the right to initiate lawsuits before the court. However, he points out the fact that such an amendment might take several years to be materialized. Hence, he suggests that, until such amendments are made, the Minister may delegate his lawsuit initiation power to the ECA board[106].

[106] Interview with the Executive Director of ECA, op.cit above note 53.

The ECA's Power to Settle Competition Lawsuits

The competition law should be amended in order to grant the power of settling competition lawsuits to the ECA instead of the Minister. However, such right should not be absolute. Indeed, the law should set guidelines that must be followed by the ECA in settling lawsuits; such guidelines should spell out the necessary conditions that must be fulfilled in order for the ECA to make such settlements. In this way, the discretion of the board members in settling lawsuits will be limited and double standards, selective and arbitrary settlements will be minimized.

The ECA's Power to Comment on and Recommend Improvements in Public Policy, Regulation and Legislation

Even though, the competition law stipulates that one of the ECA's competences is to comment upon draft laws and regulations relating to competition, it is not sufficient to guarantee the active participation of the ECA in the legislative process. The law should place a clear obligation on the parliament to receive the ECA's opinion on laws relating to competition, i.e. the ECA's opinion would be a prerequisite for promulgating the law. The Executive Director of the ECA has shown support to the importance of making the request for the opinion of the ECA a mandatory requirement for promulgation of laws relating to competition[107].

The success of the ECA in affecting legislation depends largely on the timing and relates to the question as to when it is involved. Accordingly, the law should ensure the involvement of the ECA at the early stages.

Furthermore, the law must give to the ECA the right to propose amendments of legislation to the Minister and must place an obligation on the Minister to present the ECA's proposed amendments to the parliament without any alteration. The Minister may only insert his position and opinion on the proposed amendments.

Moreover, the law should provide for the mandatory invitation and participation of the ECA in any ministerial meetings, where issues relating to competition may possibly be discussed. In this way, the law will guarantee the ECA's involvement and influence on public policy.

[107] Ibid.

III) Governmental Powers In Relation To Competition Law

The right to fix prices of essential products is the only right that may remain with the Cabinet of Ministers. However, the law should be amended to clarify the concept of an 'essential product', which shall be subject to strict criteria in order to avoid its abuse.

IV) The ECA's Budgetary Independence

The law should be amended by setting guidelines that will determine when the gifts and donations will not contradict with the goals of the ECA. However, since such an amendment may take some time to pass, the ECA is advised to form its own internal rules for acceptance of such gifts and donations, because while the current board members only accept donations and grants in kind, nothing will prevent subsequent board members from changing their policy in that matter. Thus, the ECA should publish internal rules in relation to budgetary evidence which will help to build transparency, integrity and credibility of the ECA in the eyes of the public.

B) Recommendations For Enhancing The ECA's Personal Independence

I) Appointment Mechanism Of The ECA's Board

The Minister shall appoint the Chairperson of the ECA but the Parliament should approve such appointment. Also, the Chairperson shall appoint the members of the ECA's Board of Directors but the Parliament should also approve such appointments. Accordingly, the Minister should not exclusively have the power to appoint Board members, because as Mateus argues the process is too important to be left only to the Government and that at least a Parliament hearing should be carried out[108].

Additionally, the above recommendation is in line with the conclusion reached by Voigt as well as the conclusion reached by UNCTAD, where the appointment of competition officials by a minister is seen as less conducive to independence than appointment procedures providing for the participation of representatives of more than one governmental branch[109].

[108] Mateus, Abel M., op.cit above note 10, at page 3.
[109] UNCTAD Secretariat, op.cit above note 9 and Voigt, S., op.cit above note 32.

However, the recommended amendment may not yield the intended result and may not completely eliminate the governmental influence with regard to the appointments of the ECA's board members, since the Egyptian Parliament is highly dominated by the ruling party (NDP). This makes it difficult for other political parties to succeed in affecting the decision-making contrary to the government's direction.

Nevertheless, the above recommendation will definitely lead to a better decision with regard to appointments, as it requires the approval of the majority of the 454 persons in the parliament to validate such appointment, instead of making the appointments decided by the mere discretion of only one member of the executive, i.e. the Minister.

II) Appointment Criteria For The ECA's Board

Capacity of the Board Members

The Board Members should be appointed in their individual capacity and should not represent any government ministry or interest groups. The number of board members should be reduced to a maximum of seven members, where the quorum for holding meetings should be five members and the decisions should pass by a majority of only four. This would facilitate the decision making process.

With regard to the above-mentioned recommendation, the Executive Director of the ECA agrees that the number of board members and their different affiliations, the quorum for attendance of board meetings and the quorum for voting is very high, all of which act as a barrier to decision making and makes it very hard to reach decisions. For this reason, he agrees that the number of board members, the quorum for attendance of board meetings and the quorum for voting should be reduced[110].

The Executive Director also agrees that having board members not affiliated to any government ministry is the ideal scenario for the independence of a competition authority, but he believes that in practice such recommendation will not be approved by the parliament, since the parliament is highly dominated by the ruling party. Besides, he thinks that four board members out of fifteen being affiliated to the government, is not a

big number that will necessary mean that the ECA decisions will be influenced by their affiliation to the government. However, in order for this to be true, he stresses that the law should be amended to ensure that the three members appointed as 'experts and specialists' should not be affiliated to the government and he believes that such an amendment is possible to achieve[111].

The Executive Director considers that the representation of industry and commerce associations inside the Board is important, as in practice their involvement has been proved to be beneficial. He explains that in the absence of sufficient official data and documented information about industries in Egypt, the participation of representatives of industry and commerce associations becomes essential. Those representatives have closer and deeper exposure to problems in the market as well as they are aware of facts and information relating to industries that might not be available to the ECA, thus making the ECA's decisions more accurate. However, he believes that there is no need to have representatives from the labour union and the banking association inside the board and that those representatives may be invited to board meetings, whenever their opinion is needed, but without having voting rights[112].

Nevertheless, the justification of the Executive Director for having representatives from the industry and commerce associations are not quite convincing, for the following reasons:

- while it is true that Egypt lacks sufficient official data about industries, businesses and commercial activities, this does not justify the involvement of representatives of industry and commerce associations in the ECA Board. The ECA should concentrate on solving the problem of the lack of official data, by focusing in its early years of its establishment on building up reliable databases about industries, businesses and commercial activities in Egypt, instead of just being dependent on the information from representatives of industry and commerce associations.

- the same argument provided by the Executive Director for not having representatives from labour union and the banking association is valid for not having representatives from industry and commerce association. The ECA may indeed seek information from representatives of the industry and commerce associations by inviting them to Board meetings, only whenever there is a fear that their decision might not reflect actual business or industry practices, but without having voting rights.

[110] Interview with the Executive Director of ECA, op.cit above note 53.
[111] Ibid.

Qualifications of Board Members

In the future, the law should require the Board Members to have a minimum qualification and experience in a field relevant to competition law. Additionally, the law should be amended to ensure a balance between the number of the Board members that are of a legal background and the number of members that have an economic background. But in any event, the number of members of economic background should not exceed the number of members with a legal background.

The Executive Director of the ECA admits that the current composition of the Board members – where only four out of the fifteen are of legal background – is causing problems to the decision making process of the ECA. He agrees that there must be a balance between the number of members that are of legal background and those who are of economic background. However, he insists that the presence of members from an economic background is necessary[113].

Political Affiliations of the Board Members

Ideally, the law should be amended to ensure that board members do not have any political affiliation during their term of service on the Board. At least, the law should be amended in order to limit the number of members who have political affiliation to one political party, especially the ruling party. Such recommendation is in line with widely accepted international practice, as for instance in the US no more than three out of five commissioners of the FTC can be from the same political party[114].

The Executive Director of the ECA considers that the above-recommended amendment is good in theory, but is hard to materialise in reality, since the Parliament is highly dominated by the ruling party. However, he believes that the law should be amended in order to ensure that, if such political affiliation gives rise to a conflict of interest, concerning a case under investigation, the Board member should not participate in the deliberation or vote in that case[115].

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[112] Ibid.
[113] Ibid.
[114] FTC official website, available at: **www.ftc.gov/commissioners/index.shtml**
[115] Interview with the Executive Director of ECA, op.cit above note 53.

The Board Members' Freedom to Pursue Economic Activities

The law does not limit the freedom of the Board members to pursue economic activities. The Executive Director of the ECA believes that, in light of the fact that the Board members serve on a part time basis, it is hard to require them not to pursue economic activities[116].

While the law should not eliminate completely the possibility for the Board members to pursue economic activities simultaneously, while serving on the ECA Board, it should at least limit the number of the members of the Board that are allowed to do so. It is important to note here that the UNCTAD stresses the fact that 'Competition enforcement, particularly in jurisdictions that draw members of the board of commissioners from the private sector on a part-time basis, raises some tricky issues relating to members' impartiality and independence. Concerns revolve around the ability of part-time board members holding senior positions in private companies to attain and maintain desirable levels of objectivity'[117].

Currently, the law only excludes a Board member from the deliberations or voting concerning a case under investigation, if such a member (i) has an interest in the case, (ii) is a relative to any of the parties under investigation up to the fourth degree or (iii) is currently representing or has represented any of the parties under investigation.

In the absence of criteria for establishing what constitutes an 'interest' in the case, conflict of interest situations might not be wholly prevented. It is important for the law to be amended in order to prevent less evident situations of conflict; the law should prevent situations not only when a Board member represents or has represented any of the parties to the case, but also when a Board Member, for example:

- represents a company in the same industry/relevant market, as the party under investigation; where shares of that company may be affected by the outcome of the investigation,

[116] Ibid.
[117] UNCTAD Secretariat, op.cit above note 12, at page 14 paragraph 46.

- is employed by or is a consultant or advisor to one of the parties under investigation, or

- has close business links with one of the parties under investigation, by being a client or supplier thereof.

III) Appointment Term Of The ECA's Board

It is advisable that the law would be amended in order to make the term of Board members appointment longer than four years, with no possibility for renewal. In this way, the Board members will be motivated to act independently, because regardless of whether they please the government or not, their term cannot be renewed by virtue of law. Moreover, longer terms will allow the Board members to accumulate experience and to build up expertise in competition.

It is also suggested by the Executive Director of the ECA that the amendment of the law should allow for overlap in the Board members' appointment terms. He stresses the importance that the appointment term of the Board members should not commence and expire at the same time, in order to enable new members to learn from the experience and expertise of the old members[118].

IV) Dismissal Mechanism Of The ECA's Board

Dismissal of Board members should not exclusively be determined according to the sole discretion of the Minister but instead it should be determined internally by the Board itself. The law should set out exhaustive conditions, which once they are fulfilled a Board member can be dismissed. The Executive Director of the ECA believes that the law has a shortfall in this regard. He suggests that a Board member should be dismissed, if the Board member (i) dies, (ii) losses his representative capacity, (iii) repeatedly fails to attend Board meetings and (iv) fails to announce conflict of interest[119]. With the exception of point (ii), the above-suggested conditions are agreed with.

[118] Interview with the Executive Director of ECA, op.cit above note 53.

6) CONCLUSION

In some aspects, the ECA may be viewed to have institutional independence, while in reality there are other factors, which heavily undermine such independence. Additionally, it appears that the law does not sufficiently guarantee the personal independence of the ECA's decision-making. Many factors have contributed to this result, as presented hereinafter.

Firstly, the ECA is affiliated to the Minister which has broad powers in relation to the implementation of the law and has the result that the enforcement of the law will not be entirely independent and will be influenced by political considerations of the government.

Secondly, the appointment mechanism of the Board members allows the ministries of government to be represented inside the ECA's Board. The situation is worsened by the fact that government representation within the ECA is not limited to the 4 members set out in the law, but is extended to include members appointed as experts and specialists but who are in reality also working for the government.

Thirdly, the law allows interest groups to secure seats in the ECA Board, thus providing them with the opportunity to affect the personal independence of the ECA decision making, by lobbying for their own interests.

Fourthly, there are no sufficient rules restricting the political affiliations of Board members and the law does not place any limitation on the freedom of the Board members to pursue economic activities.

In accordance with the above, it is apparent that the ECA lacks most of the elements that would make it an independent institution. For this reason, more powers should be granted to the ECA in relation to the implementation of competition law. The structure of the Board in terms of the number of members, the quorum for meetings and voting, the appointment mechanism and the appointment criteria should be revisited, as it is recommended in this article.

[119] Ibid.

An External Method for Establishing the Balance in Intellectual Property Rights' Scope: Article 102 of the TFEU

BURCU GÜREL*

1. INTRODUCTION

The breadth and complexity of legal issues give rise to intersections between different branches of law. The relationship between intellectual property and competition law has been a con-stant area of controversy which deserves to be scrutinized. More specifically, it has become a con-temporary issue in European Union law, as a result of the European Commission' s and European Courts' recent decisions which indicate a restrictive approach to the exercise of intellectual property rights.

Intellectual property rights currently provide essential protection for information, innovation and knowledge. The shift from industrial to knowledge societies, based on the flow of information and knowledge instead of material goods[1], have strengthened the importance of these particular rights due to the fact that they have played very critical roles in supporting the increase of creation and innovation. Although the material protected by intellectual property rights are accessible by the public most of the time under some restrictive conditions because of the exclusive nature of these rights, in the long term they still make contributions to public knowledge domain. However, due to this exclusivity there has been a necessity to justify their existence by examining the fundamental reasoning behind them.

In addition to the suggested theories of the justification, the internal balancing of intellectual property rights' scope and their critical position in the innovation cycle shall be taken into account. This balance is crucial because the monopolistic nature of intellectual property rights require some precautions to be taken in order to enable the society to benefit from them the most, but at the same time protecting the interests of the creators as well. This is not an easy task[2], however; the better this balance is established, the less external intervention would occur in the exercise of intellectual property rights. If not, there may be interference of other fields of law, one of the most common be-ing competition law.

The overlap between these two fields, both of which have very important positions in the EU, is not completely unexpected but on the contrary rather foreseeable. Over the last few decades, there has been a substantial amount of international and European initiatives which have shaped and directed intellectual property law.[3] Similarly, the EU has been following a policy in favor of a more harmonized intellectual property law system at the community level, however, the landmark deci-sions which affect the exercise of these rights under competition law rules raise controversial argu-ments about the strength of intellectual property protection.

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[1] Christopher May, *A Global Political Economy of Intellectual Property Rights:* The New Enclosures? (Routledge, New York 2000), p.2

[2] Thomas Dreier, 'Balancing Proprietary and Public Domain Interests: Inside or Outside of Proprietary Rights?' in Ro-chelle Dreyfuss, Diane L.Zimmerman and Harry First (eds), *Expanding the Boundaries of Intellectual Property: Inno-vation Policy for the Knowledge Society* (Oxford University Press, Oxford 2001), p.316

[3] Hector MacQueen, Charlotte Waelde and Graeme Laurie, *Contemporary Intellectual Property: Law and Policy* (Ox-ford University Press, United States 2007), p.19

This is not so unpredictable when the fact that the ultimate goal of the Union is to establish a free market without boundaries is taken into consideration. Yet, the monopolistic nature of intellectual property rights inevitably gives rise to further questions, given that their very purpose is to confer rights to exclude competitors. On the contrary, competition law is a set of rules which attempts to *"regulate the relations in the markets in order to achieve allocative efficiency and maximize consumer welfare"*[4] by eliminating the harmful effects of monopolies. In this respect, the application of the Treaty on the Functioning of the Euro-pean Union(the "TFEU") 's internal market and competition rules have great impact on the exercise of intellectual property rights in many ways like the free movement of goods, licensing agreements or the practices of dominant firms which hold these rights. The interference of competition law in intellectual property rights can either be seen as an inappropriate one which distorts the exercise of legally granted rights or as an external tool which supports the balancing of intellectual property right rationales and access to information by the public while also functioning as supplement to in-tellectual property law.

Below, the application of article 102 of the TFEU (ex article 82 of the EC Treaty, any reference to article 82 in the footnotes and quotations shall be understood as article 102 of the TFEU hereinafter) to intellectual property rights will be examined through a perspective based on the in-ternal balancing of IPRs and competition rules' supplementary function to achieve this particular balance. In order to shed some light on the issue, this study will initially focus on the intellectual property rationales which cannot be underestimated against competition law policies and the impor-tance of balancing them with the needs of the information society. Finally, the reflections of these concerns on the Commission's and the Courts' decisions will be indicated in order to show both the weak and strong points of case law.

II. THE PIVOTAL ROLE OF INTELLECTUAL PROPERTY RIGHTS IN THE INNOVATION MARKETS OF INFORMATION SOCIETY

A. Justifications of Intellectual Property Rights

1.The Need to Justify Intellectual Property Rights

"Intellectual property rights establish property protection over intangible things such as ideas, inventions, signs and information".[5] This type of property right is created by granting exclu-sivity to the owners which enable them to prevent others from using the subject matter of their rights without permission. Besides this generally accepted monopolistic nature of intellectual prop-erty rights (hereinafter referred as "IPR"), there are other unique features belonging to them related to exclusivity. When their nature is taken into account, it is seen that *"resources -the ideas and in-formation- are not scarce and can be replicated without any direct detriment to the original posses-sor of the intangible"*. [6] At the same time information products are mostly *"expensive to create and cheap to reproduce and distribute"*[7]. These facts distinguish them from property rights on tangibles, which cannot be exploited by more than one person at the same time without causing detrimental effects on each others use. It is suggested that, this increases the need for justification because as there are no physical obstacles for the use of the protected subject-matter by many people *"there are good reasons for fearing the exclusivity"*.[8]

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[4] Alison Jones and Brenda Sufrin, *EC Competition Law: Text, Cases, Materials* (3rd edn Oxford University Press, Unit-ed States 2008), p.15

[5] Lionel Bently and Brad Sherman, *Intellectual Property Law* (3rd edn Oxford University Press, United States 2009), p.2

[6] *Ibid,* p.4

[7] John H. Barton, 'The Balance Between Intellectual Property Rights and Competition: Paradigms in the Information Sector', [1997] 18 ECLR 440, p.443 ; Michael L. Katz, 'Intellectual Property Rights and Antitrust Policy: Four Princi-ples for a Complex World', [2002] 1 J. on Telecomm. & High Tech. L. 325, p.345

[8] William Cornish and David Llewelyn, Intellectual Property: Patens, Copyright, Trade Marks and Allied Rights (6th edn Sweet & Maxwell, London 2007), p.39

This fear is not groundless because considerable restrictions for the public access to relevant information exist and the scope of those rights, which cover a broad range of intangible things from inventions to artistic creations, make the fear more realistic. Still, the right to control the activities of others shall not be perceived at the extreme, otherwise it has a number of implications often inadequately understood and gave rise to arguments contrary to IPRs which need to be responded. [9]

As we have seen, at first instance, there appear to be some important concerns about basing this exclusivity on well-established and reasonable grounds. There are numerous different theories which are put forward as a reasonable justification, but none of them apply to all types of IPRs without facing difficulties and counter-arguments.[10] For my assessment based on IPRs' contempo-rary position in information societies, the reward, incentive and public interest theories are dis-tinctly relevant among many different theories. Although these theories are common to a certain extent for most types of IPRs, the focus is going to be on their relevance to copyright and patents which are more likely to be the subject of competition intervention in EU law as a result of their more monopolistic nature. Moreover, since a detailed examination of these deep-rooted concepts is beyond the scope of this study, they will be examined under the same heading by emphasizing their common viewpoints.

2. Overview of the Relevant Justification Theories

One of the important theories of justification is based on the necessity to reward the creators with a certain kind of protection. The reward could be given as a control of the created intangibles in exchange for either the efforts exerted in producing it, the investments made in producing it or the contribution that is made to the culture.[11] This view does not ignore the labour and endeavor put into the work by its creator and wants to provide control by the grant of legal protection in the form of an IPR. Historically, it emanates from John Locke' s famous discussion about the origins of property and how *"intellectual property is seen as a suitable reward for intellectual labour"*[12]. For instance, from the copyright perspective which also applies to other types, the reward provided by copyright is the payment made to the laborer in return for their labour.[13] This is also supported by notion of *fairness*[14], since it triggers an desire on society to give the creator what they deserve for their work.

The other major theory is about IPRs' role in promoting the incentives of creators, which appears to suit well with today's economic realities. It is based on the logic that, if the creators are left unprotected and the work becomes open to the use of competitors without any compensation, *"there will accordingly be little incentive to invest in the ideas or information and the consumer may be correspondingly the poorer."*[15] Since the relationship between the creator and the consumer is pointed out, it is not accurate to consider these assertions without taking IPRs' contribution in favor of public interest into account owing to the fact that it is not clearly intelligible to explain why IPRs have supportive function in terms of creative incentives without clarifying the need to support them. The incentives shall be supported because the products of the subject matter protected by IPRs are recognized to be valuable and in demand, which would make the world a poorer place in their absence.[16] This assessment of value is contingent on the ability of IPRs to serve desirable beneficial functions for the general good of the society.

[9] *Ibid,* p.6
[10] Michael Spence, *Intellectual Property* (Oxford University Press, United States 2007), p.73
[11] *Ibid,* p.47
[12] May, p.7
[13] J.A.L. Sterling, World Copyright Law: *Protection of Authors' Works, Performances, Phonograms, Films, Video, Broadcasts and Published Editions in National, International and Regional Law* (Sweet&Maxwell, London 2008), pa-ra. 2.30
[14] Bently and Sherman, p.36
[15] Cornish and Llewelyn, p.41
[16] Bently and Sherman, p.37

The relationship between the creator and the consumer can lead us to a further argument about the nature of the created goods. It is suggested that a division exists amongst public and pri-vate goods, which are distinguished from each other depending on whether the third parties can be excluded from the access to the creation or not. There will be an incentive to produce private goods, because they will allow the creator to receive some remuneration through IPRs in order to compensate the labour spent.[17] Since the control given to the creator represents a limitation to the public access to those goods which are said to be beneficial for the general good, there needs to be an ade-quate balance between these opposite interests. Fortunately, the public's limited access to these par-ticular works is traded off with the *"benefit of providing incentives to create the work in the first place"*.[18] Once they are created, the benefits to the society will come to light in the short and long terms even though some limitations exists for the sake of private interests.

This statement requires further clarification and it is appropriate to illustrate it with some specific examples. For instance, in the case of copyright, although the works are shared by the pub-lic in a way that the author wants to exploit them during the term of protection, they are still benefi-cial for the society. They contribute to the amount of knowledge and cultural products that the soci-ety already possesses, even though the free access to them as a part of the public domain takes some time until the expiry of the rights. Moreover, by inspiration, they are capable of triggering other ideas and creations based on the existing works.[19] From a patent law perspective, it is important to identify the point which emphasizes patents' function as a database of a great amount of scientific information about the latest technical developments[20] because the public disclosure of substantial information about the invention in exchange of the patent protection will assist the development of further discoveries of substitutable products through any experimental uses.[21]

The justification of IPRs is too deep-rooted and complex and there exist many different theories other than the ones stated above. On the other hand, many objections and criticism of the current theories also exist. Firstly, since the reward is given in a form of exclusivity, the nature of the reward is subject to discussion as it is argued whether the grant of a monopoly is the appropriate one or not and different systems with fewer social and economic costs in particular are suggested for patents.[22] This is evidently a reflection of the fear against IPR's monopolistic character, but the structure of the IP system provides a counterweight in order to achieve a balance which shall be ex-amined below. Secondly, it has been strongly argued that even in the absence of IPRs many works will still be produced because their emergence does not necessarily depend on the existence of IPRs.[23] However, it is found to be very *"narrow-minded or naive"* to suggest that without any sup-port to incentives the same results would eventually occur.[24] It does not seem to be possible to dis-agree with the counter-argument because the possibility that some creators' incentives would not be effected does not necessarily justify a generalization of the whole system. For instance in the case of patents, *"there is no clear evidence"* that the existence of legal protection does not have a posi-tive impact on creators' willingness to be engaged in the time consuming and costly research processes.[25]

[17] Spence, p.63
[18] William M. Landes and Richard A. Posner, 'An Economic Analysis of Copyright Law' [1989] 18 J. Legal Stud. 325, p.326
[19] Sterling, para.2.35
[20] Cornish and Llewelyn, p.139 ; Bently and Sherman, p.339
[21] Hanns Ullrich, 'Intellectual Property, Access to Information, and Antitrust: Harmony, Disharmony, and International Harmonization' in Rochelle Dreyfuss, Diane L.Zimmerman and Harry First(eds), *Expanding the Boundaries of Intellec-tual Property: Innovation Policy for the Knowledge Society* (Oxford University Press, Oxford 2001), p.367
[22] MacQueen, Waelde and Laurie, p.365 ; Bently and Sherman, p.37
[23] Bently and Sherman, p.38
[24] Michael A. Gollin, *Driving Innovation: Intellectual Property Strategies For a Dynamic World* (Cambridge Univer-sity Press, Cambridge 2008), p.14
[25] Cornish and Llewelyn, p.135

B.Internal Balancing of the Scope of Intellectual Property Rights

1. Internal Balancing of the Scope

It has been seen that IPRs establish an exclusivity over the protected material and it is re-quired to draw the boundary of their scope. When the aforementioned justification theories are taken into account all together, it is obvious that there is a very fragile relationship between the in-terests of the creator and the society. While trying to promote the creators' willingness to be en-gaged in the production of IP works by providing strong legal protection, arbitrary and excessive restrictions on the public's access to these works should be avoided and it should be made certain that *"these products find their way into the public domain"*.[26] One possible method of achieving this goal is by drawing the boundaries of these rights internally through the use of the IP system in order to strike a balance.

Essentially, different types of IPRs have their own instruments to safeguard vital public interests. For instance, the fact that only certain categories of subject matter are protectable, many works which are not worth protecting are already excluded. In addition to this, not every creation is protected purely for the reason that it falls within the scope of protectable subject matter. Even though there may be differences between different jurisdictions, there are always criteria to be ful-filled for the grant of protection, such as originality for copyright and novelty for patent.[27] Apart from this, intellectual property rights are granted with restrictions on duration which constitute one of the strongest balancing arguments between private and public interests.[28] The term of copyright is either 50 or 70 years[29], depending on the jurisdiction, with the most common duration being 20 years[30] for patent rights. The significant difference in terms of duration is a result of the balance between short and strong protection and longer and weaker protection.[31] More importantly, there are limitations on the exploitation of these rights by the right holders which are based on the concerns of allowing the public's access to these works at least up to some point. The limitations and excep-tions to copyright and the possibility of compulsory licensing of patents clearly aim to fine-tune the balance between private and public interests.[32]

In my opinion, the interests on the two ends of the spectrum are creator's incentive and pub-lic's access to information. From this point of view, IPRs should be examined in a wider range which includes their position in the innovation cycle.

2. Intellectual Property Rights' Role in Innovation

The fact that the subject matter of IPRs include important intangibles such as inventions of pharmaceuticals and various different technologies; creative film, music, entertainment and litera-ture products and computer programs should be considered when the position of IPRs is assessed in information societies. Primarily, they represent a *"source of hidden wealth worth trillions of dollars and they impose hidden costs on the same scale"*.[33] For all these different interest groups, IPR is a way of guaranteeing the exploitation of the outcomes of their efforts put into the creations as IPRs are the *"key method to assert ownership over knowledge resources"*.[34]

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[26] MacQueen, Waelde and Laurie, p.10
[27] Dreier, p.304
[28] May, p.7-8
[29] http://www.wipo.int/copyright/en/faq/faqs.htm#rights
[30] http://www.wipo.int/patentscope/en/patents_faq.html#role_patents
[31] MacQueen, Waelde and Laurie, p.14
[32] Dreier, p.304-309
[33] Gollin, p.1
[34] May, p.13

Therefore, a vital position for IPRs is imposed in the innovation cycle due to the fact that the strongest *"tools available to stimu-late and channel innovation"* are provided. by IPRs.[35]

It is suggested that the cycle has three steps: creation of the work by individuals, adoption by society and accessibility of knowledge.[36] Firstly, IPR shapes the creation stage by promoting the incentives and subsequently granting protection to make the creation known to the public as a means of exploitation. Following this, by the appearance of these creations in the public sphere they become subject to diffusion; and also influence and inspire other members of the society. Finally, a certain time after the creator benefits from their work through an exclusive right, the work becomes a part of the public domain by the expiry of the IPR. Due to this cycle, IPR maintains that the inno-vations are shared by the public instead of being hidden and lost. This cycle shows that the move-ment flows from exclusivity to accessibility, which in the end creates a *"great ocean of knowledge in the accessible domain"*.[37]

The issue concerning the diffusion of IPRs is one of particular importance which constitutes the *"balance between the incentive for the initial innovation and the benefits of the subsequent innovation"*.[38] As one of the purposes of the IP system to provide the disclosure of the IP protected materials, if the protection given is weakened then it is expected for creators to share their ideas to a lesser extent. However, with more IP protection, initial innovators can disclose information more readily as they will have means to stop others from *"simply running off with the idea once it was revealed"*. Therefore, the existence of IPRs is not an obstacle for further research, development and creation of more IPRs; but a proper means to support the follow-on innovation.[39] The assessment of the arguments against and in favor of justifications and in addition to this the innovation cycle per-spective, show that a well established IP law system naturally observes the necessary balance be-tween the private and public interests while defining the scope of the rights. Once this balance is established, efficient social use of innovations and maximization of the public good with social wel-fare are ensured.[40]

However, in addition to IPRs' inner structure, competition law has developed a position for itself in order to support the aforementioned diffusion stage externally by controlling the secondary markets.[41] Nevertheless, the scope and manner of this external interference have been found to be unclear and the attack towards them appears to proceed in the same way for an extended period of time [42]. These grounds will be further analyzed in detail below.

C. External Balancing of Intellectual Property Rights by Competition Law

1. Background

Above we saw the reasons and methods of internal balancing of IPRs. It has generally been accepted that IPRs are balanced by their inner structure, however, the possibility of additional and external competition law interference to ensure this important balance has also been suggested.[43] In addition to the theoretical arguments we will see below, the application of competition law in the EU has already started to pursue this goal. Before examining EU case law, it would be appropriate to look at the general objective, position and structure of competition law.

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[35] Gollin, p.12
[36] *Ibid,* p.17
[37] *Ibid,* p.19
[38] Barton, p.443
[39] Katz, p.333-334
[40] May, p.48
[41] Steve Anderman, 'EC Competition Law and Intellectual Property Rights in the New Economy', Summer-Fall [2002] The Antitrust Bulletin 285, p.307-308
[42] Anderman, 2002, p.308
[43] Dreier, p.300-312

2. Competition Law

Competition law is generally defined as a set of *"rules that are intended to protect the proc-ess of competition in order to maximise consumer welfare"*.[44]

The main objective of competition law is to achieve economic efficiency through effective competition which establishes benefits to the society.[45] These benefits are witnessed as lower prices, variety in products and services, more encouragement in innovation and development which are supposed to result in the maximisation of consumer welfare. The aforementioned efficiency is di-vided into types like allocative, productive and dynamic efficiency[46]; with the last one meriting fur-ther explanation since it is closely related to IP issues. Its core is based on the argument that *"producers will constantly innovate and develop new products as part of the continual battle of striving for consumers' business"* and consequently the aforementioned stimulation of innovation and con-sumer welfare will be achieved.[47] While this argument has at its core the establishment of a free market economy, it is also suggested that some degree of market power held by firms might consti-tute a better incentive to innovate. This implies that the existence of certain monopolies does not always distort effective competition and is not harmful to consumer welfare [48]. The objective of con-sumer welfare and the argument on the effects of market power in relation to innovation should be kept in mind for the discussion below. In addition to this, the status of competition law in the Euro-pean Union is especially unique and one which imposes further objectives on competition policy. Since its foundation, the most fundamental of many goals for the whole of the EU mentioned in the EC Treaty[49] is that of a single market and economic integration.[50] In this general structure, the role of EU competition law is to *"facilitate the creation of a single European market and to prevent this from being frustrated by the activities of private undertakings"*.[51] Therefore, this significant dimen-sion of EU competition law which is a result of the EU organisation should also be kept in mind.

One of the basic two provisions of EU competition law is article 102 of the TFEU, which prohibits the abuse of dominant position within the common market or in a substantial part of it. The application of the rule initially requires an assessment of dominance in a relevant market which consists of the economic power to behave independently of the competitors and consumers.[52] If it is established, it is necessary to examine whether this particular undertaking is involved in behaviours which constitute abuse. Finally, this abusive behaviour is required to affect trade between members states in order to be subject to EU competition law rules. The application of this article shall be seen in detail below, but intellectual property law dimension.

3. The Correlation Between Intellectual Property Law and Competition Law

We have seen that, competition law has been functioning as one the essential instruments to achieve the ultimate goals of the Union. Until now, in many different issues competition law had a major impact on the exercise of IPRs. While analysing the relationship between them in the broadest sense, a question arises about whether there is a conflict in terms of their ultimate goals and their instruments used in order to achieve these goals. These questions need to be examined for further assessment.

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[44] Richard Whish, *Competition Law* (6th edn Oxford University Press, United States 2009), p.1
[45] Jones and Sufrin, p.3
[46] See for further information, *Ibid* p.3-11
[47] Whish, p.5
[48] J.A. Schumpeter, *Capitalism, Socialism and Democracy* (Harper, 1942) cited in Jones and Sufrin, p.15
[49] EC Treaty (Consolidated Version of the Treaty Establishing the European Community), article 2
[50] Paul Craig and Grainne de Burca, *EU Law: Text, Cases, and Materials* (4th edn Oxford University Press, United States 2008) p.604
[51] *Ibid,* p.951
[52] Case 27/76 *United Brands Company and United Brands Continentaal BV b Commission of the European Communities* [1978] ECR 207, para.65

Initially, there are two opinions in relation to the correlation concerning their goals. As we have seen above these two branches of law have certain roles and objectives. The most common opinion is that there exists a conflict between them because of their approach to exclusivity, as we have seen above. However, it should be kept in mind that *"all the systems of intellectual property rights are based on the premise that a restraint of competition is necessary to ultimately increase competition in the public interest"*.[53] Therefore, it has recently been suggested that no such conflict exists due to the fact that these two systems are meaningful together since the exclusivity given by IP law converts the subject-matter into an economic good whereas it is only the possibility of com-petition that makes the exclusivity attractive as an incentive.[54] Even if there appears to be a prima facie conflict because of this exclusivity approach, they can in fact be *"reconciled by emphasising their common goal of promoting overall consumer welfare"*.[55] This has even been regarded as the modern view compared to the traditional perspective of seeing these two disciplines in an irresolv-able conflict because of their monopoly-exclusivity approaches and the modern view sees both of them as promoting the same aims mentioned above by *"stimulating innovative activities through competition and promising returns to successful innovation"*.[56] When this approach is considered, the first question can be answered by finding no real conflict between them in terms of objectives, however, the following problem is about whether the ways they operate in achieving these goals are reconcilable or not.

The second question needs to be analysed considering especially the application of article 102 of the TFEU over IPRs. As it was explained above, IPRs grant certain type of exclusivity which might lead to monopolies under certain conditions and article 102 tries to eliminate the existence of these conditions if they are harmful. Therefore, when some circumstances arise which seem to be conflicting on the surface, it is important to decide the instruments of which law should be applied. First, a complete immunisation of IPRs from competition law applications could be considered since exclusivity comes from the nature of these rights, yet, there is no legal basis for this immuni-sation of IPRs from competition law.[57] Although IP law has its own checks and balances it is still to a certain extent subject to competition law intervention in the same way that it has to comply with some other fields of law like *"environmental laws, health and safety laws and drug safety laws that restrict the free exercise of these rights in the public interest."*.[58] In addition to this, IPRs are re-garded as part of private law whereas competition law rules constitute public law.[59] Moreover, at the European Union level, most of the IP law issues are still subject to national legal systems which are guaranteed by article 345 of TFEU (ex Article 295 of the EC Treaty) which is silent about the corre-lation between competition and IP law.[60] At the other end of the spectrum, it is suggested that IPRs

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[53] Inge Govaere, *The use and abuse of intellectual property rights in E.C. law: including a case study of the E.C. spare parts debate* (Sweet & Maxwell, London 1996) , p.29

[54] Ullrich p.371-373

[55] Alan S. Gutterman, *Innovation and Competition Policy* (Kluwer Law International, London 1997) p.11; Estelle Der-claye, 'The IMS Health Decision and the Reconciliation of Copyright and Competition Law', [2004] 29(5) E.L.Rev. 687, p.694

[56] Katz, p.325; Whish, p.758

[57] Cyril Ritter, 'Refusal to Deal and "Essential Facilities": Does Intellectual Property Require Special Deference Com-pared to Tangible Property?', [2005] 28(3) World Competition 281, p.291, <http://www.kluwerlawonline.com/document.php?id=WOCO2005018&type=toc&num=2&> accessed on 14 April 2009; Steven Anderman, *EC Competition Law and Intellectual Property Rights: The Regulation of Innovation* (Oxford University Press, United States 1998), p.6

[58] Steven Anderman, 'Does the Microsoft Case Offer a New Paradigm for the "Exceptional Circumstances" Test and Compulsory Copyright Licenses Under EC Competition Law?' [2004] 1(2) CompLRev 7, p.22 <http://www.clasf.org/CompLRev/Issues/Vol1Issue2Article1.pdf> accessed 4 July 2009

[59] *Ibid*, p.21

[60] Ulrika Bath, 'Access to Information v. Intellectual Property Rights', [2002] 24(3) E.I.P.R. 138, p.138

do not differ from other rights and therefore do not deserve any specific treatment[61]. As a result of this, it is argued that the application of competition law for IPRs should be carried out in the same way as with other property rights while the competition law principles should be determinative in the assessment of the exercise of IPRs.[62] Yet, counter-arguments do not allow the acceptance of this assertion without considering the questions posed below.

These arguments are mainly based on the doubts about the capacity of competition law to oversee the objectives of IP law and its internally balanced system. Firstly, it is suggested that the limitations imposed on the exercise of IPRs by competition rules are questionable on grounds of policy since it is not certain whether the authorities applying these rules are competent or not and whether because of this the results might generate uncertainty and less interest in investing IPRs since *"their validity is subject to so vague a test"*.[63] The rationale behind this statement is the fact that competition law does not provide enough means to accommodate the interests protected by IP law because it does not *"concern itself directly with the question of how far the IP monopoly should extend"* since for instance, it is "too heavy-handed"[64] and "too blunt" as an appropriate instrument to adjust the shortcomings of the IP system. The nature of competition law remedies, shows that they cannot function as the proper means to adjust the IP system, because they are mainly shaped by the facts of a case instead of setting general outcomes applicable in a wider practice.[66] Although this point could have been turned into an advantage for IPRs since it would be possible to consider IP specific concerns in each case, in practice it is hard to claim this approach has been helpful. Firstly, it does not represent coherent and consistent external interference which aims to create an applic-able general set of rules for IPRs. Secondly, IP law theories have rarely been the subject of the consideration when decisions are made on these cases.

Therefore, it is inevitable to put forward that the unique system of IPRs which already estab-lishes an internal control as a result of considerations which, to a large extent, comply with compe-tition law logic, should not be ignored. One way of doing this is to apply competition remedies only in very exceptional circumstances where IP law's own mechanisms no longer serve their purpose.[67] Despite having a reasonable dimension, it takes us back to the doubts about the appropriateness of competition law methods that we discussed above. As a result, it is apparent that the use of competi-tion law instead of amending the shortcomings of IP law through IP legislation is not the best possible approach.[68] Therefore, these defects should initially be corrected by IP law rules and in the worst case, this being impossible, there should be an assessment by application of competition law which takes IPRs' "rules and functions" into account when their exercise is restricted, in order to strike a balance between these two sets of rules. The rest of this study aims to look at European case law in this field in order to see whether competition law has or has not functioned accurately in this direction until now.

III. CASE LAW OF EUROPEAN COURTS AND THE EUROPEAN COMMISSION

A.Background

[61] See note 57
[62] Ullrich. p.374
[63] Valentine Korah, *Intellectual Property Rights and the EC Competition Rules* (Hart Publishing, 2006), p.139
[64] Dreier, p.312
[65] *Ibid*, p.298
[66] Ullrich, p.383
[67] Dreier, p.312
[68] Christopher Stothers, 'The end of exclusivity? Abuse of intellectual property rights in the EU' [2002] 24(2) E.I.P.R.86, p.92
[69] Anderman, 2002 , p.288

Initially, it is important to remember that this study aims to deal with IPRs and the applica-tion of article 102 of the TFEU. In this context, the most important issue raised in case law is the refusal to licence IPRs by dominant undertakings. While early case law seems to be less reluctant in finding such abuse, there have been some controversial decisions which gave rise to questions. As we will see below, in the 1980's Community Courts became compassionate towards IPRs and paid attention to reward and incentive arguments. Subsequently, however, they followed a less favour-able approach towards IPRs which reflected a more restrictive understanding.[70] Before examining these, the position of IPRs in relation to article 102 deserves a more detailed analysis.

As mentioned above, the application of article 102 requires the fulfillment of three criteria. First, concerning dominance, it is well established in case law that only the existence of IPRs do not automatically make undertakings dominant[71], but it can only be established if certain circumstances exist. Therefore, it is clear that not every single IP is subject to the threat of being in a dominant po-sition and the majority of IPRs' exclusivity does not constitute a monopoly in any relevant market in the sense of competition law.[72] Second, even if dominance is found, it does not automatically give rise to the finding of abuse. Therefore, the second condition also needs to be assessed. In case law, it is accepted that the exercise of IPRs can be abusive only in exceptional circumstances. In order to define these circumstances, an important theory has been developed called essential facili-ties which considers the physical infrastructure such as a port, airport, railway or a pipeline belong-ing to an undertaking, essential for other competitors in order to be able to run their businesses.[73] Recently, there has been a tendency to also consider some of the intellectual property rights as es-sential facilities and the refusal to license them has been found to be abusive behavior according to article 102. Yet, it is still uncertain whether essential facilities and exceptional circumstances are the same or not.[74]

Initially, the three conditions of article 102 (dominance, abuse and effect on the trade be-tween member states) will leave many of the IPRs out of this question. Yet, this does not decrease the necessity of defining the exact conditions when certain behaviour is abusive. In my perspective, at this point, it is crucial to take all these IP justifications, the balance between the protection of incentives and the public access to the information, IPRs role in further innovation and so on, into consideration. Below we will look at related case law with an attempt to discover any implied or explicit discussions reflecting the aforementioned factors and IP related concerns.

B.Refusal to Licence Intellectual Property Rights Cases

1. The Volvo Case

Volvo[75] is commonly known as the first case of the refusal to licence IPR doctrine under article 102. In this particular case, the proprietor of a registered design for the front wings of one se-ries of cars prevented other manufacturers from producing these front wings as it would be an in-fringement of its sole and exclusive design right.[76] It was asked through a preliminary ruling whether this right confers a dominant position within the meaning of article 102 and if it is so whether the refusal to licence by the right holder constitutes a prima facie abuse of such a dominant position. Initially, the Court clearly recognised that in the absence of community standardisation or harmonisation of laws, the rules for granting rights are a matter for member states to define.[77]

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[70] Valentine Korah, 'Patents and Antitrust', [1997] 4 I.P.Q. 395, p.400
[71] Case 78/80 Deutsche *Grammophon v Metro* [1971] ECR 487, para.16
[72] Stothers, 2002, p.92
[73] Whish, p.691
[74] Korah, 2006, p.135
[75] Case 238/87, *AB Volvo v Erik Veng(UK)* Ltd [1988] ECR 6211
[76] *Ibid*, para.3
[77] *Ibid*, para.7

Following this, it was asserted that as refusing to licence a protected design and preventing others from using it constitutes the *"very subject matter of the exclusive right"* [78], it can never be in itself an abuse of dominant position. For these reasons, the Court pointed out the requirement of other condi-tions and gave some examples of possible abusive behaviours[79]. In these cases, the intervention of the competition rules was not found to completely undermine the essence of intellectual property rights.[80] Other than the recognition of specific subject matter of these rights, the only point that was taken into account as an IP specific issue is about the prices in these cases when the dominant undertaking might charge for the licence more than other competitors in order to recover the re-search and development expenditure in addition to production costs.[81]

2. The *Magill* Case

Following this decision, the general attitude towards these cases changed to a further restric-tive approach. While Volvo did not clarify when the exercise of these rights would be abusive but gave some unclear examples[82], Magill[83] developed a more detailed test which was also applied in the following cases. Yet, this triggered concerns on the IP side of the discussions fearing it could constitute a general attack on the exercise of IPRs and decrease the willingness of firms to invest in IPRs and also to innovation.[84] Simply put, the decision made by the Commission, which was later upheld by the CFI and the ECJ, required the owners of copyright for television programme listings to licence this information to third parties who wanted to produce a comprehensive weekly televi-sion guide.

Initially, as the existence of dominance is the first issue to consider, it is not possible to see the effect of IPRs in finding dominance in detail in the wording of the decision.[85] However, the broadcasting companies were found to enjoy a *"de facto monopoly over the information used to compile listings"*.[86] The finding of dominance over the particular information created many un-answered questions, especially the assessment of substitutability which is interesting due to the fact that *"each piece of information is individual and specific"* and mostly not appropriate for a substi-tutability test because of its nature.[87]

As to the abuse of this position, the judgement *"eschewed extended discussion about the na-ture of IPRs and their relationship to the competition rules"*[88] and instead of making an IP specific assessment applied general article 102 rules to the case. The factors which are supposed to be taken into account while deciding whether there are *"exceptional circumstances"* constituting an abuse or not are defined as such: no actual or potential substitute for a comprehensive weekly television guide for which a specific, constant and regular demand exists on the part of the consumers; preven-tion of the appearance of a new product; no justification for such refusal and reserving a secondary market by excluding all competition on that market by the dominant firm.[89] However, at that time it

[78] *Ibid*, para.8
[79] *Ibid*, para.9
[80] Korah, 2006, p.137
[81] Opinion of Mr Advocate General Mischo delivered on 21 June 1988, Case 238/87 *AB Volvo v Erik Veng (UK) Ltd* [1988] ECR 6211, paras. 32-33
[82] Jones and Sufrin, p.556
[83] Joint Cases C-241/91P and C-242/91P, *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v Commission of the European Communities* [1995] ECR I-743
[84] David Aitman and Alison Jones, 'Competition Law and Copyright: Has the Copyright Owner Lost the Ability to Control His Copyright?' [2004] 26(3) E.I.P.R. 137, p.137
[85] Jones and Sufrin, p.560
[86] Joint Cases C-241/91P and C-242/91P, *RTE&ITP v Commission of the European Communities* [1995] ECR I-743, para. 47
[87] Ullrich, p.387
[88] Jones and Sufrin, p.558
[89] Joint Cases C-241/91P and C-242/91P, *RTE&ITP v Commission of the European Communities* [1995] ECR I-743, para.50-56

was not clear whether these conditions were cumulative or not for the assessment.[90] A further de-tailed explanation of these factors shall be made below, as they have been taken into account in the following judgements.

However, there are some points to be noted which make this case more than a classical ap-plication of article 102 even though it does not include elaborated discussions about IPRs' nature. First of all, it has always been considered that, this strict approach of the Court could have primarily been a result of the particular type of subject-matter of the copyright, which would not receive copyright protection in the Member States other than the UK and Ireland.[91] This point has not been mentioned in the decision but only the influence of this argument can be seen from the Commission's submissions at the CFI.[92] Firstly, this cannot be accepted since the property ownership is sub-ject to national legislation, not to the Treaty according to article 345 of TFEU. If the Court follows this approach, it *"actually indirectly disqualifies national legislators."*[93] Still, it has been argued that the copyright protection granted to Magill is beyond IP justifications, especially in the case of copy-right which aims to reward the creator.[94] Even though it can be argued that this particular IPR is "unusual"[95], the decision generated concerns about the application of this test to less "unusual" kinds of IPRs especially in the case of patents, since it was claimed that the Court's wording sug-gests the application of this test even to patents which emerge as a result of tremendous investment and research.[96] It was even expressed as a fear of the danger that the Magill test would be applied by the Courts in the subsequent cases about *"patents, designs and meritorious copyright"*.[97] As we will see below, these fears were not groundless since the later cases reflected the same approach, i.e. for copyright for software. Apart from this, as the remedy to such abuses is the granting of a com-pulsory licence by the dominant IP owner; this specific IP instrument becomes general by broaden-ing its application sphere. Therefore, it is reasonable to question whether the wider use of this in-strument is capable of removing incentives for innovation which are the ultimate goal that IPRs try to achieve."[98] In addition to these, the decision gave no guidance about the possible defences that an IP holder could assert such as any positive grounds for objective justification.[99]

3. The *Tierce Ladbroke* Case

Tierce Ladbroke[100] is another refusal to licence an IPR case and a reflection of the applica-tion of previous case law. It deals with the refusal to grant a licence of televised pictures and infor-mation about horse races in France to a betting shop in Belgium. As it was pointed out before, the Magill decision had left many questions unanswered and the first application of this case-law to an IP licensing case resulted in ambiguity. The significant point of Ladbroke is that CFI interpreted Magill conditions to be alternative to each other, instead of being cumulative. Therefore, in the case of an IPR an abuse could be found if either the access for product or service that is essential for ac-tivity in another market is sought or the prevention of the emergence of a new product existed.[101] Since these exceptional circumstances did not exist, there was no abuse in this case.

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[90] Jones and Sufrin, p.560
[91] Jones and Sufrin p.557; Valentine Korah, 'The Interface Between Intellectual Property And Antitrust: The European Experience' [2001] 69 Antitrust L.J. 801, p.811
[92] Case T-69/89, *Radio Telefis Eirann v Commission of the European Communities* [1991] ECR II-485, paras.45-46
[93] Bath, p.141
[94] Christopher Stothers, 'Refusal to Supply as Abuse of a Dominant Position: Essential Facilities in the European Un-ion" [2001] 22(7) E.C.L.R. 256, p.262
[95] Aitman and Jones, p.141
[96] Korah, 1997, p.403
[97] *Ibid*, p.409
[98] Jones and Sufrin p.557-558
[99] Anderman, 2002, p.293-294
[100] Case T-504/93 Tierce Ladbroke SA v Commission [1997] ECR II-923
[101] *Ibid*, para.131

4. The *Oscar Bronner* Case

Oscar Bronner[102], which is about the refusal to grant access to the only nation wide newspaper home-delivery scheme belonging to one undertaking is clearly not an IP case. But what makes it important in this analysis is the fact that the decision was based on Magill. The Court held that Magill, a case purely involving the exercise of an IPR, is applicable to other types of property right cases but with a more restrictive approach since an additional requirement is introduced requiring the service to be indispensable, which means that there are no actual or potential substitutes for the person asking for access to run a business.[103] This new element will require firms to show more than a simple desire to have access to certain facilities and therefore it is expected that the Courts will be less willing to find an abuse in these circumstances.[104] In addition to this, Oscar Bronner with its strict test seems to point out *"legal predictability and concern for the stronger firm's incentives to invest"*.[105]

In addition to this, what is more important in Oscar Bronner is AG Jacobs' comment on the rationales of IPRs and the way they must be treated. He suggests a balance which should be achieved in the case of IPRs since he acknowledged their extraordinary nature. According to the AG, primarily, this line of refusal to supply and license cases are exceptions to the generally ac-cepted right *"to choose one's trading partners and freely dispose of one's property"* and different interests need to be very carefully balanced.[106] He emphasizes the need to consider short and long term effects on competition and incentives to innovate which can be damaged if these facilities are easily open to access of competitors. Since he declares these opinions for a broad class of property without distinguishing between them, he specifically draws attention to the case of IPRs which he defines as *"the fruit of substantial investment"*. He points to the internal balancing of IPRs in the form of a limited period of right, between the free competition and incentive for creativity. He does not suggest a complete immunization for IPRs, but it is clear that any interference to the IP system should be made in very exceptional circumstances such as if this limited monopoly granted by an IPR turns into a permanent monopoly.[107] He has been criticized for supposing that the time limita-tion for the IPRs properly balances the private and public interests mentioned above and against his approach it was suggested that the authorities should rely only on competition law.[108] However, as we shall see in the following cases, the application of competition law could not provide complete answers to the questions related to these issues either. Therefore, in my point of view, it was prom-ising to find this analysis in an official ECJ document, despite this being only the AG's opinion, due to the fact that it can trigger further consideration in the future.

5. The *IMS Health* Case

The IMS Health case relates to a *"1860 brick structure"* developed by IMS which divides Germany into small geographical areas in grid form (bricks) by taking some specific criteria into account. With this structure, it provides data on regional sales of pharmaceutical products. The pro-cedural background of IMS Health decision is more complicated than other cases. Two proceedings were occurring at the same time, one of which was initiated by the Commission and resulted in an interim decision[109] that ordered IMS to licence its brick structure. On the other hand, the national proceedings between these parties tried to resolve the conflict by making a preliminary reference to the ECJ about the interpretation of article 102 in refusal to license intellectual property right

[102] Case C-7/97 *Oscar Bronner GmbH and Co KG v Mediaprint* [1998] ECR I-7791
[103] *Ibid*, para.41
[104] Korah, 2006, p.145
[105] Mats A. Bergman, 'The Bronner Case - A Turning Point for the Essential Facilities Doctrine?', [2000] 21(2) E.C.L.R. 59, p.63
[106] Opinion of Mr Advocate General Jacobs delivered on 28 May 1998, Case C-7/97 *Oscar Bronner GmbH and Co KG v Mediaprint* [1998] ECR I-7791, para.56
[107] *Ibid*, paras.62-64
[108] Ritter, p.293
[109] 2003/741/EC: Commission Decision of 13 August 2003 relating to a proceeding under Article 82 of EC Treaty(Case COMP D3/28.044 - NDC Health/IMS: Interim Measures) Official Journal L 268, 18/10/2003, p. 69-72

cases[110]. During these concurrent proceedings, the Commission stepped back and withdrew its decision after it was suspended by the President of the CFI mentioning that *"the obligation to licence went too far"*.[111]

First, as this is a preliminary ruling procedure, the ECJ could not give an exact decision about the problem but left the application of what it suggested to the national court. Initially, in the IMS decision the court emphasised that Magill factors are cumulative and all of them need to be satisfied with addition to Oscar Bronner's *"indispensability"* requirement. [112] Other than this, there are no new elements introduced into this doctrine by IMS, which despite providing more elaborated explanations of these factors, follow Magill. However, in the Commission decision, the emergence of a new product was not required since it followed Ladbroke. Initially, it is clear that in this line with case-law, the Court looks for two different markets where dominance exists in one and tried to be used in the other. Therefore, the existence of two different markets enables the court to restrict the exercise of IPRs. Interestingly, the Court rules that this can be a potential or even a hypothetical market and the finding of two different stages of production which are interconnected and upstream product is indispensable for the downstream product would be sufficient enough.[113] It is quite hard, however, to see two different markets and products in IMS, where the 1860 brick structure is sug-gested to be the upstream market and supply of German regional sales data for pharmaceutical pro-ducts is considered as the downstream market.[114] This raises concerns about the reliance of hypo-thetical markets terms being very wide, especially in the case of IPRs.[115] This requirement has been interpreted as *"a polite way of rejecting the doctrine that for a duty to supply to arise there must be two markets where transactions are being concluded"*.[116]

However, the emergence of a new product issue is discussed in depth and I find it compati-ble with IP issues due to the fact that it at least prevents the possibility of a dominant firm to be forced into sharing its IP protected material with competitors who aim to produce the *"clones"* and *"me too"* products which would be in complete conflict with the rationale of IP. [117] Therefore, this particular requirement is seen as the reflection of the need to strike a balance between the interests of copyright and competition since preventing the emergence of a new product would not be compatible with neither copyright nor competition laws because it is beyond copyright's goal of pro-moting innovation[118]. Also, as was explained above, IPRs do not aim to stop further and follow-on innovations but they still have to take IPR's internal balancing of limited monopoly and access to information by public into consideration. It is suggested that these points are also recognised by the IP system and may lead to compulsory licensing and even the withdrawal of protection, especially in the case of inadequate use of an invention.[119]The decision sets the requirement that the refusal *"may be abusive only where the undertaking which requested the licence does not intend to limit itself essentially to duplicating the goods and services already offered on the secondary market by the owner of IPR, but intends to produce new goods or services"*.[120] It is suggested that this re-quirement should be interpreted as drawing a difference between IP and physical property cases[121]

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[110] Case C-481/01, *IMS Health GmbH & Co. OHG v NDC Health GmbH & Co. KG* [2004] ECR I-5039
[111] Korah, 2006, p.144
[112] Case C-481/01, *IMS Health GmbH & Co. OHG v NDC Health GmbH & Co. KG* [2004] ECR I-5039, para.38
[113] *Ibid*, paras.44-45
[114] *Ibid*, para.46
[115] Damien Geradin, 'Limiting the Scope of Article 82 EC: What Can the EU Learn From the U.S. Supreme Court's Judgment in Trinko in the Wake of Microsoft, IMS, and Deutsche Telekom?' (2004) 41 CML Rev 1519, p.1530
[116] Korah, 2006, p.147
[117] Anderman, 2004, p.13
[118] Derclaye, p.695
[119] Ullrich, p.393
[120] Case C-481/01, *IMS Health GmbH & Co. OHG v NDC Health GmbH & Co. KG* [2004] ECR I-5039, para.49
[121] Derclaye, p.694; Geradin, p.1527

since it has *"no analogue in the essential facilities cases that involve physical property cases"*.[112] Yet, the requirement has not been defined without leaving any questions unanswered and as we will see below, the first application of the requirement in Microsoft has raised more questions than before.

Although this decision had been regarded as shedding light on the court's *"murky"* case law[123], it will become evident that Microsoft raised further issues.

C.Refusal to Licence Interoperability Information

1. The Microsoft Case

The Microsoft case is considered to have had the biggest impact in this particular field and attracted broad criticism, primarily due to the €497 million fine the Commission issued for the two breaches of article 102.[124] Other reasons exists as to why it is important to examine the outcome of this case in order to see how the previous case law has continued to effect and how it might appear to effect the subsequent cases. However, both the Commission and the CFI decisions are rather long and detailed, compared to previous cases in this field, therefore it is not possible to discuss all the issues in detail below. One reason for this is the fact that the case is about two different abuses, one of which is the refusal to supply interoperability information and the other is the tying of two pro-ducts. Below we will focus on the first issue with a specific look at three points which are related to the particular IP-competition law correlation.

a.Dominance and the Market Structure

As to the finding of dominance, initially two markets were defined: PC operating systems and work group server operating systems. Microsoft's dominance in the first market was uncon-tested, with almost more than 90% of the market share.[125] Moreover it is clear that Microsoft has a very unique position in this specific high technology market. One reason for this dominance is sug-gested to be the network effects which arise in technology markets.[126] The clue for this suggestion also comes from the wording of the decision which mentions that there exists an *"overwhelmingly dominant position"* in the Microsoft case,[127] or in Orwellian terms: *"Some dominant firms are more dominant than others"*.[128] By using a simple analogy it is thought that while a dominant undertaking has a special responsibility for not abusing its particular position, another undertaking with a more specific dominance might have more responsibility.[129] Although this doctrine has not been explicitly accepted, the outcome of the decision should also be considered taking this into account, since the judgement reveals that the defendants "had not taken sufficiently into account its special responsi-bility" for not distorting the competition.[130]

The features of this particular market also merit special attention. These are high technology markets, which emerge as a result of time-consuming and costly investments. Moreover, another particular feature of these markets is the necessity of interoperability information. Interoperability concerning computer programs is the functional interconnection and interaction between the

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[122] Derek Ridyard, 'Compulsory Access Under EC Competition Law - A New Doctrine of "Convenient Facilities" and the Case For Price Regulation' [2004] 25(11) E.C.L.R. 669, p.669
[123] Derclaye, p.687
[124] Geradin, p.1533
[125] Case T-201/04 *Microsoft Corp v Commission of the European Communities* [2007] ECR II-3601, para.387
[126] Jones and Sufrin, p.54-55
[127] COMP/C-3/37.792 Microsoft, Commission Decision of 24.03.2004 relating to a proceeding under article 82 of the EC Treaty, para.435
[128] Jochen Appeldoorn, 'He who spareth his rod, hateth his son? Microsoft, super-dominance and Article 82 EC' [2005] 26(12) E.C.L.R. 653, p.653
[129] Whish p.185
[130] Case T-201/04 *Microsoft Corp. v Commission of the European Communities* [2007] ECR II-3601, para.775

elements of software and hardware in order to provide communication and proper operation with other components of computer systems and users.[131] In fact, the Software Directive recognises that necessity and provides an IP law instrument to cope with it by setting the conditions where the legitimate obtaining of the interoperability information does not infringe copyright and at the same time observes the interests of the copyright owner.[132] It is suggested that the provisions about the interoperability in the Software Directive constitute one of the important attempts made at the Community level in order to *"strike a balance between, on the one hand, the importance of IPRs, and, on the other hand, the importance of competition and access to information"*.[133] It was identified that, from another point of view, the possibility of decompilation might increase the number of firms and products in the software markets and decrease the incentives to create especially for the larger and well established firms.[134] Thus, it should be observed that in some cases IP law might prefer to leave the creators with less incentives in order to balance the system for the general good of the creators, users and public.[135] Therefore, the particular article of the Directive is a real example of the means that IP law has in its internal system to balance the interests of different parties. However, the Directive also points out the possible application of article 102 where this interoperability information is held by dominant firms.[136] Still, if Microsoft's rivals cannot obtain interoperability information according to decompilation rules under article 6 of the directive, it is very debatable as to whether it is possible to extend its scope by competition law with a claim of being "beneficial for the society as a whole" especially because of the concerns about article 102 as the appropriate means.[137]

One last point related with the markets is the requirement from previous case law which looks for two different markets in this line of cases, upstream and downstream and the indispensa-bility issue. As we saw above, this constituted one of the exceptional circumstances which would make the finding of abuse on the part of IP holders harder. However, IMS had made quite a differ-ent impact on the requirement by the hypothetical markets approach and the two different stages of production. By following these, the CFI did not identify two different markets but instead two products in Microsoft which are personal computer operating systems and work group servers. Yet again however, because of the network effects, which has been asserted by Microsoft[138] and also pointed out by some authors[139], any technology in these kind of network markets may always be regarded as indispensable.

b. The New Product Requirement

Although the IMS doctrine has been followed in Microsoft to a large extent, the assessment of the new product requirement is controversial due to the fact that it causes the issue to become more extensive. As was explained in IMS, a proper application of this element is capable of protect-ing some of the IP concerns, however, after the previous cases, it was observed that the decision left the questions about the exact definition of this term unanswered.[140] The Microsoft decision is a real reflection of this criticism, because this element, which was thought to observe IP specific require-ments, was put into a different position by the interpretation of the Commission and the Court.

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[131] Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs, Recital 10

[132] *Ibid*, Article 6

[133] Bath, p.141

[134] Barton, p.442

[135] Michael Anthony C. Dizon, 'Decompiling the Software Directive, the Microsoft CFI case and the I2010 strategy: how to reverse engineer an international interoperability regime', [2008] 14(8) C.T.L.R. 213, p.214

[136] Directive 2009/24/EC, recital 17

[137] David Howarth and Kathryn McMahon, '"Windows has performed an illegal operation": the Court of First In-stance's judgment in Microsoft v Commission' [2008] 29(2) E.C.L.R. 117, p.134

[138] Case T-201/04, *Microsoft Corp. v Commission of the European Communities* [2007] ECR II-3601, para.340

[139] Howarth and McMahon, p.120 ; Bill Batchelor, 'The fallout from Microsoft: the Court of First Instance leaves crit-ical IT industry issues unanswered' [2008] 14(1) C.T.L.R. 17, p.17

[140] Derclaye, p.695

First, the criticism focuses on the point that there is not an exact definition of a new product in this case and Microsoft's conduct is regarded as preventing the emergence of *"unspecified future new products"* which is considered as a failure of the Magill test.[141] In previous cases, the emphasis was made on the competitors' need to produce new products which require the IP protected material as an indispensable input, instead of a mere duplication. However, in Microsoft this approach has not been made the basis of the decision. The CFI refused to consider new products as the only cri-terion and broadened the understanding by interpreting it as a *"limitation to technical development to the prejudice of consumers"* under article 102(b).[142] So it enables the competitors to access IP protected materials when their intention is to develop some new technical features on the same and existing products if it can be shown that in the case of limiting this development prejudice of con-sumers will occur.[143] Therefore, the Commission relied on the evidence from consumer surveys which shows that the applicant's working group servers had better technical futures compared to Microsoft's in order to find abusive behaviour on Microsoft's side.[144] However, this data is not con-sidered to be the most reliable evidence because of the networks effects in the market[145]. Further-more, in this specific industry, competitors can almost always be in a position to claim that better technical features exist since it is not very likely that two competing products exist with exactly the same characteristics, a new approach which in the end essentially weakens the balance between IP and competition.[146]

c. Objective Justification and the Commission's Effects-Based Approach

The other crucial issue to emphasise in Microsoft decision is the incentive balancing argu-ment which was dealt with under the objective justification heading. Objective justification defence in assessing abuse has never been seriously discussed in this line of cases. Finally, in Microsoft, the defendant's claim about the existence of intellectual property rights as an objective justification to refusal to licence interoperability information has become a subject of discussion.

Microsoft claimed that the information requested by Sun Microsystems was protected by in-tellectual property rights which should constitute an objective justification since it is the outcome of a large amount of investment while the protection given by the IPRs promotes its incentives for fur-ther innovation in software and other technologies.[147] The Commission applied a balancing-test to examine this claim before finding that the existence of IPRs did not constitute an objective justifica-tion which was later approved by the CFI.[148] However, it was added that Microsoft was not success-ful in benefiting from this claim since it put forward *"vague, general and theoretical arguments"*.[149] Consequently, it is likely that the court may deal with these arguments more in subsequent cases under the objective justification assessment[150] if the defendants can successfully support their arguments especially when the facts of the cases are not as unique as Microsoft's.

What is important to look at in relation to objective justification is the Commission's afore-mentioned effects-based approach used to refute Microsoft's points. As Microsoft claimed that this access to its interoperability information would decrease its incentives to innovate, the Commission tried to refute the claim by applying a test which focuses on whether *"balance, possible negative impact of an order to supply on Microsoft's incentives to innovate is outweighed by its positive*

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[141] Geradin, p.1538
[142] T-201/04 *Microsoft Corp. v Commission of the European Communities* [2007] ECR II-3601, para.647
[143] Steven Anderman, 'Microsoft v Commission and the interoperability issue' [2008] 30(10) E.I.P.R. 395, p.399
[144] T-201/04 *Microsoft Corp. v Commission of the European Communities* [2007] ECR II-3601, para.650
[145] Howarth and McMahon, p.123
[146] Batchelor 2008, p.18
[147] COMP/C-3/37.792 Microsoft, Commission Decision of 24.03.2004 relating to a proceeding under article 82 of the EC Treaty, para.709
[148] T-201/04 *Microsoft Corp. v Commission of the European Communities* [2007] ECR II-3601, para.690
[149] *Ibid*, para.698
[150] Anderman, 2008, p.399

impact on the level of innovation of the whole industry".[151] This approach has been approved by the Court as it was found to be more than just simply refusing the arguments[152], even though Microsoft claimed that this is not appropriate because the test itself is vague and does not provide the under-takings with enough guidance[153].

The Commission has recently developed this approach as well as issuing *the Guidance on the Commission's enforcement priorities in applying article 22 to abusive exclusionary conduct by dominant undertakings* on 3 December 2008.[154] This is part of the modernisation process of EU competition law which highlights the importance of promoting consumer welfare and efficiency as the main objective of this branch of law.[155] By taking these factors into account, the aforementioned approach focuses on the effects of alleged conducts not for the whole economy but for the consumers.[156] The application of article 102 has always faced criticism since it tends to focus on the "form" of dominant undertakings' behaviours in order to assess the existence of abusive conduct instead of the "effects" of them.[157] In some cases, this formalistic approach tends to find abuses when the tests of infringement are met at first instance however in reality conduct may not be abusive but pro-competitive or neutral, because of the specific facts of the case.[158] Therefore, when this effects-based approach is accepted, it would help to reconcile IPRs and article 102, due to the fact that dominant firms' behaviours, which categorically fall under article 102 but in fact do not produce the effects that competition law tries to eliminates, may be allowed. This approach has been well re-ceived, in particular by the IT industry which is closely related to IPRs due to the fact that it is thought that the specific sectorial requirements like the definition of markets will be better met.[159] This would enable more discussion about the effects of the existence of IPRs with long term and short term benefits taken into account.

However, this approach has also faced some criticism as it is suggested that if this particular approach is going to be used more in the future, it will trigger the development of a *"more open-ended"* approach, one which is regarded as a move from essential facilities doctrine to a new "con-venient facilities doctrine" that leaves the Commission a great amount of discretion.[160] The Com-mission has already rejected the possibility of the existence of an exhaustive check list of excep-tional circumstances. Some authors believe that the Commission, at its own discretion, chooses the most convenient element from previous case law as a basis for its decision in order to examine other factors.[161] Although the positive aspect of this balancing test has been valued since it takes incentive concerns into account, it is not clear how well the Commission can perform such a diffi-cult task. This is because these kinds of tests are *"inherently unreliable and unpredictable"* instruments which could carry a prejudice in favour of the access seekers. This effects-based approach could be seen to provide some flexibility; however, since it does not have enough guidance for the dominant firms to know whether they are abusing their position or not, it brings uncertainty and un-predictability instead.[164]

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[151] COMP/C-3/37.792 Microsoft, para.783
[152] T-201/04 *Microsoft Corp. v Commission of the European Communities* [2007] ECR II-3601, para.696
[153] *Ibid*, para.671
[154] http://ec.europa.eu/competition/antitrust/art82/index.html
[155] Jones and Sufrin, p.44
[156] Jones and Sufrin, p.48
[157] *Ibid*, p.330
[158] Whish, 195
[159] See, Sofia Bune and Bill Batchelor, 'Reform of Article 82 EC Treaty: how will it affect the IT industry?', [2006] 12(1) C.T.L.R. 22
[160] Ridyard, p.670
[161] COMP/C-3/37.792 Microsoft, para.555
[162] Appeldoorn, p.657
[163] Geradin, p.1542-1543
[164] *Ibid*, p.1553

d. Comment

Nevertheless, if the specific facts of this case, such as the dominance of Microsoft and the structure of the market, are taken into account, the result of this balancing test in favour of free competition may be found to be reasonable. If the decision were in favour of Microsoft, its domi-nance would be reinforced since it would face little competition and would consequently be hard to find any incentive on Microsoft's side to produce and innovate better.[165] In this case it would be extremely difficult to claim that a result in favour of Microsoft is compatible with IPR's goals since it could go beyond its defined aim. Therefore, it is suggested that the examination must be based on this crucial question, whether the IPR is exercised according to its essential function or not.[166] Thus, this incentives balance test *"would seem to be in line with the most recent economic thinking on IPRs"*.[167] This particular test could be beneficial owing to the fact that the essential function of IPRs is the inability to prevent further innovation, however in this decision the assessment about what constitutes a new product leaves many questions unanswered. Moreover, as discussed above, the amount of certainty and predictability required for the identification of abusive conduct is not satisfied.[168]

2.The French Apple Case

a. Interoperability Concerning Technological Protection Measures

Apart from the interoperability between computer programs and components, a further as-pect of this topic exists in relation to interoperability between technological protection measures. Technological protection measures are used by copyright owners while exploiting their rights in the forms of encryption and similar access controls.[169] The Information Society Directive expressed the need to establish compatibility and interoperability between these systems which might be different from each other[170]. Although the recital indicates nothing more than a wish for this requirement, this is thought to be a result of the current situation in 2001 since at that time the interoperability of technological protection measures did not seem to be an essential and daily issue.[171] Yet, even ten years before the enactment of the Information Society Directive, the Software Directive provided a more elaborated approach and guidance to the interoperability issue in software markets because the need of interoperability was observed even at that time.[172]

On the other hand, although the Copyright Directive does not say much about interopera-bility, it requires that adequate legal protection against the circumvention of any such measures be provided by member states.[173] These measures also give rise to questions about interoperability, however, the Copyright Directive does not provide further explanation. It has been suggested that these protection measures should be regarded a part of the system components that the Software Directive applies to in terms of interoperability, however no case law or legislation exists to solve this question.[174] Nevertheless, since the Microsoft case constitutes a landmark decision for interop-erability at the EU level, the interoperability issue related to these specific protections means may become the subject of further cases in the future.

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[165] Simonetta Vezzoso, 'The incentives balance test in the EU Microsoft case: a pro-innovation "economics-based" approach?', [2006] 27(7) E.C.L.R. 382, p.385
[166] Howarth and McMahon, p. 124
[167] Vezzoso, p.386
[168] Howarth and McMahon, p.134
[169] Bently and Sherman, p.318
[170] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the Harmonisation of Cer-tain Aspects of Copyright and Related Rights in the Information Society, recital 54
[171] Mikko Valimaki and Ville Oksanen, 'DRM Interoperability and Intellectual Policy in Europe', [2006] 28(11) E.I.P.R. 562, p.563
[172] *Ibid*, p.563
[173] Information Society Directive, article 6
[174] Valimaki and Oksanen, p.564

b. A National Application of the EU Doctrine: Apple v Virgin

Although not yet at the community level, a case which is in a way similar to the Microsoft case and which is important to point out briefly in order to observe possible future dimensions of the issue, has been seen in France[175]. In 2004, the French competition authority was involved in a case with an IP related issue concerning technological protection measures on music files, as an-other part of the IP and competition law debate.

Apple is today one of the most important players in the multimedia market. The product in question in this case is its famous portable music player iPod which is the fruit of its innovation success.[176] Apple uses a digital rights management system called FairPlay, which has certain fea-tures for restricting the further unauthorised copying of downloaded material which can only be played on Apple's portable music players; a format only obtained through its iTunes software.[177] As explained before, these measures which are protected by the Information Society Directive obvi-ously carry a beneficial role in the prevention of unauthorised sharing of IP protected materials es-pecially with today's problems concerning online music and file sharing.[178] Despite being a IP related area, it can also be subject to competition law assessment as we see in the French case because the difference between formats diminishes other players' ability to play FairPlay formatted songs and constitutes a restriction in the market and raises demand for interoperability.[179]

The French authorities applied EU case law on compulsory licensing of IPRs to this case. Essentially, the question here is whether Apple abused its dominance in the portable music player market by leveraging it in the downloaded music market.[180] Initially, while applying the existing doctrine, the finding of dominance in the relevant digital rights management technologies market was left unclear because of the dynamic market features which make the assessment particularly hard. However, Apple is found to be dominant in the market for portable music players.[181] Although dominance was not found for digital rights management technologies market, the previous case laws conditions were considered and according to the decision, Apple's digital rights management information was not indispensable, the competition was not eliminated in the music downloads market, no specified new product and consumer demand existed, and Apple managed to assert ob-jective justifications[182], ending the proceedings in favour of Apple.

c. The Relationship Between Technological Protection Measures and Competition Law in the EU

Nonetheless, what is important for the purpose of this study is once again the relationship between IP measures and competition law, since technological measures are important tools for the protection of IP materials and it is legally given a very similar status to IPRs. Moreover, digital rights management systems consist of two aspects, one being the IPR protected software that cre-ates it and the other being the restriction brought by the Directive for the removal and circumvent-ion of this protection measure. This is a status similar to IPRs, but they only differ in that these technological measures are not regarded as property rights. Nevertheless, it is suggested that the

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[175] Conseil de la Concurrence, Décision N° 04-D-54 du 9 Novembre 2004 relative à des pratiques mises en œuvre par la société Apple Computer, Inc. dans les secteurs du téléchargement de musique sur Internet et des baladeurs numéri-ques, cited in MAZZIOTTI bunu duzelt available at: <http://www.conseil-concurrence.fr/pdf/avis/04d54.pdf>

[176] Ewan Kirk, 'Apple's iTunes digital rights management: "Fairplay" under the essential facilities doctrine', [2006] 11(5) Comms.L. 161, p.161

[177] *Ibid*, p.161

[178] *Ibid*, p.161

[179] Stan J. Liebowitz and Stephen E.Margolis, 'Bundles of joy: the ubiquity and efficiency of bundles in new technol-ogy markets' [2009] 5(1) J.C.L. & E. 1, p.21

[180] Giuseppe Mazziotti, 'Did Apple's Refusal to License Proprietary Information enabling Interoperability with its iPod Music Player Constitute an Abuse under Article 82 of the EC Treaty?', [2005] 28(2) World Competition 253, p.263

[181] *Ibid*, p.261

[182] *Ibid*, p.270

same principles applied for IPRs under competition law should *apply to digital rights management systems*.[183] Therefore, it is obvious that these systems *"cannot enjoy any kind of per se immunity from competition law assessment"*.[184] With this in mind, it should be remembered that in this case there exist IP measures which are regulated by EU Directives. Consequently, it is important to con-sider to what extent these measures help to solve this particular problem and what IP law can do before competition law interference arises. For example, provisions related with the possibility of reverse engineering these measures may be incorporated into the legislation in order to provide compatibility under defined conditions.[185] On the other hand, French legislature tried to enact provi-sions requiring Apple to open its format to its competitors during the implementation of the Infor-mation Society Directive but the proposal was rejected.[186] Although the proposal was not entirely in favour of these measures it would be clearer and more appropriate to impose this requirement by means of legislation instead of an external competition law application because the use of competi-tion law in this way could discourage Apple and also others in the market from creating in the first place.[187] Because of this, an adequate interoperability doctrine could be introduced by individual IP laws.[188] However, it is claimed that the EU does not have a sufficient interoperability policy and the modification of the existing rules is unlikely in the near future.[189] In spite of this absence, it is rea-sonable to support the necessity to develop a common standard which would eliminate this incom-patibility.[190]

Although, this national decision left space for the exercise of technological protection meas-ures, the position of Apple and even the position of Microsoft which is pointed out in this decision are very likely to come to the Commission' s attention in the near future which could see the cre-ation of a subsequent part of current case law.[191]

D.Concluding Remarks

The essential comments and critiques about case law have been discussed above, however it is necessary to sum them up to illustrate our point better. It is obvious that the factors of competition law tests created for IPRs have some pros and cons when they are examined in conjunction with IPR rationales. It is not possible to think of IP exercise without any competition law interference, therefore this interference should definitely include a balancing assessment between incentives to innovate as the core of IPRs and the competition in the market.[192] However, when the available case law is examined the elements of the applied tests do not provide a good enough picture. While some of the aforementioned tests could have been fulfilling IP expectations, like the definition of two dif-ferent markets, new product requirement and objective justification, their broad interpretation by the court has recently left little in common between competition and IP in terms of reconciliation. The Microsoft decision, being the more recent case, has certainly done *"little to clarify the scope of the duty for the refusal to licence IPRs under EC law."*[193] Therefore, the main question which is clearly still unanswered is whether the solution for this grey area between the laws should be pro-vided by IP law through a method of reforming itself or be left to competition law.[194]

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[183] Kirk, p.162
[184] Valimaki and Olsanen, p.566
[185] Mazziotti, p. 272
[186] *Ibid*, p.565
[187] Kirk, p.166
[188] Valimaki and Olsanen, p.568
[189] Valimaki and Olsanen, p.567
[190] Kirk, p.166
[191] Mazziotti, p.271
[192] Howarth and McMahon, p.119
[193] *Ibid*, p.117
[194] Anderman, 2008, p.399

It is not an uncommon idea to suggest that competition law should be used in exceptional circumstances when IP law no longer fulfils the function that it is granted for.[195] Nonetheless, we can see how the appli-cation of competition laws have not satisfactorily taken the necessary IP issues into account until now. This also shows that competition law *"cannot remedy whatever deficiencies, misconceptions or excesses a given IP system may have"* and therefore should not be the method used for modifying the shortcomings of IP laws[196]. For instance in the Microsoft case, *"if IP law were to take a form of offering a more extensive guarantee of interoperability of interface information for software, then the effect would be that article 82 would called upon even more rarely"*.[197] Due to this fact, IP law should build the necessary safeguards into its internal system since easy reliance on competition law does not help to correct the deficiencies.[198] Moreover, the reform of intellectual property law and more harmonisation at the EU level in order to decrease the amount of external competition law intervention would represent *"a more democratic way, using competence transferred by the national parliaments"*.[199]

IV. CONCLUSION

Intellectual property rights have a significant position in today's innovation markets since they promote the creation of various desirable works for the establishment of knowledge societies. These works, which are the product of considerable creativity and investment, are protected by in-tellectual property rights in the form of an exclusivity given for a certain period of time. However, this exclusivity has never been absolute due to the fact that it is desirable for the public to benefit from these assets. In order to establish an equilibrium between the interests of both creators and the public, intellectual property law possesses its own internal checks and balances which define the scope of these rights. Nevertheless, in certain circumstances, the rules which determine the condi-tions of public access have been shaped by other branches of law and for this purpose the most con-troversial intervention to the exercise of intellectual property rights has stemmed from the applica-tion of competition rules, specifically article 102 of the TFEU in European Union law. In the sec-ond part we looked at whether these two branches of law are in conflict or not since intellectual property law promotes the creation of exclusivity whereas competition law tries to eliminate the harmful effects of monopolies. There is no conflict in terms of their objectives because both laws ultimately aim to promote consumer welfare, however, they are incompatible with each other due to the fact that their methods of operation are different. Therefore, it has been concluded that the inter-vention of competition law is not the best possible approach as a solution to correct the short-comings of intellectual property law rules. Present EU case law, as discussed in the third part, re-veals the fact that competition law is not entirely suitable to safeguard the essence and objectives of intellectual property rights. As a result, for these circumstances where the internal system of intel-lectual property rights is not sufficient, the possible reform and improvement of intellectual prop-erty law should be the focus of discussion instead of leaving it to competition law.

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[195] Vezzoso, p.286
[196] Ullrich, p.378 ; Katz, p.351
[197] Anderman, 2004, p.19
[198] Ullrich p.383
[199] Bath, p.146

Arbitration In The Context of EU Merger Control and Its Interface with Brussels I Regulation: A New Era For Arbitration In The EU Arena?

IOANNA GAVRA[1]

In the EU context a merger forms the basic method to which firms resort in order to maintain their profit and viability. Within the EU Competition Law system, the EC Merger Regulation forms the legal framework that regulates this kind of transactions and reflects the need for maintenance or strengthening of competition in the internal market. The Commission holds a dominant role in the procedure for the implementation of concentrations with a Community dimension. Against this background, this paper examines the role of arbitration as a monitoring adjudicatory mechanism for the control of the merging parties' behaviour, in relation to the commitments they have undertaken in order to ensure a clearance Commission decision that will approve their implementation. Further, the actual role of the arbitrator is described, as influenced by the Commission's intervention in the arbitration proceedings in parallel with the significance of the arbitral award on the implementation of the intended concentrations. Finally, the Commission's latest attempt to incorporate arbitration in the Brussels I Regulation for the recognition and enforcement of civil and commercial judgments within the EU is examined as well as the impact that this 'uniformity' might have on the enforcement of the merger-related arbitral awards is assessed and its effect on the legal nature of arbitration is approached.

1. INTRODUCTION

In the EU legal framework, mergers have proved to play a significant role. With the character of transnational restructuring of undertakings operating in different Member States, mergers can either ensure a level playing field between the certain market players thereby enhancing effective competition or may result in a significant impediment of competition and cause major disorder in the internal market. In the EU Competition Law context, merger control is regulated by the EC Merger Regulation that forms its basis on the need for maintenance or strengthening of competition in the internal market. In this respect the Commission holds a dominant role in the control of the procedure for the implementation of concentrations with a Community dimension, in order to prevent potential competition obstacles raised by the notified concentrations that would in turn significantly harm the balance in the internal market. In order to achieve this goal, the Commission has embraced arbitration as an alternative dispute resolution mechanism, ideal for the 'judicial monitoring' of the behavioural remedies offered by the merging parties and ensure their compliance with the undertaken commitments, before it grants a clearance decision for a notified concentration to be implemented[2]. The role of the arbitrator at this point, as assessed in relation to the Commission's primary overall control, will significantly define the outcome of the proceedings for the implementation of the intended concentrations. Therefore, arbitration is proved to be valuable within that context since with its 'fast-track' mechanism it brings flexibility in the conduct of the proceedings and ease in the enforcement of the arbitral awards under the New York Convention which reflects worldwide recognition[3].

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[2] Gordon Blanke, *The Use and Utility of International Arbitration in EC Commission Merger Remedies,* 2006, at page 5.

[3] New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958.

Also, the recent amendments on the recognition and enforcement of the arbitral awards within the European Union as proposed by the Commission, with uniform rules to regulate the procedure and with the concept of the 'free movement of judgments' in the EU as its basis, it is expected that considerable changes can be assessed on the way merger-related arbitral awards will be enforced within the EU framework.

2. THE EU MERGER CONTROL FRAMEWORK

The Merger Regulation 4064/89 and its successive Regulation 139/2004 (hereinafter referred to as 'ECMR') were introduced in order to fulfil a certain need for a legislative framework structured to regulate the control of mergers at the EU level[4]. The ECMR that not only amended but completely replaced the original EC Merger Regulation, and having 'the force of law', it directly affects all the Member States within the EU[5]. The ECMR is only applicable to concentrations, including mergers and acquisitions that have 'a Community dimension' depending on whether the undertakings involved in the concentration meet sufficient turnover thresholds, so as to reach the certain requirements demanded under the Regulation[6]. Thus, those concentrations which fall below the prescribed thresholds become part of the framework of national merger control rules. This turnover criterion has been characterized as 'blunt and arbitrary' having at the same time 'the great merit of clarity' as it divides the judicial powers between the Commission and the Member States by clearly defining the tasks that the ECMR brings about[7]. It is expressly mentioned that this specific threshold should be assessed with quantitative criteria considering the impact of the merger, which in that sense is arbitrary as those mergers which stand in a 'grey area', i.e. closely above or below the threshold set out in the ECMR, cannot be judged to be of any significant difference. Hence, the decision as to which concentrations form part of the 'Community dimension' concerning the threshold criterion, can only be made 'on the basis of a broad brush assessment'[8].

The adoption of the ECMR granted the Commission authorization to control concentrations with a Community dimension in the context of EU Competition Law. In terms of the control of concentrations the main objective of the EU rules is 'to avoid the obstacles that prevent greater European integration, ensuring a level playing field between undertakings operating in the different Member States'[9]. Although the meaning of mergers is not defined in the Regulation, given instead a concept of 'acquisition of control' in a wide sense it is made clear that the essential element of a concentration, whether it arises from the change of control between previously independent

[4] Council Regulation (EC) 139/2004 of 20 January 2004 [2004] OJ L24/1 and Council Regulation (EC) No.4064/89 21 December 1989 [1989] OJ L395/1, amended by Council Regulation (EC) 1310/97 of 30 June 1997[1997] OJ L180/1.
[5] Dabbah Maher, Merger Control Worldwide, 2006, at page 384.
[6] Article 1 of EC Merger Regulation; see further, Levy Nicholas, European Merger Control Law: A Guide To The Merger Regulation, 2003, at paragraph 6-3; Marc Blessing, Arbitrating Antitrust And Merger Control Issues, 2003, at page 51; Dabbah Maher, Merger Control Worldwide, 2006, at page 391.
[7] Levy Nicholas, European Merger Control Law: A Guide To The Merger Regulation, 2003, at paragraph 6-2.
[8] Ibid.
[9] Blanco Luis, EC Competition Procedure, 2006, at page 601.

undertakings or from the merger between undertakings, is that the change in the market structure and in the control of the relevant undertakings must be formed on a lasting basis[10]. Under this background the Commission while initiating a new substantive test of compatibility it also widened its investigative powers by establishing as a key factor for the approval of a merger, the implementation not to create or even strengthen a dominant position and consequently result in a significant impediment to effective competition in the common market or in a substantial part of it[11].

Unlike the legislation that implements Articles 101 and 102 EU and Regulation 1/2003 which introduces a system of 'shared competences', the Commission with the 'one-stop-shop' principle established by the Merger Regulation, is deliberately anticipated to be the solitary and exclusive authority for the control of concentrations within the EU[12]. Further, the issuance of a 'single institutional port of call' for the control of the Community defined concentrations, grants the Commission sole competence in the application of the Merger Regulation subject only to the judicial review by the ECJ and the General Court[13]. As a result, parallel proceedings between different national jurisdictions are prevented, as the merging parties have to notify the concentration in question solely to the Commission and strictly in accordance with the rules of the ECMR.

The merging parties' notification to the Commission is an essential part of the clearance process of concentrations in the context of the EU Merger Control system and triggers an investigative period. The latter is commenced by the Commission in order to reach a decision concerning the compatibility of the proposed concentration with the common market and the ECMR or its compatibility with the common market subject to certain conditions and obligations or lastly a prohibition decision[14]. Within this investigative period, the merging parties have the opportunity to undertake commitments in order to meet the Commission's criteria for granting a clearance decision. For a notification to be possible within the ECMR context there is no need for a prior binding agreement to have been formed between the merging parties or a public bid to have been announced, but it is encouraged on the basis of the parties' mere 'good faith intention' to reach an agreement or make a public bid[15]. On the contrary, concentrations implemented prior to their having been declared compatible with the common market by the Commission are to be declared unlawful[16].

[10] Within the definition of Article 3(1) of the EC Merger Regulation a 'concentration' arises when a change of control is created on a lasting basis either from 'the merger of two or more previously independent undertakings or parts of undertakings' (Article 3(1)(a) ECMR) or results from 'the acquisition by one or more persons already controlling at least one undertaking, or by one or more undertakings […] of direct or indirect control of the whole or parts of one or more other undertakings' (Article 3(1)(b) ECMR). A concentration is also deemed to be constituted in case of the creation of a full-function joint venture (Article 3(1)(b) ECMR). See also, Cook, John and Kerse, Christopher, EC Merger Control, Fifth edition, 2009, at page 27.
[11] Dabbah Maher, Merger Control Worldwide, 2006, at page 382.
[12] As defined in Article 3 of the EC Merger Regulation. This is enhanced by Article 21(3) which does not authorize national competition laws of the Member States for the control of concentrations with a Community dimension. See further, Dabbah Maher, Merger Control Worldwide, 2006, at pages 392-393 and Blanco Luis, EC Competition Procedure, 2006, at page 609.
[13] Article 21(2) ECMR.
[14] Articles 6(1)(a), 6(1)(b) and 6(2) ECMR; For a detailed analysis, see Dabbah Maher, Merger Control Worldwide, 2006, at pages 401-406.
[15] Article 4(1) ECMR.
[16] Articles 6(1)(b), 8(1) or 8(2) ECMR. For further discussion see Cook, John and Kerse, Christopher, EC Merger Control, Fifth edition, 2009, at page 118.

Nevertheless, it should be noted that despite the fact that a centralized system of control is established in line with 'the overall policy goal' there are certain limits to the exclusive jurisdiction of the Commission[17]. In particular, the exclusive authority of the Commission to deal with concentrations having a Community dimension relates only to the Competition Law dimension[18]. Therefore, in some circumstances Member States are not precluded from the control of mergers in the ECMR context, as regards the pursuing of certain 'policy objectives' while being able to protect those legitimate interests that are not covered by the ECMR, but still being compatible with the EU Law. In that regard, it is clear from Article 21(4) ECMR that a Member State is merely permitted to block a concentration already or potentially cleared by the Commission while the opposite does not hold true under any circumstances[19]

3. THE INTERNATIONAL COMMERCIAL ARBITRATION REGIME

It is difficult to reach a coherent definition on arbitration, due to the dynamic nature of the latter, as an alternative dispute resolution mechanism in relation to the national courts. By depicting the fundamental characteristics of arbitration a more close approach will be attempted in order to highlight its nature.

The parties' agreement to arbitrate is essentially a bilateral agreement to avoid the national judicial system and resort to an alternative dispute resolution mechanism that with its fundamental safeguards will meet their legitimate expectations[20]. The essential part of the arbitration agreement is the arbitration clause, which is independent of the main agreement between the parties and stands on its own if the arbitration agreement is 'null and void'[21]. The institutional or ad hoc character of arbitration depends on the arbitration agreement between the parties.

Against this background, the use of international arbitration in the ECMR context, especially with the party autonomy principle at its core, is considered to be perfectly fit, because of the complexity and great range of remedies necessary for the clearance of complex notified concentrations[22]. In terms of the party autonomy principle, the arbitration procedure being determined by the parties' agreement on a case-by-case basis is subject to the special characteristics of each individual case.

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[17] Blanco Luis, EC Competition Procedure, 2006, at page 610.
[18] Dabbah Maher, Merger Control Worldwide, 2006, at page 395.
[19] Ibid.
[20] Lew, Mistelis, Kroll, Comparative International Commercial Arbitration, 2003, at page 4.
[21] Gordon Blanke, The Use and Utility of International Arbitration in EC Commission Merger Remedies, 2006, at page 27, and Lew, Mistelis, Kroll, Comparative International Commercial Arbitration, 2003, at page 101.
[22] Gordon Blanke, The Use and Utility of International Arbitration in EC Commission Merger Remedies, 2006, at page 26.

Furthermore, it is the neutral character of arbitration that grants preference to such a dispute resolution. The parties' rights to select the seat where the arbitration procedure will take place and the more close sight of the arbitrator to the subject matter of the dispute may assure the outcome preferred by the parties. Moreover, because of its a-nationality, arbitration becomes a mechanism of first choice in mergers for resolving disputes, while at the same time this flexibility does not undermine the arbitrators' 'independence and impartiality' until the outcome of the proceedings and the reaching of a decision[23].

Further, according to the principles of 'due process and fair hearing' as well as the 'independence and impartiality' that form the 'magna carta of arbitration', the arbitrators 'promise' to assess evidence with the 'maximum discretion' and the parties are treated on an equal and fair manner which results in a guarantee of a fair trial[24]. These principles in combination with the doctrine of confidentiality that depicts its very private nature, lead arbitration to constitute a distinguished dispute resolution mechanism that is not only 'tolerated', but more importantly it is widely recognized, a fact that is evident by the elimination of the State courts' monopoly[25].

4. THE FUNDAMENTAL ROLE OF THE NEW YORK CONVENTION TO THE ENFORCEMENT OF THE ARBITRATION AWARDS

'The arbitration award is the instrument recording the tribunal's decision provisionally or finally determining claims of the parties'[26]. The arbitral award 'seals' the arbitration proceedings and expires the arbitrator's mandate[27]. Its legal nature is final and binding with *res judicata* effect upon the parties, without providing for the review procedure of the award. Thus, the grounds for challenge of the award are limited and are subject to certain conditions.

The recognition and enforcement of the arbitral award in the international arena is of great importance for the world-wide success of the arbitration as a dispute resolution mechanism. It is at this stage that 'arbitration and the parties leave the private sphere in which they are operating' and the arbitration procedure is recognized officially in the public domain[28]. As it has been stated it is a private act which is being empowered by a public act[29].

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[23] Lew, Mistelis, Kroll, Comparative International Commercial Arbitration, 2003, at pages 256 ff., Gordon Blanke, The Use and Utility of International Arbitration in EC Commission Merger Remedies, 2006, at page 29.
[24] Lew, Mistelis, Kroll, Comparative International Commercial Arbitration, 2003, at page 95.
[25] Gordon Blanke, The Use and Utility of International Arbitration in EC Commission Merger Remedies, 2006, at page 26.
[26] Lew, Mistelis, Kroll, Comparative International Commercial Arbitration, 2003, at page 628.
[27] Except for final there are more types of awards, but for the need of this study only the final is reffered. See further Lew, Mistelis, Kroll, Comparative International Commercial Arbitration, 2003, at Chapter 24.
[28] Lew, Mistelis, Kroll, Comparative International Commercial Arbitration, 2003, at page 689.

However, it must be mentioned that the arbitrator's duty to render an award that could be enforceable on a world-wide basis is quite impossible, since it is not feasible for the arbitrator to consider all the countries where the parties would potentially seek enforcement at a later stage. The international arbitrator's mandate has the character of a 'best effort commitment' to ensure that he renders an award that is enforceable at law'[30].

The uniform enforcement of the arbitral awards is obtained through the New York Convention, which constitutes the 'backbone of the international regime for the enforcement of foreign awards'[31]. Having achieved the harmonization of the national rules regarding the enforcement stage, it has made it easier for an award rather than a foreign judgment to be enforced and this is one of the reasons that adds to its uniqueness and lead to its international recognition as an 'instrument for the uniform enforcement of foreign arbitral awards'[32].

5. ARBITRABILITY OF COMPETITION LAW ISSUES

Although not being the essential subject matter of the present research, it is considered important to refer firstly to the role of arbitration in the EU Competition Law context in order to subsequently introduce the role of arbitration in the Merger Control system.

Numerous opinions have been expressed as to the arbitrability of the EU Competition Law[33]. However, particularly the Commission's approach to arbitration has lead to the recognition of the latter as the ideal mechanism to solve competition law disputes. The decisions in *Eco Swiss* and *Mitsubishi* are landmark judgments for the role of international arbitration in the EU Competition Law regime and the arbitrators have so far embraced the duty to *ex officio* determine Competition Law issues that are raised before them during the award rendering process[34]. Therefore, the increasing role of private enforcement in the EU legal system and especially the developments mentioned in the area of merger control justify the conclusion that apparently, international arbitration has widely drawn the Commission's attention. Lastly, particularly in the area of EC Merger Control,

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[29] Ibid, at page 689.
[30] Gordon Blanke, The Use and Utility of International Arbitration in EC Commission Merger Remedies, 2006, at page 36.
[31] New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958. See also, Lew, Mistelis, Kroll, Comparative International Commercial Arbitration, 2003, at page 693.
[32] Dempegiotis, S., EC Competition Law and International Arbitration in the Light of EC Regulation 1/2003, JIA 25 (3), 2008s, at page 371.
[33] See further Hans Van Houtte, Arbitration and Arts. 81 and 82 EC Treaty – A State of Affairs, Kluwer Law International, Volume 23, No.3, 2005, at pages 431-448; Hans Van Houtte, The Application by Arbitrators of Articles 81 & 82 and Their Relationship with the European Commission, 2008, 19, European Business Law Review, 63–75; Loukas A. Mistelis & Stavros L. Brekoulakis, Arbitrability: International and Comparative Perspectives, 246-250; Lew, Mistelis, Kroll, Comparative International Commercial Arbitration, 2003, at pages 201-203.
[34] Case C-126/97, *Eco Swiss China Time Ltd v Benetton International NV* [1999] ECR I 3055 and *Mitsubishi Motors Corp v. Soler Chrysler Plymouth Inc,* 473 US 614,105 S Ct 3346 (1985). See also, Brekoulakis, Stavros, On Arbitrability: Persisting Misconceptions and New Areas of Concern; L. Mistelis, S. Brekoulakis, Arbitrability: International and Comparative Perspectives, 19-45, Kluwer, 2009; Queen Mary School of Law Legal Studies Research Paper No. 20/2009; Loukas A. Mistelis & Stavros L. Brekoulakis, Arbitrability: International and Comparative Perspectives, 246-250 and Lew, Mistelis, Kroll, Comparative International Commercial Arbitration, 2003, at pages 201-203.

the Commission has proved to benefit from the use of arbitration, because of its efficiency in the role that it has undertaken in relation to the monitoring of the merged entities' compliance with the behavioural commitments undertaken[35].

6. EU MERGER REMEDY RELATED ARBITRATION

A. The standard for commitments

In a number of cases, in order for a concentration to be declared compatible with the common market, without raising anti-competitive concerns, the merging parties are permitted to modify the concentration, offering certain commitments to the Commission so as to eliminate entirely any such concerns[36]. With the objective to obtain a clearance by the Commission, while avoiding the distortion of effective competition that the notified concentration would cause, the modification commitments proposed by the parties are known as remedies. According to the Commission's Notice on Remedies, these are categorised as either structural or divestiture, access and behavioural[37]. The most commonly used are structural and behavioural.

Structural remedies refer to those commitments that bring a significant change in the relevant market structure, thereby resulting in the strengthening of competition, whereas behavioural remedies entail a promise for the future behaviour of the merged entity to prevent the distortion of effective competition in the common market[38] Following the principle of proportionality, the commitments undertaken by the parties should be adequate enough so as to eliminate any competition problems and lead to a clearance Commission decision after the completion of the merger assessment[39].The Commission will only accept those remedies that will keep competition in a certain level playing field within the EU, while preventing 'significant impediments' that would constraint effective competition making them, thus, highly case-specific[40]. The Commission has explicitly stated in the Notice on Remedies its preference to structural and particularly divestiture remedies, considering them as the most effective

[35] James Bridgeman, The Arbitrability of Competition Law Disputes, 2008, 19, European Business Law Review, at page 148.
[36] Article 6(2) of the ECMR (related to investigative stage Phase I) and Article 8(2) of the ECMR (related to investigative stage Phase II). According to Blessing, in a more realistic approach, the commitments are 'imposed' by the Commission and not 'offered' by the parties (Blessing, Marc, Arbitrating Antitrust And Merger Control Issues, 2003, at page 79). See also Blanco Luis, EC Competition Procedure, 2006, at page 683; for further details on phases I and II investigations by the Commission see also Blessing, Marc, Arbitrating Antitrust And Merger Control Issues, 2003, at page 78.
[37] Paragraph 17 of the Remedies Notice; Cook, John and Kerse, Christopher, EC Merger Control, Fifth Edition, 2009, at page 287.
[38] Cook, John and Kerse, Christopher, EC Merger Control, Fifth Edition, 2009, at pages 282 ff.
[39] This is stated at Recital 30 of the ECMR and recognized formally in the Commission's Notice on Remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004, October 2008. For further discussion see Cook, John and Kerse, Christopher, EC Merger Control, Fifth Edition, 2009, at pages 283-284.
[40] Paragraphs 12 and 16 of the Notice on Remedies. See also, Cook, John and Kerse, Christopher, EC Merger Control, Fifth Edition, 2009, at page 284.

way to maintain effective competition in the common market[41]. Therefore, a 'hard commitment' that would lead to a new competitive unit, strengthening this way competition within the relevant market is certainly preferred to a plain promise for well behaving in the future by a dominant enterprise, in the sense of 'mere-soft' behavioural remedies, at least not in a stand-alone basis as they lack legal certainty and permanence[42] Furthermore, according to *Blessing*, in certain cases where the Commission has to determine *ex ante* the possible anti-competitive effects of a proposed concentration and must impose behavioural commitments, arbitration seems to be the best possible solution to deal with that kind of situations on a 'rule of reason' level[43].

B. The Commission's increasing use of arbitration clauses in behavioural and structural remedies

Behavioural remedies are greatly beneficial both for the Commission and for the parties as they are flexible, since they can be tailored to the particular concerns in each case[44]. Due to their medium to long-term perspective, while they refer to the future behaviour of the merged undertaking their extended use has been reinforced as long as they have *quasi-structural* effects thereby causing immediate as well as permanent changes in the market structure and provided that they incorporate the appropriate monitoring mechanisms[45]. Therefore, with their very structural nature, access-behavioural commitments, while directly affecting market structure, are capable of removing the compatibility test of the 'significant impediment of effective competition' which is the cornerstone of the ECMR and therefore they may be widely used by the Commission[46].

However, behavioural commitments, because they concern the future behaviour of the merged entity, they are difficult to be monitored by the Commission since the latter does not have adequate resources for extensive monitoring[47] Hence, a special mechanism for 'self-enforcement' has to be incorporated in the access commitments in order for their effectiveness and implementation to be ensured . The solution to this particular

[41] Paragraphs 15 and 17 of the Remedies Notice. For further discussion see Cook, John and Kerse, Christopher, EC Merger Control, Fifth Edition, 2009, at pages.293-321; also Blessing, Marc, Arbitrating Antitrust And Merger Control Issues, 2003, at pages 70-72.
[42] The European Antitrust Review 2009, Efficiencies and Remedies under the ECMR, at page 4. Blessing, Marc, Arbitrating Antitrust And Merger Control Issues, 2003, at page 71.
[43] Blessing, Marc, Arbitrating Antitrust And Merger Control Issues, 2003, at page 81.
[44] The European Antitrust Review 2009, Efficiencies and Remedies under the ECMR, at page 4.
[45] Gordon Blanke, Comments on Draft revised Commission Notice on remedies acceptable under the Merger Regulation, available at http://209.85.229.132/search?q=cache:3y9X2TVRcSMJ:ec.europa.eu/competition/mergers/legislation/files_remedies/berwin.pdf+Gordon+Blanke,+Comments+on+Draft+revised+Commission+Notice+on+remedies+acceptable+under+the+Merger+Regulation&cd=2&hl=el&ct=clnk.
[46] Johannes Lubking, The European Commission's View on Arbitrating Competition Law Issues, 2008, 19, European Business Law Review, at page 78.
[47] As an illustration, a typical behavioural commitment would require the merged entity to continue supplies to a third party on a non-discriminatory basis.
[48] Notice on Remedies, at paragraph 127. See also, Johannes Lubking, The European Commission's View on Arbitrating Competition Law Issues, 2008, 19, European Business Law Review, at page 79.

problem is to impose an arbitration agreement to the merged entity[49]. It is exactly at this point that the role of the arbitration commitments proves to be dominant, as they help the Commission to monitor behavioural commitments and ensure compliance, an important function that could not be fulfilled merely by the Commission[50]. This is the essential aim that justifies the role of the arbitration clause when incorporated in the commitments undertaken by the merging parties[51].

In the Remedies Notice, the Commission by referring to 'other structural remedies' it implies access commitments thereby considering behavioural equal to structural remedies, especially given the fact that behavioural remedies incorporate arbitration commitments, i.e. most of the access commitments are backed by arbitration obligations[52]. Hence, the important and effective role of the arbitration commitments is highlighted in the context of the ECMR behavioural remedies[53].

The broad acceptance of such commitments by the Commission is greatly depicted in the judgment of the General Court in *EasyJet v. Commission*, where the arbitration commitments were manifestly approved as the appropriate monitoring tool for behavioural remedies within the scope of the EU Merger Control[54]. Further, in the judgments of *Gencor* and *ARD* an increased use of behavioural over structural remedies was evident[55].

Despite the fact that arbitration clauses are mainly incorporated in behavioural remedies, the Commission has so far used arbitration clauses in certain cases revolving around structural remedies[56]. By way of example, it is worth noting the innovative choice of procedure in *Dow Chemical/ Union Carbide* where the arbitrator was to choose one of the parties' proposals, providing this way for 'pendulum' arbitration[57].

[49] The first arbitration commitment is to be found in a 1992 Commission's decision (Decision of the Commission Case No IV/M.235 of 4 September 1992, *Elf Aquitaine – Thyssen / Minol*).
[50] Blessing, Marc, Arbitrating Antitrust And Merger Control Issues, 2003, *at page* 81.
[51] Johannes Lubking, The European Commission's View on Arbitrating Competition Law Issues, (2008) 19 European Business Law Review, at page 79.
[52] Paragraph 17 of the Notice on Remedies. See also, Johannes Lubking, The European Commission's View on Arbitrating Competition Law Issues, 2008, 19 European Business Law Review.
[53] Gordon Blanke, The Use and Utility of International Arbitration in EC Commission Merger Remedies, 2006.
[54] Case T-177/04 – *EasyJet v. Commission*, Judgment of the Court of First Instance of 4 July 2006.
[55] Case T- 102/96 – *Gencor v. Commission*, Judgment of the European Court of First Instance of 25 March 1999, [1999] ECR II- 753 and Case T- 158/00 – *ARD v. Commission*, Judgment of the Court of First Instance of 30 September 2003, [2003] ECR II-3825.
[56] Comp./ M. 2268, Commission Decision of 8 May 2000, OJ C16, 19 January 2002; *GlaxoWellcome/Smithkline Beecham* (2000); Comp./M.2268, *Pernod Ricard/ Diageo/ Seagram Spirits*, Commission Decision of 8 May 2000, OJ C16, 19 January 2002. For further discussion see James Bridgeman, The Arbitrability of Competition Law Disputes, 2008, EBLR at page 165 and Marc Blessing, Arbitrating Antitrust And Merger Control Issues, at pages 110-111 and 113-114.
[57] Comp./ M. 1671, Commission decision of 3 May 2000, OJ, C245, 14 September 2001 . See also, James Bridgeman, The Arbitrability of Competition Law Disputes, 2008, EBLR at page 165; Gordon Blanke, The Use and Utility of International Arbitration in EC Commission Merger Remedies, 2006, at page 61.

C. Legal nature of the arbitration commitments

Arbitration commitments constitute, in particular, unilateral *erga omnes* obligations undertaken by the parties, to resort to arbitration, any claims that third party beneficiaries might have against the Commission's decision on the clearance of a certain merger, when they estimate that the merger commitments have not been honoured[58]. In this respect, arbitration commitments have a 'semi-compulsory' nature, as one of the parties in case that seeks to obtain a clearance decision by the Commission is then obliged to consent to the arbitration agreement. At the same time it serves an 'open-ended' character, as the arbitration agreement constitutes a promise to arbitrate, that the merging party makes against the third parties and thus the latter derive their right to arbitrate from the commitment undertaken by the merging party[59]. In that case we have an 'arbitration without privity' similar to the arbitration procedure in the scope of bilateral investment treaties. In this context, an arbitration commitment is consensual in nature as long as the merged undertaking, which is under investigation by the Commission, gives its consent to the commitments that the Commission approves, while the third party beneficiary, which claims harm from anticompetitive behaviour, consents to arbitration by initiating the arbitral process[60]. The relationship between the merged entity and the third party beneficiary has no contractual basis, which in turn does not create any obligation on the third party against the merged entity's *erga omnes* promise to arbitrate, but it is independent either to refer to the Commission to start its own parallel investigations or to seek compensation for losses that the third party suffers, bringing civil law claims before the Member States courts for breach of EU Competition Law[61]. In other words the third party is not *'required'* to arbitrate eventual disputes with the merged entity as this is merely a *'possibility'* offered by the commitment letter[62]

D. The adjudicatory or regulatory function of arbitration

Mergers in the ECMR context are under the exclusive competence of the Commission as regards their assessment, but also for the monitoring of the commitments accepted in order to grand the clearance decision[63]. Incorporating the arbitration clause as their essential part, the arbitration commitments, when accepted by the Commission, do not lead to the latter's delegation of powers to the arbitrator in terms of the ECMR nor do they affect the Commission's statutory competence on the implementation of the said commitments, but they establish a monitoring device for these commitments[64]. The General Court in its ARD judgment clearly confirms this view by distinguishing and separating the role of the Commission to that of the arbitrator's, recognising the initiation of

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[58] Blessing in particular refers to 'erga omnes offers'. See Marc Blessing, Arbitrating Antitrust And Merger Control Issues at page 164; Alexis Mourre, Dissenting Opinion on a Dangerous Project, 2008, 19, European Business Law Review, at page 224.

[59] Luca G Radicati Di Brozolo, Arbitration in EC Merger Control: Old Wine in a New Bottle, 2008, 19, European Business Law Review, at page 7 and Brozolo; Gordon Blanke, The Use and Utility of International Arbitration in EC Commission Merger Remedies, 2006, at page 185.

[60] Alexis Mourre, Dissenting Opinion on a Dangerous Project, 2008, 19, European Business Law Review, at page 224.

[61] Gordon Blanke, The Use and Utility of International Arbitration in EC Commission Merger Remedies, 2006, at page 185.

[62] Patrick Wautelet, Arbitration In EU Commission Cleared Merger Transactions, at page 6.

[63] Johannes Lubking, The European Commission's View on Arbitrating Competition Law Issues, (2008) 19 European Business Law Review, at page 80.

[64] Ibid.

parallel proceedings between the merged parties and the Commission. In particular, it accepts that in case that the merging parties are violating the undertaken commitments, by not complying with the arbitral award, the Commission in order to ensure that the award is enforced it can rely on the ECMR provisions that regulate the enforcement of the commitments[65]. On the other hand, the tribunal indirectly enforces the commitments when dealing with the private disputes which may arise between the parties with an adjudicative role[66]. Therefore, in this case the monitoring mechanism empowered by the arbitration commitment leads to the result that the arbitrator's responsibilities run in parallel with those of the Commission's[67]. Therefore, the arbitrator's role is separate from the Commission's and clearly orientated to the adjudicatory task assigned to him in respect of the commitments.

The arbitrator's adjudicatory role is clearer when approached by analogy to the national judge in case where the arbitration clause is not a part of the commitment decision made by the Commission. In such a case, in an attempt for the enforcement of the third-party beneficiary's rights, national courts would judge on the basis of their public authority. Although being bound by the direct effect of the supremacy of EU Law, the national judge would keep his independent character, without being a 'regulatory extension of the Commission'[68]. Correspondingly, the arbitrator's mandate when accomplishing his task as a private judge in merger related disputes is completely independent. At this point it needs to be made clear that national courts' authority is not considered equal to that of the arbitral tribunal, as national courts form part of the state machinery, in terms of the Article 249 EU and consequently they are bound by the Commission's decisions. On the other hand, the arbitration tribunal does not fall within the scope of the same Article, as its adjudicative role is not on behalf of the State and accordingly by keeping its independent character it is not obliged to follow the Commission's decisions[69].

Moreover, the Commission in reaching its decisions under the exclusive jurisdiction granted by the ECMR, it cannot limit the national courts' competence to deal with the civil consequences that may arise in situations where the merger related commitments are violated[70]. The exclusive jurisdictional power delegated to the Commission to modify the commitments that the parties undertake in opting for a clearance decision, is not extended to the aspect of any civil action arising from such commitments[71]. Hence, when the parties have agreed on arbitration, this is interpreted as an alternative choice to court proceedings.

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[65] Ibid; Articles 6(3), 8(6), 14 and 15 of the ECMR.
[66] Ibid.
[67] Ibid.
[68] Note that this is so even though they are being bound by Article 10 EC and the supremacy of EC law. Gordon Blanke, The Use and Utility of International Arbitration in EC Commission Merger Remedies, 2006, at page 63; Luca G Radicati Di Brozolo, Arbitration in EC Merger Control: Old Wine in a New Bottle, 2008, 19, European Business Law Review, at page 9.
[69] Loukas A. Mistelis & Stavros L. Brekoulakis, Arbitrability: International and Comparative Perspectives, 246-250.
[70] Article 21(2) ECMR no 139/2004. See also, Alexis Mourre, Dissenting Opinion on a Dangerous Project, 2008, 19, European Business Law Review, at page 226.
[71] Ibid.

Even from a more formal perspective, in terms of an investigation for a breach of a commitment, the decisions made by the arbitrators on such matters cannot be regarded as evidence that there is in fact a breach of the notified commitment, despite the fact that both the Commission and the tribunal share the same concept of 'breach'.Therefore, it is not deemed to furnish an adequate basis for the Commission to rely on it[72]. Consequently, the Commission has to hold the investigation procedure on its own, as long as arbitrators do not act on its behalf and they are not obliged to give a response to the Commission on that part[73].

Further, it is supported that merger-related arbitration is an ordinary arbitration governed by the national law of the jurisdiction where the arbitration took place[74]. In this respect, like in any ordinary arbitration procedure, the arbitrator will have to deal with civil claims, such as a damages action that may arise from the breach of the arbitration commitments. Thus, he will have to accomplish his ordinary adjudicatory task, quite in the same way as any other arbitral tribunal. In those circumstances, 'the arbitrator or the arbitral tribunal will have to apply his own independent judicial appreciation, and the findings will be binding upon the parties, subject to the limited judicial review as may be available under the provisions of the applicable Arbitration Act.'[75]. In general he will have to follow ordinary principles that are applied in arbitrations dealing with Community and Competition law issues[76]. Equally, national courts will serve the same duty to set aside or enforce the final award as in relation to any ordinary arbitration dealing with such matters, without having any power to review the award on the merits[77]. Even more, as the argument goes, the dispute arising between the third-party beneficiary and the merged entity on the basis of claims that derive from the non-fulfilment of the commitments, is a private law dispute which does not differ from the dispute that arises from the breach of an EC Competition Law dispute. On the contrary, these disputes have been argued to be identical[78].

What is the scope of the arbitrator's indpendence?

The arbitrator's independent role in making a decision under the merger-related arbitration commitment, has as a consequence that this independence would lead to the commitments to be enforced properly, while at the same time the Commission maintains its responsibility for the overall enforcement of the commitments[79]. Still, the question remains as to the existence of a distinguishing line that orientates and separates these two worlds regarding the private nature that characterises arbitration underlined by the fundamental principle of party autonomy and the Community's mandate as a 'public prosecutor' in the EU Competition Law context[80].

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[72] Luca G Radicati Di Brozolo, Arbitration in EC Merger Control: Old Wine in a New Bottle, 2008, 19, European Business Law Review, at page 13.
[73] Ibid.
[74] Luca G Radicati Di Brozolo, Arbitration in EC Merger Control: Old Wine in a New Bottle, 2008, 19, European Business Law Review, at page 12.
[75] Blessing, Marc, Arbitrating Antitrust And Merger Control Issues, 2003, at pages 172-173.
[76] Ibid, at page 12.
[77] Luca G Radicati Di Brozolo, Arbitration in EC Merger Control: Old Wine in a New Bottle, 2008, 19, European Business Law Review, at page 12.
[78] Ibid, at page 8.
[79] Johannes Lubking, The European Commission's View on Arbitrating Competition Law Issues, 2008, 19, European Business Law Review, at page 81.
[80] Gordon Blanke, The Use and Utility of International Arbitration in EC Commission Merger Remedies, 2006, at page 20.

However, the private nature of international arbitration which is based on the parties' agreement to arbitrate their disputes, indicates the rendering of the award by the arbitrator on the basis of his own private judgment and further the universal recognition and enforcement of the award under the New York Convention. On the other hand, the Commission 's public nature in the context of EU Competition Law underlines its mandate to make decisions that will maintain effective competition in the internal market and in accordance with the EU legal order. More specifically, in the merger control area the Commission will have to approve the undertaken commitments by the interested parties in order to grant its clearance decision on the notified concentration. Against this background, the role of the international arbitrator to monitor the parties' compliance with the undertaken commitments is distinct for the reasons analysed before. But, still, although the arbitrator can remain independent in conducting the arbitration proceedings and render a final award on the basis of his own judgment, to the extent that his award must be enforceable, he is impliedly 'obliged' to take into close consideration the *reason d'etre* of the commitment included in the Commission's decision and accordingly to prevent the initiation of parallel investigation by the latter as regards the monitoring of the undertaken commitments[81]. In an opposite situation, even if the arbitrator manages to render a final award, if this award is not in line with the Commission's clearance decision, it will not be enforced under the New York Convention.

Further, the essential for international arbitration party autonomy principle, within the scope of EU merger related arbitration, it must be accepted that it is compromised, considering the fact that, when the parties agree to a binding commitment to arbitrate as part of the Commission's decision, the third party beneficiary, derives his right to arbitrate from this *erga omnes* commitment, without being obliged to accept that offer, but standing on his own will. Thus, he identifies the involvement of the Commission to the arbitration procedure in the scope of the arbitration commitment[83].

Against this background, the role of the arbitrator in monitoring the parties' compliance with the undertaken arbitration commitments is clearer. The commitment decision which entails the parties' agreement to arbitrate, arguably, does not affect the Commission's statutory powers as an 'EU legal order prosecutor' and no way does it mean that it is substituted by the arbitrator. The arbitrator awards private law remedies under national law, while the Commission is the enforcing authority of the Community as well as the guardian of the EU Treaties according to Article 211 EU and it imposes public law sanctions provided for by the ECMR. The arbitrator maintains his independence with the final award sealing his mandate that is not fully reviewed by the Commission as in this way it would clash the adjudicatory function of arbitration and degrade its role to merely regulate administrative matters. At this point the distinct line that orientates the arbitrator's and the Commission's role is drawn and it is clear that their functions do not overlap.

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[81] Gordon Blanke, The Use and Utility of International Arbitration in EC Commission Merger Remedies, 2006, at page 21.
[82] Ibid, at page 23.

Nevertheless, the Commission's intervention may be expressed by other means such as reserving the possibility to challenge the arbitrator's award before national courts. In the Eco Swiss case the ECJ held that *'a national court to which an application is made for annulment of an arbitration award must grant that application if it considers that the award in question is in fact contrary to Article 85 of the Treaty, where its domestic rules of procedure require it to grant an application for annulment founded on failure to observe national rules of public policy'*[83]. In this respect, national courts in ensuring their compliance with EU Competition Law, they will have to take a 'second look' on the merits of the award and not be restricted to a procedural review. Therefore, the applicable law, when adjudicating the parties' compliance to the commitments undertaken before the Commission's clearance decision, is 'by definition' EU Competition Law, which in turn is an essential part of the EU legal order, directed by the doctrines of 'direct effect' and 'supremacy' of EU law[84]. Thus, in terms of the cleared merger transactions, the arbitrator has to apply the provisions of EU Competition Law in order to ensure the enforceability of the awards that he renders. Otherwise, his award and its enforcement will be challenged by means of breach of public policy.

Last, but not least, even at the exequatur stage, i.e. when the national courts decide on the effectiveness and enforceability of the arbitral award, the Commission maintains its role of monitoring the undertaken commitments. Therefore, in case that the arbitral award is not in line with a Commission finding, the public order defence can be invoked under the New York Convention and the recognition and enforcement of the arbitral award can be challenged. It is obvious that the Commission's and the arbitrator's role might not substitute each other, but the latter's independence is still arguable, as the Commission seems not to have taken a final position regarding the influence it wishes to exercise on the arbitration procedure.

E. The role of the Commission as *amicus curiae*

The role of the Commission in the arbitration proceedings is widely debated. In particular, it is questionable whether the Commission should serve as an *amicus curiae* when arbitration proceedings are conducted in terms of arbitration commitments or it should merely stand as an observer. A potential intervention in the merger-related arbitral proceedings on the Commission's behalf, would take place pursuant to the arbitration agreement that underlines these proceedings.

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[83] Case C-126/97, Eco-Swiss China Time Ltd. v. Benetton International NV, [1999] ECR I-3055, at paragraph 41.
[84] Ibid.

From the arbitral tribunal's point, the Commission's assistance in that regard is considerable for the outcome of the proceedings in terms both of the interpretation of the EU Competition Law provisions and of the commitments incorporated in the Commission decision, having in mind the fact that, unlike national courts, the tribunal cannot directly refer to the ECJ for a preliminary ruling. This leads to a uniform application of EU Competition Law by ensuring a certain economic and legal standard in the internal market in accordance with the aims of the European Community[85]. Also, this kind of contribution by the Commission could guarantee the enforcement of the final arbitral award in accordance with the provisions of the New York Convention as it would certify that it does not contradict the EU public policy. In that case the Commission should only offer its interpretation in the scope concerned by the arbitral proceedings, retaining this way its separate role from the tribunal under the arbitration commitments in dispute.

In the same regard, the Commission's participation in the hearings during the proceedings of the arbitral tribunal, either as an observer or as an amicus curiae on its own right, depicts its *amicus curiae* intervention without actively taking part, but by being informed about the conduct of the proceedings and is ready to assist the arbitrator on technical issues arising in the competition law context. Accordingly, this may prohibit the tribunal from rendering a potentially unenforceable award in case that it might be contrary to the European public policy[86]. Furthermore, should the tribunal accept its intervention, the Commission could be a witness of the hearings on its own right, testifying the appropriate conduct of the proceedings with regard to the correct application of the EU Competition Law. Nevertheless, the Commission's intervention cannot intrude the decision of the arbitral tribunal, if not asked to do so, by the latter. Moreover, even if this situation does occur, the arbitrator is not obliged to consider the Commission's statements that go beyond its sole interpretation on the appropriate applicability of the EU Competition Law rules, or on the definition of the commitment decision, as the final award on the merits is on the arbitrator's independent mandate[87].

Moreover, the Commission could contribute to the arbitral proceedings by submitting amicus curiae briefs in relation to the subject matter of the decision, mainly when this is required by the ECMR[88]. The *amicus curiae* brief depicts the Commission's opinion on the related issue, without having the character of evidence. Still, the arbitral tribunal has obligation to apply for this kind of support by the Commission.

Importantly enough, since the Commission has a different mandate from that of the arbitral tribunal in the 'EU-merger-remedy-related' context, it can undeniably initiate proceedings to ensure the correct application of the EU Law provisions, while arbitration proceedings are pending on the same subject matter. The Commission's administrative authority in the EU realm enables it to start parallel proceedings with the arbitral tribunal

[85] Gordon Blanke, The Use and Utility of International Arbitration in EC Commission Merger Remedies, 2006, *at page* 161.
[86] Ibid, at pages 167-168.
[87] Ibid, at page 169.
[88] Ibid, at page 171.

invalidating the res *judicata* principle[89]. Similarly, the Commission's parallel investigation proceedings on request by a third party to the commitment, with binding legal effect on the concerned party, are justified due to the reason that even in the case where the arbitral tribunal has rendered a final award, it would be unenforceable because of its incompliance with EU Law as the Commission's investigation might have proved. Hence, endorsing the arbitral award to its decision, adding the direct effect of its decisions to the national courts based on the supremacy of EU Law, it would guarantee its enforcement by the Member State courts[90]. Nevertheless, it should be taken into account, that only serious concerns should call this duty for the Commission.

When the final award is made by the arbitral tribunal, the Commission's expertise in EU Competition Law issues and especially mergers, would contribute to its effectiveness. The award would be rendered enforceable, minimizing at the same time the risk of exposing the parties to concurrent or additional public proceedings by the Commission, in case that EU merger rules have not been applied properly by the international arbitrator. Therefore, the parties' recourse to arbitration would be led 'ad absurdum'[91]. Also, the role of the Commission could be deemed similar to that of an expert when asked for his pronouncement by the tribunal although its opinion would be highly authoritative[92].

On the other hand, this model of intervention by the Commission raises serious concerns on the balance kept in the relationship between the Commission and the arbitral tribunal on the basis of the merger related commitments. Despite the alleged non-binding nature of the *amicus curiae*, such an intervention plays a significant role on the arbitrator's mandate in this field and it should seriously be considered that rather important policy reasons orientate the Commission's intervention. The fundamental principles that derive from arbitration as a private dispute resolution mechanism make more than obvious the need for a balanced participation in the proceedings. The basic principles of confidentiality seem to be at stake when the Commission interferes in the arbitral proceedings when participating in the hearings either as an observer or as a witness on its own right, trying to have control of the conduct of the proceedings in accordance with the EU Competition Law rules. This is especially the case when it reviews on its own initiative the outcome of the proceedings. In other words, if the balance is not kept, the arbitral tribunal will be vested with duties equal to the Member States courts', subject to the Commission's objectives and at last form part of the judicial system of the European Community[93].

Notwithstanding the Commission's significant contribution to the arbitrator by sharing its expertise on competition and particularly in merger related issues, the handling of the sacrosanct principle of confidentiality of arbitration as indicated by its nature as a private dispute resolution mechanism draws special attention. It is

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[89] Ibid, at page 163.
[90] Ibid, at page 174.
[91] Ibid, at page 178.
[92] Luca G Radicati Di Brozolo, Arbitration in EC Merger Control: Old Wine in a New Bottle, 2008, 19, European Business Law Review, at page 13.
[93] Alexis Mourre, Dissenting Opinion on a Dangerous Project, 2008, 19, European Business Law Review, at pages 221-222.

arguably stated, that as far as arbitrators are not obliged to inform the Commission on the conduct of the arbitration proceedings, the duty of confidentiality fully prohibits this co-operation[94]. Therefore, the informative role of the Commission becomes apparently uncertain as long as it is to 'keep its internal deliberations confidential and not prejudice its decisions until published'[95]. In an arbitration procedure where the independent nature of the arbitrator is not clear, but appears to rule under the Commission's mandate and its close supervision, it cannot be considered as an independent dispute resolution mechanism benefited by the New York Convention and the UNCITRAL model law.

Importantly in this context, it is said that even if the *amicus curiae* role of the Commission is to be accepted in a merger-related arbitration, its role should be limited and its intervention should take place in certain circumstances, where its contribution would appear to be necessary for the proceedings without replacing the arbitrator's authority neither be institutionalised under any circumstances. Under no event should the making of a decision be shifted on the Commission's shoulders[96]. If the certain ground that motivates the Commission's intervention in the arbitration's framework is not defined, the issue of *ex officio* application of EU Law by the arbitrator or in respect to the 'subjectively reasonable expectations of the parties' could convincingly be raised[97].

Against this debate on the actual and potential role of the Commission in the arbitration proceedings, a 'hybrid' nature of arbitration may be said to be born. This refers to a certain type of arbitration, that maintains its independent character when initiating the arbitration proceedings and renders an award final in nature, without being bound, at least directly, by the principles of 'direct effect' and 'supremacy' as implied by the EU legal order. Still, if the arbitrator wants his award to be enforceable under the New York Convention and in order to avoid the risk to be set aside for public policy reasons, then he has to co-operate efficiently with the Commission and consider the *reason d' etre* underlying the commitment decision. EU merger-related arbitration is, thus, conceived as 'supranational arbitration' especially formed as indicated by the ECMR[98]. In any case, though, the 'efficient and fair dispute resolution and effective application of competition policy must be safeguarded without losing sight of the private nature of the arbitral process as opposed to proceedings before the courts'[99].

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[94] Loukas A. Mistelis & Stavros L. Brekoulakis, Arbitrability: International and Comparative Perspectives, at page 260. On the issue of confidentiality see Loukas M. Mistelis, Confidentiality, *at pages* 211-231.
[95] Loukas A. Mistelis & Stavros L. Brekoulakis, Arbitrability: International and Comparative Perspectives, at page 260.
[96] Hans Van Houtte, The Application by Arbitrators of Articles 81 & 82 and Their Relationship with the European Commission, 2008, 19, European Business Law Review, *at page* 73.
[97] For further discussion on the ex officio application of the EC Competition Law by the arbitrator see further discussion at Hans Van Houtte, Arbitration and Arts. 81 and 82 EC Treaty – A State of Affairs, Kluwer Law International, Volume 23, No.3, 2005.
[98] Gordon Blanke, The Case for Supranational Arbitration – Ideas and Prospects, 2008, 19, European Business Law Review, at page 19.
[99] Renato Nazzini, A Principled Approach to Arbitration of Competition Law Disputes: Competition Authorities as Amici Curiae and the Status of Their Decisions in Arbitral Proceedings, 2008, 19, European Business Law Review, 89–114 and Gordon Blanke, The Use and Utility of International Arbitration in EC Commission Merger Remedies, 2006, at page 158.

A highly important issue concerns the recognition and enforceability of the awards rendered by the arbitrator in terms of the arbitration commitments and considering the role of the New York Convention with the public policy exception, in relation to that matter. In that regard, this paper aims to examine the recent amendments on the enforcement of the arbitral awards within the EU in the light of the Commission's Green Paper on Regulation 44/2001, in order to estimate how it impliedly affects the role of arbitration in the control of mergers within the EU.

7. THE MATRIX OF THE EUROPEAN JUDICIAL COOPERATION IN CIVIL AND COMMERCIAL MATTERS UNDER THE REGULATION 44/2001 AND THE USE OF ARBITRATION

The relationship between arbitration and court proceedings in the European Union arena was, until recently, rather underdeveloped. Especially in terms of the Brussels Jurisdiction Convention and more specifically, the Brussels I Regulation, arbitration was completely excluded from its scope. Based on Article 220 of the EU Treaty which aims at the 'simplification of formalities governing the reciprocal recognition and enforcement of judgments', the rationale of the Regulation is to enhance the enforceability of national courts' judgments within the EU on civil and commercial issues in line with the fundamental principles of 'free movement of judgments' and 'full faith and credit' or mutual trust'[100]. The 'free movement of judgments' has been converted into an essential principle for the proper function of the internal market. Having been characterized as 'a federating instrument' reflecting the 'country of origin principle' concerning the recognition of judgments within the EU, independently of the Member States where the judgments find their origin and enforcement, it is considered to serve the role of the 'cornerstone of the European area of freedom, justice and security'[101]. With its recent Green Paper the Commission is attempting to revisit the Judgment Regulation process by enhancing the interface between arbitration and the Regulation, in order to provide a 'clear and non-conflictual enforcement system of arbitral awards internationally'[102]. Within that context, it is possible to explain the basic points introduced by the Regulation that can directly affect arbitration.

To start with, the Regulation recognizes the significant role of arbitration in the world of international commerce, by pointing out the increasing importance for the arbitration agreements and arbitration awards to be safeguarded the 'fullest possible effect'[103]. In this framework, while recognising the fundamental role of the 1958 New York Convention and its satisfactory operation in arbitration, the Regulation suggests that the time has come where 'certain specific points' should be added to the Regulation regarding arbitration, in line with the free movement of judgments principle and within the EU framework, so as to avoid parallel court and arbitration proceedings, without at the same time changing the scope of the New York Convention nor aiming at regulating arbitration in any way whatsoever.

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[100] Assimakis P. Komninos, EC Private Antitrust Enforcement: Decentralised Application of EC Competition Law By National Courts, 2008, at page 255.
[101] Ibid.
[102] Brussels, 21.4.2009 COM (2009) 175 final.
[103] Section 7.

More specifically, the Regulation suggests that the exclusion of arbitration should be (partially) deleted from its scope, embracing court proceedings ancillary to arbitration and in this manner enhancing the interface between court and arbitral proceedings[104]. Further, it suggests that legal certainty would be achieved, while 'granting exclusive jurisdiction for such proceedings to the courts of the Member State of the place of arbitration, possibly subject to an agreement between the parties'[105]. Moreover, according to the Regulation in case that the seat of arbitration is not defined by the arbitration agreement or not reached by the tribunal, the courts of the Member States with exclusive jurisdiction over the dispute should be appointed[106]. At the same time 'uniform criteria' for the determination of the seat of arbitration are suggested for a more certain outcome[107].

In that case the fundamental principle of party autonomy that governs arbitration proceedings seems to be at stake. The parties' right to directly choose the seat of arbitration through the arbitration agreement or indirectly by the arbitral tribunal or the appointing authority, can be seriously limited[108]. Even in the case of institutional or *ad hoc* arbitrations with specific rules governing the proceedings and in case that the seat of arbitration has still to be defined, as long as there is no arbitration agreement, the national courts do not have the jurisdiction to decide the seat of arbitration. The Commission at this point, following the Heidelberg Report, suggests the interference of the courts with exclusive jurisdiction over the dispute enhancing at the same time forum shopping[109]. On the other hand, the Arbitration Committee by incorporating a reference to the jurisdiction rules of the Regulation, it stresses out that giving one of the parties the opportunity to choose the seat of arbitration at its own motion and independently of the other parties' consent is considered to be completely inappropriate[110]. Furthermore, when the parties in an arbitration choose the seat of arbitration, they prefer a neutral place to initiate such proceedings, and they also prefer to be subject to a national legislation that will be more suitable to adjudicate the subject matter of the dispute as well as to fulfil their legitimate interests. Thus, it seems that a 'neutral connecting factor' would be appropriate[111].

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[104] Section 7, at page 9. Note that the ECJ in the Marc Rich case analyses what is specifically meant by 'ancillary' procedures. *[ECJ] Marc Rich & CO v Societa italiana Impianti PA-25 julliet 1991-Cour de Justice des communautes europeennes*

[105] Section7, at page 9.

[106] Green Paper, Section 7, at page 9.

[107] Green Paper, Section 7, at page 9 footnote 14.

[108] Article 16 UNCITRAL Arbitration Rules.

[109] Section 7, at page 9. See also, Report on the Application of Regulation Brussels I in 25 Member States, by Prof.. Dr. Hess, Prof. D. T. Pfeiffer, and Prof. Dr .P. Schlosser - The 'Heidelberg Report', International Bar Association, Arbitration Committee, Working Group on the Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee (COM (2009) 174 final) and the Green Paper on the Review on Council Regulation (EC) No 44/2001 on Jurisdiction and the Recognition and the Enforcement of judgments in Civil and Commercial Matters at page 5.

[110] Ibid at page 5.

[111] Ibid at page 6.

While the scope of exclusive jurisdiction is not clearly defined, it is noted that it is rather suitable in specific and limited measures in support of arbitration. One such measure is the appointment of an arbitrator. The ancillary support of the state court of the seat of arbitration is sufficient enough for the arbitral tribunal to be established[112]. In that manner, the judicial support given to the arbitration proceedings is centralized in one single court and conflicting decisions that might occur by parallel proceedings conducted by foreign courts, are avoided[113]. Also, another factor concerns the *lex arbitri*[114], that is more possibly considered to be the law of the seat of arbitration which that makes the courts of the seat suitable enough for supporting the establishment of the arbitral tribunal[115]. Hence, while the appointment of the arbitrator is in line with the provisions of Article V(1)(d) of the New York Convention, it is at least assured that the arbitral award will be enforced[116]. So, as long as in the EU regime most of the national arbitration laws are in line with this kind of supportive measures taken by the courts, in this respect it seems to be identified that there is no need for the establishment of a mandatory rule by the Regulation[117].

Further problems arise in terms of the exclusive jurisdiction of the arbitral tribunal in the procedure of gathering the evidence. In disputes with international dimension the place where the evidence is located and which is considered to be the place where the courts of the state offer their support to the arbitral tribunals is not the place of the seat of the arbitration. Instead a neutral 'third' country is usually selected by the parties to constitute the seat of arbitration[118]. It is then obvious, that during the gathering of the evidence the parties have to request for court support indirectly by referring first to the courts of the seat and they must officially apply for 'cross-border judicial assistance', as long as, due to their exclusive jurisdiction in supporting the arbitral tribunals in the procedure of taking evidence, the parties cannot seek for assistance in the state that allocates the evidence[119] .

The same is supported for the provisional measures. The European Court of Justice in the *Van Uden* case decided that rules regulating jurisdictional issues under the Regulation cannot determine the jurisdiction for ordering provisional measures, when the parties have agreed to resort to arbitration[120]. In the more recent *West Tankers* case, the ECJ declared incompatible the anti-suit injunctions ancillary to the arbitration with the Regulation[121]. In both cases, it is obvious that within the scope of exclusive jurisdiction, parties' freedom to resort to any forum where the provisional measures are enforceable is eliminated as long as they have to apply first to the court of the seat of arbitration and then enforce the ruling in another State.

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[112] George Martin, Brussels I review-Illmer and Steinbruck on the Interface Between Brussels I and Arbitration, Journal of Private International Law, June 2009.
[113] Hans Van Houtte, Why Not Include Arbitration in the Brussels Jurisdiction Regulation?, Arbitration International, Vol. 21 No. 4 (2005), at page 509.
[114] On the concept of Lex arbitri see L. Mistelis, Reality Test: Current State of Affairs in Theory and Practice Relating to 'Lex Arbitri, The American Review of International Arbitration, 2006, Volume 17 No.2.
[115] George Martin, Brussels I review-Illmer and Steinbruck on the Interface Between Brussels I and Arbitration, Journal of Private International Law, June 2009, at page 1.
[116] Ibid.
[117] Ibid.
[118] Ibid.
[119] Ibid.
[120] *Van Uden Maritimes BV v/ Kommanditgesellschaft in Firma Deco-line*, Case C 391/95, 17 November 1998, ECR I 7091.
[121] *West Tankers Inc v. RAS Riunione Adriatica di Sicurta SpA and others,* [2007] UKHL 4.

Considering the principles established by the *Van Uden* case and taking into account the time-consuming and onerous character of a rule for 'cross-border judicial assistance', the exclusive jurisdiction rule does not seem to align with the international arbitration practice.

Another interface between arbitration and the Judgment Regulation relates to the validity of the arbitration agreement. The Regulation suggests that the suppression of the arbitration exception by its scope might lead to the automatic recognition of judgments that decide on the existence, validity or scope of the arbitration agreement[122]. Further, it proposes 'the coordination between proceedings concerning the validity of an arbitration agreement before a court and an arbitral tribunal' giving this way 'priority to the courts of the Member State where the arbitration takes place to decide on the existence, validity or scope of the arbitration agreement'[123].

On this point there are several opposite views which hold that such a proposal is, at first, inconsistent with the parties' direct decision to resort to arbitration in order to settle their disputes[124]. This can be explained by considering that they are obliged to bring court proceedings in order to stop the procedure before a Member State court that deals with a suit, without considering the arbitration agreement, thereby enhancing parallel proceedings[125]. Similarly enough, the arbitrator will have to suspend arbitration proceedings until the Member State court decides on its jurisdiction. Hence, it is further stated that the Regulation, with this proposal, completely disregards the diverse arbitration laws of each Member State, namely the doctrine of 'Kompetenz-Kompetenz', that confers on the arbitrators the right to decide on their own competence, without any kind of court control[125]. For instance, in terms of the negative effect of the doctrine of Kompetenz-kompetenz, French law grants supreme priority to the arbitral tribunal to decide on its own power unless the arbitration agreement is prima facie 'manifestly null and void'[127]. Additionally, in this context[12], under Article II (3) of the New York Convention, the doctrine of 'Kompetez-Kompetenz' is further recognized, as the courts of the Contracting States declare their incompetence, while referring the parties to arbitration, when requested by one of the parties, in cases they are seized of an action in a matter, in relation to which the parties have made an arbitration agreement, unless the agreement is found to be null and void, inoperative and incapable of being performed[128]. So, in this respect, under the New York Convention, even the courts of the states that do not apply the negative effect of the 'Kompetenz-Kompetenz' doctrine, are still empowered to refer the parties to arbitration, when the subject matter seized before them is agreed to be settled by arbitration. All in all, it is suggested that the arbitration agreement should not be stayed under any circumstances in case of parallel court proceedings.

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[122] Green Papers, at page 9.
[123] Ibid.
[124] Arbitration Commitee, at page 7-8.
[125] Ibid.
[126] For the meaning of the doctrine see further Lew, Mistelis, Kroll, at paragraphs 14-13 ff.
[127] French NCPC Art.1458. Further on the Kompetenz-kompetenz concept see Brekoulakis, Stavros, The Negative Effect of Compétence-Compétence: The Verdict Has to Be Negative, Austrian Arbitration Yearbook, at pages 238-258, 2009; Queen Mary School of Law Legal Studies Research Paper No. 22/2009
[128] In other countries, following the principle of UNCITRAL Model law Article 8, when the matter brought before the courts is the subject matter of the arbitration agreement, the courts have to refer the parties to arbitration unless the arbitration agreement is null and void, inoperative or incapable of being performed and despite the fact that the issue is pending before the courts the arbitration proceedings may commence or continued and an award may be made. See also Germany ZPO, Article 1032(2).

The Heidelberg Report in dissuading parallel proceedings, it proposes the initiation of a mechanism to allocate jurisdiction[129]. In particular, it suggests that the court of the Member State at the place of arbitration, when seized by the parties of the arbitration agreement for a declaratory relief considering the existence, validity or scope of this agreement, it will have priority over the court first seized, with binding effect upon the courts of the Member States[130]. Thus, the Report confers exclusive jurisdiction to the courts of the seat of arbitration and recognizes the *res judicata* effect of their decision upon the courts of the Member States.

At this point it is worth noting the issue of *lis pendens*, *contained* in Article 27(1) of the Judgment Regulation, which by way of example refers to the parties in an arbitration agreement providing for *ad hoc* arbitration in Paris. According to that example, proceedings before a court of a Member State are initiated by one party that seeks a decision on the validity of the arbitration agreement, while the other party of the arbitration agreement seeks from the court of the seat of the arbitration (in Paris) support for the appointment of an arbitrator. At that point the negative effect of Kompetenz-Kompetenz, which applies in French law, would govern the decision of the court on the *prima facie* validity of the arbitration agreement, in order to appoint the arbitrator. It is at this particular point that the lis pendens issue arises, since in case of deletion of the arbitration exclusion, the provision of Article 27(1) of the Regulation applies. A decision on the validity of the arbitration agreement will be pending before the courts between the same parties. In order to prevent the *lis pendens* result, the Green Paper proposes the concentration of the litigation on the validity of the arbitration agreement before the courts of the seat of arbitration, conferring to their decisions obligatory power, so that parallel proceedings can be avoided[131].

It is supported that by allocating jurisdiction in this way, legal certainty is safeguarded for the parties, while contradicting decisions are avoided and the parties' interest in an early decision on the existence, validity and scope of the arbitration agreements with binding force is fulfilled[132].

Conversely, there is an argument on that point, that sounds coherent enough, which supports that in any case, this provision should define that the stay of the proceedings for the court first appointed should be issued even in those cases where parallel court proceedings are taking place in order to decide on the prima facie existence, validity, or scope of the arbitration agreement or further in such a case where the arbitral tribunal will decide on the existence,

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[129] Article 22 No 6 to the Brussels I Regulation.
[130] Heidelberg Report paragraph 133-134.
[131] Mourre, The Regulation of International Arbitration by European Law: What Does the Future Hold?, Kluwer Law International, May 2009.
[132] George Martin, Brussels I review-Illmer and Steinbruck on the Interface Between Brussels I and Arbitration, Journal of Private International Law, June 2009, at page 3.

validity or scope of the arbitration agreement in the first instance[133]. Hence, all the decisions made by the arbitral tribunals and the courts that allow the arbitration proceedings to go on are enclosed, including the decisions that are restricted to decide on the basis of the negative effect of Kompetenz-Kompetenz, whether the arbitration agreement is prima facie null and void, or inoperative[134]. With this amendment, such a provision would consider all diverse arbitration laws in all Member States averting parallel proceedings and safeguarding the effectiveness of the arbitration agreement[135].

Last but not least, the Regulation, in determining the validity of the arbitration agreement proposes 'a uniform conflict rule' connected to the law of the State of the place of arbitration which aims to reduce possible contradicting decisions on the validity of the arbitration agreement among Member States[136]. Nevertheless, it seems doubtful that this provision would suffice to eliminate the *lis pendens* issue, as this way, in case where the seat of the arbitration is not decided by the parties, jurisdictional rules should be applied by them in order to determine the applicable law to the arbitration agreement despite the fact that this conflict of law rules would not be sufficient enough to connect the dispute with the applicable law[137]. Hence more jurisdictional options would be available to the parties and would result in enhanced forum shopping[138].

Finally, an area of interface between the arbitration and the Regulation concerns the recognition and enforcement of arbitral awards within the EU in accordance with the provisions of the New York Convention. The Green Paper suggests that a provision incorporated in the Regulation that would permit the non-enforcement of a judgment irreconcilable with an arbitral award, would benefit the latter which is enforceable under the New York Convention[139]. It seems, that such a rule that safeguards the effectiveness of the arbitral awards is well accepted given the fact that the New York Convention would continue to govern the recognition and enforcement of the arbitral awards in line with the applicable national arbitration laws.

Further, it is proposed 'to grant the Member State where the arbitral award was rendered, exclusive competence to certify the enforceability of the award as well as its procedural fairness, after which the award would freely circulate in the Community'[140]. But in this respect, it should be taken into account the fact that in line with the New York Convention, arbitral awards set aside in their state of origin can still be recognized and enforced in other Member States, as there are no common grounds recognized by all Member States. Considerable case law, in terms of the arbitration exception, has proven that even in that case were fundamental legal principles are breached by an arbitral award in one Member State, this does not prescribe its non-enforcement by another State with which they do not share common legal principles.

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[133] The new article 27 ασ proposed by the Heidelberg Report; see further paras133-134 of the Report. See also, Arbitration Committee, at page 8.
[134] Arbitration Committee, at page 8; Article 1458 French NCPC.
[135] Arbitration Committee, at page 9.
[136] Green Paper, at page 9.
[137] Arbitration Committee, at page 10.
[138] Mourre, The Regulation of International Arbitration by European Law: What Does the Future Hold?, Kluwer Law International, May 2009.
[139] Green Paper, at page 9.
[140] Green Paper, at page 9.

This issue was examined in the *Fincantiery* case, where an award was rendered in France and enforced by the French cour de cassation , despite the fact that the Italian courts had nullified the arbitration agreement[141]. Similarly in *Putrabali* an arbitral award set aside in England was enforced by the French courts[142]. Consequently, it is obvious that the New York Convention, despite providing for a certain basis of conformity, nevertheless it still accepts differences between Member States, especially when public policy issues are concerned.

Following the proposal of the Commission, decisions made under the exclusive competence of Member States where the award is rendered, setting aside this award for contradiction to the public policy principle of that Member State, would then freely circulate in the European Union, preventing this way its enforcement by those Contracting States that could recognize the particular award in terms of the New York Convention, as it might not be contrary to their national public policy rules[143]. It is considered that, with this provision, the Commission, sets lower thresholds and creates a reality within the European Union which is less favourable than that existing in other States governed by the New York Convention. Thus, it provokes a conflict with the Regulation thereby making the EU arena a detrimental venue for international arbitration.

All in all, it seems that the interface between arbitration and European law is not that easy. With fundamentally different backgrounds, the New York Convention and the European Judicial Private Law are not treated equally. The European law has its basis on the 'free movement of judgments' whereas arbitration is based on the concept that each country has its own legal provisions and approaches differently the recognition and effect of the awards with international character. If the arbitration exception is deleted from the scope of the Regulation, basic principles which essentially characterize arbitration will have to be revisited. Such a deletion, far from leaving untouched the operation of the New York Convention, would cause the Contracting States to be in breach of their obligations under that Convention. What is more, the European Union would be treated as if it were one territory with respect to the Convention and would lead to the regionalization of the law of arbitration. This in turn, would result in the European Union being a jurisdiction where the New York Convention would no longer apply. Even if a regulation of the New York Convention is not intended, the goal of making the EU an integrated territory for arbitration through a reform of recognition procedures does not seem very pragmatic. In any case, the balance seems difficult to be kept and the exceptional character of the New York Convention appears to be seriously jeopardized.

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[141] *[FRA] Legal Department of the Ministery of Justice of the Republic of Iraq v. Fincantiery –Cantieri Navali Italiani, et al.-15 June 2006- Cour d' appel (Court of Appeal), Paris.*

[142] *[FRA] Societe PT Putrabali Adyarnulia v. Societe Rena Holding et Societe Moguntia Est Epices – 29 Juin 2007 (Cour de Cassation).*

[143] New York Convention, Article V (2)(b).

8. CONCLUSION

This article initially discussed the role of arbitration in the context of the ECMR and illustrated its significance in the process of clearance of the notified concentrations by the Commission, through the means of monitoring the implementation of the arbitration commitments undertaken by the merging parties. Moreover, it examined the legal nature of the arbitrator within these proceedings as influenced by the policy of the Commission, and the way this interrelation can lead to the creation of a 'hybrid' nature of arbitration, mainly caused by the role of the arbitral award in this context. Due to the impact of the enforcement of the arbitral award on the role of arbitration in the clearance procedure, as regards its compatibility with the EU legal order, the recent amendments on the enforcement of the arbitral awards within the EU were examined in the light of the Commission's Green Paper on Regulation 44/2001 and its effects on the clearance procedure of concentrations by the Commission subject to the ECMR rules in relation to arbitration were estimated.

This article concludes that, the wide attempt made by the Commission to extend its reach to international arbitration in different but interrelated areas within the context of EU Competition Law and in particular in relation to mergers, recognises arbitration and the established procedural mechanism appropriate for the enforcement of such legal regime. Furthermore, under the scope of the adoption of uniform conflict rules that will enhance the free movement of arbitration awards within the EU, arbitration would facilitate the accomplishment of the common market. On the other hand, the above changes in the Commission's view on arbitration, with its obvious aim to bring all arbitration aspects under the scope of Regulation 44/2001, especially as regards the enforcement of the awards, entails the danger to completely change arbitration's universal character and finally trigger its function in the control of mergers in the EU. With the implementation of the harmonised rules proposed by the Commission on the enforcement of arbitration awards, the protections built in the enforcement mechanisms provided by the New York Convention are abandoned and an increased involvement of court control is introduced in the state of the seat of arbitration while at present it is possible to directly enforce the arbitration award in other New York Convention states[144]. This in turn, calls in question the hybrid nature of arbitration in terms of the EU Merger Control and totally doubts the scope of the arbitrator's independence, as in fact the Commission's intervention to the arbitration proceedings becomes more than apparent. As a result this could convert arbitration as its 'prolonged arm', when the Commission imposes certain criteria for its function and regulates at the same time its legal framework. Such an intervention would have a strong impact on arbitration's fundamental principles that establish it as an internationally accepted ideal dispute resolution mechanism and its legal framework would be seriously damaged.

[144] The Commission suggests that 'the Member State where an arbitral award was given [should be granted] exclusive competence to certify the enforceability of the award as well as its procedural fairness, after which the award would freely circulate in the Community'.

At the end of the day the whole structure of the control of the Commission's clearance decisions in merger transactions, from the monitoring of the behavioural commitments of the merging parties to the recognition and the enforcement of the arbitration award would change as although arbitration would keep its key role to these proceedings, it would still be completely different in its legal nature. Thus, we would not be talking about a hybrid nature of arbitration in terms of the EU Merger Control system, but for a special review mechanism established and structured by the Commission in order to delegate its powers in the conduct of the whole merger control procedure. All in all, the present position in the relationship between arbitration and EC Merger Control is that there is a constant process towards conversion, as these legal norms do not run in a parallel manner but they meet at a certain point and in particular in the assessment of mergers. Therefore, not only arbitration is not immune from the EC Competition Law system, but on the contrary it has been adopted by the Commission as a principal factor in the examination of mergers.

Commitment decisions: A Polish perspective

KATARZYNA MRZYGLÓD[1]

INTRODUCTION

The commitment decision is quite a new instrument for European competition authorities. At first, it was introduced at the European level at the time of the modernisation of competition enforcement rules by Regulation 1/2003. Many Member States, recognising the advantages of this tool, decided to introduce the commitment mechanism copying more or less the European model.

The commitment procedure is an expression of proceduralisation of law, the idea of which is to depart from direct and governing intervention in social life and apply legal means respecting the autonomy of individuals instead.[2]. Competition law, which has as its subject the quick change of economic conditions, seems to be particularly prone to that type of ideas

Current practice shows that the commitment procedure is a useful enforcement tool. Both competition authorities and undertakings have many reasons to issue a commitment mechanism instead of an infringement decision. Competition authorities have the possibility to eliminate anti-competitive conditions in a faster (and cheaper) way with a more effective use of their limited sources. In complicated cases when the facts are not obvious or the issue in question is very complex, the commitment procedure may be a better way to address potential restriction of competition. Also when the case would require a long and detailed analysis and an infringement decision would have limited precedential value, the commitment decision seems to be a good solution[3]. Since the commitment mechanism is far less exposed to the risk of appeal, competition authority may also be interested in accepting commitments when it comes to the conclusion that the evidence is ambiguous or simply weak[4]. From the undertaking's point of view, the possibility of obtaining a commitment decision has also many advantages. Firstly, the company avoids formal finding of infringement and therefore avoids the imposition of fine. Moreover, the commitment procedure does not have a prejudication character and thus the person claiming damages has to prove the infringement (if the infringement instead is formally established, it considerably facilitates private claims). Furthermore, lack of formal infringement finding means that the practice in question is not illegal *ex lege* and the undertaking may step by step change its behaviour in accordance with proposed commitments. The undertaking has also possibility to offer commitment which it knows it can realize in practice and the outcome of the proceedings is more comprehensible.

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[2] A. Gill, M. Swora 'Decyzja zobowiazujaca jako metoda rozwiazywania sporów w postepowaniu przed Prezesem
Urzedu Ochrony Konkurencji i Konsumentów', 3/2005, Kwartalnik Prawa Publicznego,105-141,p. 133.

[3] Ch. J. Cook 'Commitment Decisions: The law and Practice under Article 9', 29 (2)/2006, World Competition, 209-228, p.212.

[4] J. Temple Lang 'Commitment Decisions and Settlements with Antitrust Authorities and Private Parties under European Law' in: B. Hawk (ed.) *International Antitrust Law & Policy: Fordham Corporate Law 2005,* 2006, New York, 265-324, p. 275.

On the other hand, the commitment mechanism is a kind of a compromise between the authority and the undertaking and therefore it has a lower deterrent effect. The application of the commitment procedure strengthens the administrative model of competition law enforcement in Europe. If taken too far, it may change competition authorities to regulatory bodies[5]. This because commitment mechanisms do not deal with past infringement but rather introduce remedies for the future. Overreliance on the commitment procedure may also delay introduction of effective private enforcement of competition law in Europe since there is an increased difficulty for successful assertion of claims in case when commitment decision is adopted[6]. The undertaking, on the other hand, may bind itself to commitments in case when the competition authority would be unable to prove existence of a violation[7].

The article provides an overview of rules regarding commitment procedure under Polish competition law, in particular stressing the differences between the Polish and European regulation. It describes the cases suitable for commitment mechanism as well as the influence of the procedure on the leniency programme. The text presents also the procedural issues relating to the commitment instrument, especially the steps for adopting the decision with emphasis on the importance of procedural safeguards and pointing out its relative lack in the process described.

1. The commitment decision under Polish law

The commitment mechanism was introduced into the Polish legal order together with several amendments aligning Polish law to European regulations. It is worth mentioning that introducing this instrument did not come from compliance obligations since according to Article 5 of Regulation 1/2003 national competition authorities are entitled to accept commitments in relation to Article 101 and 102 of TFEU (and Article 288 of TFEU provides for a direct applicability of regulations).

However, as it was explained in the substantiation to the project of the amendment of the Polish Competition and Consumer Protection Act[8], (hereafter CCPA) the aim of introducing the commitment decision to the Polish regulation was to increase the efficiency of Polish competition authority[9] whose main task is to protect competition on the market and not just impose fines on the undertakings. Additionally, the commitment procedure was introduced to Polish law in order to equal the position of an undertaking in the proceedings before the Polish competition authority and to that before the European Commission. It is interesting in this regard that the Polish regulation regards potential breaches of both Polish and European competition rules (therefore somehow repeats the authorisation included in Article 5 of Regulation 1/2003).

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[5] G. S. Georgiev 'Contagious Efficiency: The Growing Reliance on U.S.-Style Antitrust Settlements In EU Law', 2007 Utah Law Review, , 971-1037, p. 1026.
[6] G. S. Georgiev 'Contagious Efficiency: The Growing Reliance on U.S.-Style Antitrust Settlements In EU Law', 4/2007, Utah Law Review, , 971-1037, p. 1035.
[7] A. Magnus, B. McGrath 'Commitments in competition enforcement. All's well that ends well'?, PLC April 2006, 14-16, p. 16.
[8] Print of the Sejm no. 2561 from 20.02. 2004, p. 5 of the substantiation of the Project of amendment.
[9] i.e. The President of the Office of Competition and Consumer Protection.

1.1. Cases suitable for commitment decisions

According to recital 13 of Regulation 1/2003 commitment decisions are not appropriate in cases where the competition authority intends to impose a fine. In addition, the opinion presented by the European Commission excludes the use of commitment decision to hardcore restrictions (e.g. cartels)[10]. Polish regulation does not impose such limitation, therefore it is possible to make use of the commitment mechanism in all kind of cases[11]. The decision whether to accept commitments or not rests exclusively with the Polish competition authority.

One should bear in mind that the regulation in question is an example of the Europeanisation of Polish competition law and there are no obligations to follow directly European model (e.g. also in Italy and in France a commitment decision may be issued in relation to hardcore restriction cases). Nevertheless, some authors indicate that such practice is inconsistent with the objectives expressed by the European legislator.[12] The instrument in question was originally designed to balance between the need to detect and punish competition law infringements and the necessity of maintaining procedural efficiency as well as introducing the possibility of instant removal of anticompetitive effects of certain practices on the market[13]. If commitment decisions are allowed to be issued with regard to hardcore restriction cases, this balance seems to be disturbed. Furthermore, the possibility of issuance of a commitment decision in all cases may hamper proper exercise of the rule of equality before the law and it may have negative effects on achieving proper deterrence of competition law. The latter does not however seem to be an actual threat for competition law application in Europe as competition authorities tend to impose heavy fines nowadays[14]. Nevertheless, even application of very high fines when combined with the widespread use of the commitment mechanism may have a negative influence on the deterrent enforcement of competition rules.

The possibility of adopting commitment decisions in hardcore restriction cases is not just theoretical. In 2008, the Polish competition authority has issued a commitment decision in a case involving fixing minimum resale prices[15]. The proceedings concerned the distribution agreement between Xella and its 10 distributors. The agreement contained a provision which explicitly prohibited the application of lower resale prices than the price of purchase of products from the producer. This kind of agreement is qualified as minimum resale price maintenance and as underlined to the decision *"pricing agreements are considered to be one of the hardcore restrictions of competition*[16]*"*. Such opinion has been also expressed in the motivation of the decision[17], however in the Polish competition authority's view, the provision was somehow specific because contrary behaviour of distributor would be economically irrational and has

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[10] 'Commitment decisions (Article 9 of Council Regulation 1/2003 providing for modernised framework of antitrust scrutiny of company behaviour)',MEMO/04/217.
[11] C. Banasinski, E. Piontek (eds.) *Ustawa o ochronie konkurencji i konsumentów Komentarz,* 2009, Warsaw, p.310.
[12] A. Pera, M. Carpagnano 'The law and practice of commitment decisions: a comparative analysis', E.C.L.R. , 2008, 669-695, 685.
[13] A. Pera, M. Carpagnano 'The law and practice of commitment decisions: a comparative analysis', E.C.L.R. , 2008, 669-695, p. 685.
[14] For example in December 2009, Polish competition authority imposed maximum possible fines (i.e. amounting 10 % of the revenue) on some of the biggest producers of cement in Poland, participating in the cartel on the construction market.
[15] Decision DOK - 3/2008 *Xella*.
[16] Decision DOK - 3/2008 *Xella*, p. 22.
[17] Decision DOK - 3/2008 *Xella*, p. 11, 22, 24.

marginal importance[18]. Xella immediately after the initiation of the proceedings, began to amend its agreements with distributors. Of course, such active cooperation deserves its "reward", nevertheless it has been considered whether, in case of hardcore restrictions, other objectives of competition law, like educational or deterrent effect of the decision, should not prevail (especially that under Polish CCPA imposition of fine by the authority is not obligatory). The decision in Xella case may be a sign that the Polish competition authority will change its position in relation to resale price maintenance[19] and will not indicate this practice as a hardcore violation of antitrust rules. According to the current competition doctrine, only cartel cases are regarded as hardcore restrictions[20].

1.2. Commitment decision and leniency programme

The policy behind introducing the leniency programme and the commitment decision procedure to competition law is to some extend similar. Both tools have the object of inducing undertaking to active cooperation with competition authorities in order to terminate restrictions of competition existing on the market.

However, from the practical point of view, application of one of those instruments should exclude the possibility of introducing the latter one. It is because the undertaking applying for immunity (or fine reduction) under leniency programme is required to make self-incriminating statements and provide all relevant information and evidence relating to the alleged cartel. The competition authority may grant immunity only if it finds infringement (and the finding concerns also the leniency applicant). In turn, commitment decision does not include the finding of the infringement.

Under EU competition law, leniency programme concerns only cartel cases and in practice applications regard usually hardcore restriction cases where if no immunity was granted, it had been appropriate to impose a fine. Therefore, such cases would not be suitable for commitment decisions under Regulation 1/2003.

Polish regulation provides for a different solution. First of all, leniency programme applies not only to cartel cases but to all anticompetitive agreements. Secondly, as indicated above, there are no reservations as to cases suitable for the commitment procedure. As a result, it is not hard to imagine circumstances where an undertaking is put in a dilemma: to apply for leniency or propose commitments. It should be stressed that both instruments are of discretionary character. At the moment, considering the lack of settled case law, assessing the possibility of obtaining any of those instruments seems to be extremely difficult.

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[18] Decision DOK - 3/2008 *Xella*, p. 24.

[19] Although in all cases regarding RPM the Polish competition authority stresses that pricing agreements are considered to be hardcore restriction, one can notice that even in Polish guidelines on the method of setting fines, RPM is qualified only a "serious" and not "very serious" infringement. Guidelines are available at Polish competition authority's website at: http://uokik.gov.pl/leniency_programme.php .

[20] See the decision of FTC in *Nine West* case regarding RPM practices: http://www.ftc.gov/opa/2008/05/ninewest.shtm. Also, the Spanish competition authority has applied in December 2009 *de minimis* rule to RPM practice in *El Corral de las Flamencas* case

Polish legislator imposes a significant burden on undertakings by forcing them to make decisions while available guidelines – both jurisprudential and those coming from Polish competition authority are in fact very little. As an effect, the undertaking will be under constrain in making a key decision as to the strategy of defence and this decision may have significant consequences in future (e.g. with regard to possible private claims).

The practice of application of those instruments under Polish regulation is vague, particularly in the light of recent *P4/Polkomtel* commitment decision[21]. The investigation concerned the alleged anticompetitive agreement regarding conditions on which Polkomtel has provided P4 with access to its network. At the end of 2008 four telecommunication network operators provided their services on the Polish market of mobile telephony. However, only three of them (including Polkomtel) had full mobile network infrastructure of national coverage. P4, which was the operator with limited coverage, concluded an agreement with Polkomtel on national roaming. The agreement obliged P4 to purchase access exclusively to the network of Polkomtel and guaranteed Polkomtel the right of priority to provide this service before other operators. In the decision the Polish competition authority indicates that P4 has filed an leniency application (interestingly, it is probable that P4 has applied for leniency only to force Polkomtel to remove the disadvantageous for P4 restrictions from the agreement). During the antimonopoly proceedings both undertakings has proposed commitments. Unfortunately, the authority does not explain in the reasoning of the decision its assessment of P4 leniency application. The case, however, indicates that under Polish law it is not completely excluded to file for both instruments in one proceeding. With no pointer from the authority in the future, such practice may blur boundaries between the two, in fact distinct, instruments.

1.3. Procedure

According to Article 12 of CCPA, it is possible to adopt commitment decisions in the course of antimonopoly proceedings[22]. There are two basic conditions to apply commitment procedure: the case is pending before the Polish competition authority and the proceedings are carried out against a particular undertaking (i.e. it is not just an investigation into a specific market situation). The regulation does not provide any time limits, therefore theoretically a commitment decision may be issued in all stages of the proceedings. In practice, it seems that the Polish competition authority is not willing to accept commitments if the undertaking concerned does not proactively act from the beginning of the antimonopoly proceedings. In *Zabka/Koral* case[23], one of the undertakings applied for a commitment decision, however the Polish competition authority decided to issue an infringement decision. As explained in the decision, the application of Zabka was refused because it was filed at the final stage of the proceedings, after the parties were acquainted with the evidence in files of the case. In the authority's opinion, proposing commitments after 8 months of proceedings would by no means accelerate the procedure and hence, the issuance of commitment decision would be aimless.

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[21] Decision No DOK -6/2009 *P4/Polkomtel.*

[22] Polish CCPA provides for two types of proceedings: explanatory which may aim at initial determination whether an infringement occurred, market study, etc.; and antimonopoly proceedings which concern particular behaviour with regard to particular undertakings involved (may lead to an agreement or practice being prohibited and imposition of fine).

[23] Decision RKT 107/08 *Zabka/Koral*; what is interesting the decision was issued in 2008 (just like *Xella* case) and also concerned resale price maintenance.

Secondly, the CCPA introduces a condition regarding the plausibility of the existence of the infringement of competition rules (both Polish and European). "Plausibility" is a separate concept from "evidence" under Polish law. It is a kind of ersatz of the evidence *sensu stricto*. It allows fastening the proceedings by releasing the authority from strict standards of proof. The plausibility does not give certainty but only credibility as regards to the facts. As indicated by the Polish Court of Competition and Consumer Protection, the main aim of the provision is to fasten the antimonopoly proceedings, when object – elimination of the potential infringement – may be achieved without caring out the entire proceedings[24]. What is important, however, the condition does not mean that it is sufficient to obtain any degree of probability, even the smallest which in the opinion of the competition authority is adequate. The authority should obtain such a degree of probability that competition rules were breached that would make impossible to state that competition law was not infringed[25]. Otherwise, the commitment decision should not be adopted. It is because according the rule of deepening the trust of citizens existing in Polish administrative proceedings when choosing legal effect to particular fact, the authority should consider the "justified interest in the case", however without giving priority to public interest. Hence, if it is not contradictory to public interest, the doubts should be decided to citizens' advantage[26]. The plausibility, as a rule, should not be based only on the statements of the party[27].

In practice, however, the control over the process of adopting commitment decisions is slender. In fact, if the undertaking wants to avoid a long and expensive procedure that may involve a high fine, it may be willing to offer commitments, especially when the law is unclear, even if the facts of the case seem to be controversial. If the commitment decision was appealed (which is rather unlikely), the Polish Court of Competition and Consumer Protection is obliged to examine the case in first instance, therefore it is not as such oriented on "punishing" Polish competition authority for its procedural faults. Therefore, it appears that the main guard of "fair play" rules in the competition proceedings is the competition authority itself.

It is worth to mention that several practitioners have postulated removal of the condition of plausibility as in the light of this provision, proposing commitments may be found by the Polish competition authority as a acknowledge undertaking's guilt[28].

Contrary to European regulation, the Polish competition authority is not obliged to issue a formal act similar to preliminary assessment. As it is pointed out, the authority should inform the undertaking concerned about the plausibility of infringing competition law, otherwise it would make impossible for the undertaking to propose appropriate commitments[29]. The information should include precise and clear description of the practice which, in the authority's view, may constitute a prohibited practice. Nevertheless, the CCPA does not impose such obligation on the competition authority. The process is to large extend not formalised. On the one hand, it allows to keep the flexibility of the negotiations but on the other hand, causes a significant threat for basic rights of the party in the proceedings, in particular right of defence. The undertaking proposes commitments without having a detailed knowledge about actual

[24] Judgment of the Polish Court of Competition and Consumer Protection from 15.12.2006, XVII AmA 35/06.
[25] A. Gill, M. Swora 'Decyzja zobowiazujaca jako metoda rozwiazywania sporow w postepowaniu przed Prezesem
Urzedu Ochrony Konkurencji i Konsumentow', (3)2005, Kwartalnik Prawa Publicznego, 105-141, 128
[26] Judgment of the Suprme Administrative Court, 23.09.1982 r., II SA 1031/82 (ONSA 1982, no 2, item 91).
[27] Kazimierz Piasecki (ed.) *Kodeks postepowania cywilnego. Komentarz*, 3 edition, Warsaw, 2001, p. 1022.
[28] Paper of Working Group of Competition Law Society regarding proposition of changes to Polish Competition and Consumer Protection Act, dated as of 6.10.2008
[29] K. Kohutek, M. Sieradzka *Ustawa o ochronie konkurencji i konsumentów. Komentarz*, Warsaw, 2008, 433.

concerns of the authority. As a result, it may negatively affect the proportionality of the commitments – the undertaking acts without formal statement of the authority and at the same time it has to take into account that the authority may abandon negations and issue an infringement decision.

The process of submitting commitments is also not regulated. It is not determined who has the initiative to propose commitments, hence both the undertaking and the authority are entitled to commence the process. It should be emphasized, however, that it is not possible to force the undertaking to give any commitments. At the same time, the undertaking cannot compel the authority to accept commitments.

1.4. Procedural safeguards

Although the undertaking is not obliged to propose commitments, nevertheless the benefits arising from the commitment procedure are considerable. Still elimination of potential restriction of competition should not be held at the expense of basic procedural rights.

The undertaking against which the proceedings are carried out is a party to the proceedings. Although this seems obvious, it is particularly important because only the entities which have the status of the party to the proceedings enjoy procedural rights provided for in administrative procedure, including the right to be properly and exhaustively informed about the legal and factual circumstances that may have influence on the existence of rights and obligations that are subject of the proceedings, the right to actively participate in all the stages of the proceedings, the right to be heard, and the right to have access to the file.

Although the substantiation to the project of the amendments of CCPA introducing commitment decisions states that the project is parallel to the enforcement tool from Regulation 1/2003, it is not entirely true. The Polish regulation does not provide for any consultation procedure (neither a public market test nor an opinion of "professional" body), therefore at the end of the day case handlers are the ones who in accordance with material gathered and experience have to decide whether or not accept commitments.

In particular, the lack of procedure analogous to market test provided for in Article 27.4 of the Regulation 1/2003 seems to have adverse effects. Observation submitted by third parties would enable the authority to get acquainted with different interest and put the commitments to a broad market test. The practice of the European Commission indicates that opinions submitted in the course of consultation procedure provided in the past some valuable remarks and in some cases resulted in appropriate modification of proposed commitments[30]. Publication of proposed commitments should not involve significant costs and administrative sources (after all, issuance of commitment decision should be rather an exception, then a rule). It is worth to mention that the procedure of public consultation exists not only in the European regulation but is also implemented in other Member States including France, Italy, and the UK[31].

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[30] COMP/38.381 De Beers/Alrosa.

[31] A. Pera, M. Carpagnano 'The law and practice of commitment decisions: a comparative analysis.', E.C.L.R. , 2008, 669-695, p.676 and 669, A. Magnus, B. McGrath 'Commitments in competition enforcement. All's well that ends well?', PLC April 2006, 14-16, p. 15.

After the modernisation of Polish competition law in 2007, it is particularly important since Polish legislator has limited the definition of the party, depriving the entities lodging a complaint of the status of the party[32]. The rights of third parties are quite insignificant. First of all, the Polish competition authority is not obliged to inform third parties about the proposed commitments. It seems to be disadvantageous, above all in relation to entities directly affected with the practice which is subject to the proceedings. Third parties may only apply general provisions regarding right to be heard and from their own initiative submit explanations concerning essential circumstances of a given case. However, expressing a constructive opinion is only possible when the third party has a sufficient knowledge about the facts of the case and proposed commitments.

2. Elements of commitment decision

2.1. No formal finding of violation

One crucial characteristic of the commitment mechanism, especially for the undertaking concerned, is the fact this decision does not include a finding that there was a violation of competition rules.

This statement is justified also from the formal point of view. As indicated by the Polish Supreme Court, commitment decision does not definitively forejudge the existence of the infringement because it is only based on the plausibility of the violation[33].

Some authors indicate that a different view can be taken and it is acceptable to state that commitment decision *materially* confirms the existence of the violation and therefore it could be useful in private suits[34]. Such opinion seems to be unjustified, not only because it is totally contrary to the objectives of European model and would deprive this instrument from its primary attraction, but also from the formal point of view *(above)*. Even if offering commitments may be somehow understood as plead guilty *de facto*, it is not determine that the law was actually violated[35]. Such conclusion would not only influence private claims, but could also affect the assessment of potential violation by the same undertaking in the future[36].

The sentence of commitment decisions expressly states that the decision is only based on plausibility. Some concerns may raise to the wording of justification of the commitment decisions which, unfortunately, used not be so carefully drafted as it is done by the European Commission (e.g. "[the authorithy] *found the infringement (...) not only plausible but* ***even proven****"*[37], *"the effects of the practice in* question are ***clearly anticompetitive****"*[38], *"the effects (...) consist in abuse of dominant position (...)that distorts of competition"*[39]*)*.

[32] Currently, Polish competition authority acts only *ex offico*, entities may submit to the authority a written notification concerning a suspicion that competition restricting practices, however the authority is not obliged to initiate proceedings.
[33] Resolution of the Polish Supreme Court, III CZP 52/08. The resolution was issued before modernization of Polish CCPA, however the wording of provisions regarding commitment decision has not been modified.
[34] C. Banasinski, E. Piontek (eds.) *Ustawa o ochronie konkurencji i konsumentów Komentarz*, 2009, Warsaw, p.314; What is interesting (and somehow disturbing) the publication (as a whole) was prepared mostly by former and current case handlers of the Polish competition authority.
[35] T. Skoczny (ed.) *Ustawa o ochronie konkurencji i konsumentów Komentarz*, 2009, warszawa, p. 739
[36] According to the Polish Guidelines on setting fines for competition-restricting practices past infringement is an aggravating circumstance that could raise the base fine up to 50% (the Guidelines are available on the Polish competition authorithy's website: www.uokik.gov.pl).
[37] Decision RGD 44/2005 *Gmina Miastko*.
[38] Decision RGD 16/2006 *Telewizja Kablowa VECTRA S.A. z siedzibą w Gdyni i Spółdzielnia Mieszkaniowa KORAB w Ustce.*
[39] Decision RWR 4/2009 *Gmina Jelenia Góra*.

2.2. Commitments and other conditions imposed

The undertaking may propose commitments of behavioural or structural remedies, factual or legal activities. The regulation states only that the commitments may concern undertaking or termination of certain activities. Obviously, commitments should lead to prevention or liquidation of effects of potential competition violation. As the practice does not differ from the European model, the issue will not be addressed in detail hereunder[40] .

The obligatory element of the commitment decision under Polish law is the imposition of information obligations. The authority should fix dates when the information should be submitted.

It is also possible for the authority to determine the final date for realisation of the commitments. There are no pointers as to the duration, however the authority should take into consideration legal and factual situation of the undertaking. Some authors point out that determination of final date is desirable with regard to security and certainty of legal transactions as well as necessity of effective realization of competition law aims[41].

3. Enforcement of commitment decision

3.1. Competition authority

Polish regulation provides for three tools aiming at effective enforcement of commitment decision.

The basic instrument regards the possibility of revocation of the decision. The revocation always takes place *ex offico* and has a discretionary character. First of all, it may be done in the event when the decision has been issued on the basis of false, incomplete or misleading information or documents. It is emphasized that the source of the information is of no importance[42]. Secondly, the decision may be revoked in case when the undertaking has not carried out commitments or obligations imposed in the decision Finally, the decision may be revoked if the circumstances having a significant impact on the issuance of the decision, have changed. What is important, however, the possibility of revocation of the decision in the last situation depends on the consent of the undertaking concerned. Thus, the Polish regulation differs from European model where the consent of the undertaking is not required. The requirement of undertaking consent is related to acquisition of specific "right" in commitment decision (the concept of advantage under Polish administrative regulation is understood broadly[43]). The benefit is that the undertaking has avoided potential finding of violation and fine imposition[44]. In any event when the decision is revoked, the authority is obliged to adjudicate on the merits of the case.

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[40] See J. Temple Lang 'Commitment Decisions and Settlements with Antitrust Authorities and Private Parties under
European Law' in: B. Hawk(ed.) *International Antitrust Law & Policy: Fordham Corporate Law 2005,* 2006, New York, p.265-324, J. Temple Lang "Commitment decisions under Regulation 1/2003: legal aspects of a new kind of competition decision" E.C.L.R. , 24 (8), 2003, p. 347-356.
[41] K. Kohutek, M. Sieradzka *Ustawa o ochronie konkurencji i konsumentów. Komentarz,* Warsaw, p. 439.
[42] K. Kohutek, M. Sieradzka *Ustawa o ochronie konkurencji i konsumentów. Komentarz*, Warsaw, p. 441.
[43] B. Adamiak, J. Borkowski (eds.) *Kodeks postepowania administracyjnego. Komentarz*, 8 edition,2006, Warsaw, p. 710.
[44] K. Kohutek, M. Sieradzka Ustawa o ochronie konkurencji i konsumentów. Komentarz, Warsaw, p. 444.

The authority may also impose a fine up to EUR 50 000 000 if the undertaking, even unintentionally, has not fulfilled the information obligations or provided untrue or misleading information. Finally, in case when the authority has determined final date for realisation of the commitments, it is possible to impose fine up to EUR 10 000 per each day of delay in execution of decision.

Contrary to the European model, the Polish regulation does not provide for the possibility of imposition fine up to 10% of the total turnover in the preceding business year. In case when no final date was determined the only "sanction" would be revocation of the decision and deciding on the merits of the case. Hence, the non fulfilment of the commitments does not constitute an infringement *per se* as it is in European commitment decision. Such solution leads to significant weakening of the possibilities of enforcement of the commitment decisions.

3.2. Third parties

As indicated above (in spite of doubts raised by some authors), commitment decision does not have a prejudication character[45]. In addition, in case when commitment decision is adopted, the CCPA expressly excludes application of provisions regarding possibility of issuing the decision finding the violation or the decision declaring termination of the violation.

Therefore the person claiming damages will be obliged to prove the infringement. An interesting issue, that has to be marked, is the possibility of claiming damages for improper fulfilment of commitments imposed in decision. In practice, it appears that fulfilling general prerequisites of civil liability (in particular proving casual nexus) would be difficult. It seems that such possibility would depend particularly on the character of commitments and the way in which the commitment were expressed.

It is clear that third parties have very little possibilities to influence the outcome of commitment procedure. They are not the party to the proceedings (even if they notify the possible infringement), they are not consulted during the proceedings and finally, they are also deprived from the possibility lodging the appeal (as they do not have a status of a party in administrative proceedings). Basically, what they can do is to wait for the result of the proceedings and accept it. This issue can be seen as a significant disadvantage of the Polish competition law procedure.

[45] Resolution of the Polish Supreme Court, III CZP 52/08.

CONCLUSIONS

The Polish regulation, although in principle designed to follow the European commitment mechanism, at the end of the day seems to be only "inspired" by the European regulation. Significant changes regarding mainly the process of accepting commitments, in particular lack of public market test, seem to be insufficient for proper realization of rule of openness of the proceedings. Introduction of the process of public consultation would definitely assure minimum degree of protection of the rights of third parties in the proceedings.

The diversity in the regulation of the commitment procedure across Europe has its origin in cultural, political and legislative factors[46]. However, those differences may have negative effect on uniform enforcement of competition law in the EU as well as on the implementation of the "one stop shop" system of EU competition law[47]. The Polish regulation of the commitment instrument gives a good example of the potential inequalities that may significantly affect the undertakings concerned if the proceedings are not carried out at the European level but in several Member States separately.

[46] A. Pera, M. Carpagnano 'The law and practice of commitment decisions: a comparative analysis', E.C.L.R. , 2008, 669-695, p. 685.
[47] Denis Waelbroeck 'Global Competition Law Centre Working Paper 1/08', p. 12-13; Note that in practice Polish completion law applies national procedure also in cases regarding 101 and 102 TfEU (e.g. Decision DOK 98/07 *Telekomunikacja Polska S.A.*).

Assessing the developments of the failing firm defence in the present credit crunch situation

VALERIA GRAZIUSSI[1]

This article defines the meaning and the use of "the failing firm defence". After an overview of the present world financial crisis in the US and EU, the article analyses how this defence is being used by Authorities and parties in this delicate period of crisis. Particularly, this article critically discusses the use of the failing firm defence in the current financial climate, its development and adjustments to face the current credit crunch situation. Finally, the developments of the failing firm defence will be assessed on the basis of recent merger transactions and the response from National Authorities and Governments.

1. Introduction: the "failing firm defence"

Competition authorities can decide that a concentration, which in a normal situation would raise concerns from a competition perspective, is compatible with the market if one of the participants to the concentration is failing on the basis of the Failing Firm Defence (FFD). The main requisite is that the deterioration of the market following the concentration is not attributed to the concentration itself. This is possible if, absent the concentration, the structure of the competition on the market would be undermined anyway. The policy governing FFD is quite strict, allowing mergers between competitors only in few cases, when firms face the risk of an imminent bankruptcy. Although competition authorities are quite reluctant to accept the failing firm defence, it is a principle that can be found in many competition regimes. For instance, in US this defence is enclosed in the *Joint Horizontal Merger Guidelines 1992 of the Department of Justice* (DoJ) and the Federal Trade Commission (FTC), whilst in the European Union (EU) the FFD is described in the Horizontal Merger Guidelines. [2]

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[2] Dabbah M., *UK and EC Competition Law,* Oxford University Press 2004.

However, comparing the guidelines of different jurisdictions, it can be noticed that a common *ratio* underlying the polices can be identified: firstly, in the absence of any other benefit, those mergers cannot be cleared if they increase market power, secondly, the failing firm should be genuinely failing, namely the operation should be permitted only when the alternative is immediate bankruptcy, and the failing firm should not receive a significant share of the gains from the merger. If it does, it can be a signal that the firm is not failing. Thirdly, the greater the anticompetitive effects are, the less favourably a failing firm is viewed by regulators.[3]

The failing firm defence is a controversial topic and it has attracted many discussions and debates, especially in relation to the assessment of the benefits from the operation, which in many cases are unpredictable and difficult to be conducted as competition authorities lack the adequate instruments to that effect, and, as a result, they usually decide not to clear the merger. Often, in the uncertainty of the impact of an operation involving a failing firm on the structure of the market and competition, competition authorities prefer not to allow the merger, rather than to take the risk to clear an operation that could be detrimental for the market. This is the reason why there have not been many claims from firms using such a defence so far.

However, many authors have suggested that the FFD discipline should be considered carefully, because, firstly, the majority of these mergers are efficient, and, secondly, these operations generate social and economic benefits. Due to these benefits, jurisdictions around the world have developed some conditions that should be satisfied in order to allow such operations. In the US, where FFD firstly emerged, the Agencies (DoJ and FTC), took in account three elements that trigger the defence: the grave possibility of business failure, the lack of an alternative purchaser, and the slim chances for successful reorganisation. The first criterion is quite difficult to be established, because the decline in sales or profit losses or problems in management are insufficient to claim the defence. Such downturns can be part of the carrying on of a business, therefore, as it is complicated to prove an imminent business failure, only the declaration of insolvency is accepted to invoke the FFD. The second condition excludes the possibility that an alternative less anticompetitive solution could occur, namely an alternative purchaser, whose acquisition of the failing business would not

[3] Mason R., Weeds H., *The failing Firm Defence: merger policy and entry, 2003 http://searchjustice.usdoj.gov/search?q=failing+firm+defense&sort=date%3AD%3AL%3Ad1&output=xml_no_dtd&ie=iso-8859-1&oe=UTF-8&client=default_frontend&proxystylesheet=default_frontend&site=default_collection*

be detrimental for the market. The last requirement regarding the chances of internal reorganisation is heavily criticised by commentators, because a reorganisation under chapter 11 of the Bankruptcy Act, for instance, is difficult to predict ex ante. Even in a different scenario, such as the one in the Community context, the requirement is difficult to be applied, because each member state has different reorganisations policies.[4]

However, paragraph 89 of the Horizontal Merger Guidelines explains that the Commission could find compatible with the common market a merger, when one of the two parties is a failing firm. The Guidelines set out three relevant criteria: the allegedly failing firm would in the near future be forced out of the market because of financial difficulties if not taken over by another firm; there is no less anticompetitive alternative than the notified merger; in the absence of the merger the assets of the failing firm would inevitably exit the market. [5]

A key issue in applying the defence is not only to prove that the failing firm would exit the market, but also that its productive and specialised assets would exit with it. The operation will be cleared, therefore, on the basis that it is the only way to keep the assets of the target business in the market. The importance of maintaining the assets on the market is highlighted in the US guidelines:

> *"a merger is not likely to create or enhance market power or to facilitate its exercise, if imminent failure (…) of one of the merging firms would cause the assets of that firm to exit the relevant market. In such circumstances, post-merger performance in the relevant market may be no worse than market performance had the merger been blocked and the assets left the market.*

The above shows that the pre-merger conditions of competition are not always the appropriate scenario to assess anticompetitive effects, because in a failing firm situation the business would exit the market anyway, and the current market condition cannot be examined in comparison to the counterfactual. Therefore, establishing the exact counterfactual is crucial, that is asking whether, in absence of the merger, the target firm would exit the market or would recover and become a viable business and competitor in the market.[6]

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[4] Monti G., Rousseva E., *failing Firm Defence in the Framework of the EC Merger Control Regulation in European law Review 1999*

[5] Whish R., *Competition Law, Oxford University Press 6th Edition 2004*

[6] *Failing of Flailing? The Failing firm defence in mergers,* Agenda Advancing Economics in Business, Oxera March 2009, ww.oxera.com)

The competition guidelines on the FFD show how the policy adopted by the US and EU competition authorities, albeit sometimes slightly different in analysis or applying more lenient criteria in one jurisdiction, are actually orientated to achieve the same result, namely preventing detrimental effects on competition and ensuring and preserving the adequate level of competition in the market.

2. The use of the failing firm defence during the recent economic downturn

2.1 Recent mergers concerning the Failing Firm Defence (Lloyds/HBOS, HMV/ Zavvi, Fiat/Chrysler)

In this new world financial crisis, it is interesting to analyse the remodelled role of the FFD and the ever more increased use of this practice by parties as well as the different approach of the authorities when a merger with a failing firm is submitted. The criteria and the analysis go beyond the usual parameters and mergers that would not have been allowed in different circumstances, are cleared during this period. This is made possible due to a wave of flexibility in the approach of competition authorities and because, also, of government's interventions.

Lloyds TSB Group Plc/ HBOS Plc

The first case that has drawn public attention around the world and has triggered high pitched debates and clashing opinions among competition authorities and practitioners, has been the Lloyds Group TSB plc/HBOS plc merger, which was cleared on the 31st October 2008 in UK.

The Parties

Lloyds TSB Group plc is a British financial group which provides a vast variety of financial and banking services, offering services from personal to corporate customers and its UK turnover in 2007 was £ 18 billion. The acquiring party is HBOS Plc, a financial group that provides financial services and all related financial activities in UK as well as overseas, and its turnover in 2007 was £4.25 billion.

On the 18 September 2008 the parties reached an agreement about a merger operation, although the terms and conditions were not concluded until 13 October 2008, following a drop in the share price of the acquired company. Eventually, the parties agreed that HBOS 's shareholders, following positive approval, would receive 0.605 Lloyds TSB share per HBOS share; it must be noted that the agreement was reached in a period of high instability for the value of the shares of HBOS, during the period of the global financial market crisis [7].

The operation

The operation concerned a share of 33% in the market of personal current accounts in July 2008 and Lloyds acquired the market leading share of 20% in mortgages, reaching a total market share of 29%. However, in the situation of dramatic crisis, the UK Government was willing to safeguard the stability of the financial system, looking at the operation with an open mind and supporting it. Although the UK competition policy avoids government's intervention in competition operation, in such case, the government's action was deemed necessary to save the market.

The creation of the new Public interest ground concerning the stability of the UK financial system

According to Article 42 of the Enterprise act 2002 (hereinafter EA 2002), an intervention notice by the government to the OFT, can be issued in particular circumstances, interfering in the regular review merger process, usually carried out by the OFT, when a public interest consideration might be relevant to the review. The assessment is carried out by the OFT, but the Government, in the person of the Secretary of State, is allowed to override any competition concerns, when he deems that other public concerns outweigh such negative effects on competition. Public interest might be clarified as required under Section 58 of the EA 2002. In the present case, the Secretary of State promptly submitted that the stability of the UK financial

[7] Decision by Lord Mandelson, the Secretary of State for Business Enterprises and Regulatory Reform 31/10/2008

system was relevant and might have to be considered as a public interest consideration. It is noteworthy to stress that until September 2008, a public interest consideration could have arisen only with regard to national security and media sector, whilst now it can be concern also the stability of the UK financial markets. The EA 2002 sets out the rules on the assessment of the relevant merger situations which might have an adverse effect on competition. Investigation is triggered when as the result of the concentration certain thresholds are overcome. The Office of the Fair Trading and the Competition Commission are the competition authorities in charge of carrying out the operation review. The test they apply is whether, following the operation, a substantial lessening of competition (SLC) on the relevant market or markets occur. The EA 2002, in Section 58 allows a limited power to the Business and Enterprise Secretary of State to intervene to protect public interest considerations: new public considerations can be added by an order that must have the approval of both Houses of Parliament. Of course, the public interest consideration is applicable only when the operation does not fall under the scope of the European Merger Regulation 139/2004.

Eventually, the order was announced on 18 September 2008 and was submitted on 7 October 2008. Pursuing it, the OFT submitted a report to the Secretary of State on 24 October 2008, on the basis of which he issued its final decision. In making the Order, the Secretary was advised by the HM Treasury, Bank of England and the Financial Service Authority.

The Office of Fair Trading's Report to the Secretary of State of the 24 October 2008

The OFT is the competent authority to review the operation, albeit the Secretary of State's action. It is interesting to follow the steps of the OFT in its analysis. The UK authority assessed the operation having regard to the counterfactual, the personal current account markets, the banking sector, the mortgage market, even analysing areas where the competition concerns did not arise, coordinated effects theories, non horizontal effects, efficiencies, the view of the parties regarding both competition concerns and public interest considerations. At the end, remedies were proposed. For the purpose of this article, it is necessary to focus on the analysis of the efficiencies carried out by the OFT. The OFT stated that it would have taken into account whether there were rivalry enhancing efficiencies (two smaller firms merge to create a more competitive entity to a larger rival) that would enable it not to find a realistic prospect of SLC despite the concentration in the market, or customer benefits.

With regard to the rivalry enhancing efficiencies, parties claimed that the acquisition would have brought about significant saving in costs, by creating the largest retail franchising in UK and improving the access and service for customers. The OFT found that this efficiency was theoretically possible, but there was lack of compelling evidence (Merger specificity, the efficiency was not quantified, ability to pass onto customers).

As far as customer benefits were concerned, the parties put forward the argument that the benefits would derive from the increased certainty surrounding the future of HBOS, arguing that the acquisition would have embanked the risk of a deeper crisis in the bank sector, by creating a better quality of service as set out in Section 30 (1)(a) of the Act. However, the OFT rejected the arguments, considering (as the parties themselves observed) that the Government would have not allowed HBOS to fail, but it would have intervened to rescue it. Therefore, if this rescue could have come from the Government, the merger-specific requirement for the efficiency to be allowed, was not met.

Eventually, the OFT stated in the report it believed that the merger was expected to result in a substantial lessening of competition within the relevant markets identified in the UK for goods and services related to the financial sector. Therefore, the OFT deemed that the case should be referred to the Competition Commission for further investigation, as provided by Section 33 EA 2002. By doing this, the OFT completed its task of assessing the merger and advising the Secretary of State as required by Section 44 EA 2002.[8]

Secretary of State's Decision

Following the report of the OFT, the Secretary of State decided not to refer the case for further enquiry to the Competition Commission, which might have come to the same conclusion of the OFT, blocking the merger accordingly. In contrast, he decided to specify the new public interest ground, as mentioned above, under Section 58 EA 2002 and submit it to the Parliament, in order to safeguard the major concerns above specified. In reaching his decision, the Secretary took into account the OFT

[8] Fingleton J., OFT Report , 24/10/2008.

report *Consumer Focus,* and the arguments of the Scottish First Minister, Lloyds TSB, the Chancellor of the Exchequer and of private individuals. The OFT found that the arrangements in progress, if put into effect, would have resulted in a relevant merger situation that might be expected to result into a substantial lessening of competition in the three markets identified: personal current accounts, banking services to small-medium enterprises (SMEs), mortgages.[9] Under the Act, the Secretary of State has to accept these decisions, but in deciding whether the case is to be referred to the Competition Commission, he must decide if the public interest is relevant in the situation at hand and if the creation of the relevant merger situation may be expected to operate against the public interest. The OFT analysis is based on a realistic prospect of a substantial lessening of competition, whilst the CC carries out an analysis on balance of probabilities.

It is interesting to report also the opinion submitted by the Bank of England and the Financial Service Authority. Both of them expressed a positive view about this controversial operation. The Bank of England considered that the failure or delaying of the merger would have been detrimental for the financial stability of the UK system, because HBOS played a big role in providing financial services to corporate as well as to single private customers, and that a merger with a stronger competitor is seen as the right way to strengthen the liquidity and the funding provision of HBOS, improving and maintaining confidence in the UK banking sector.

On the other hand, the Financial Service Authority noted that, absent the proposed merger by Lloyds TSB, a temporary public ownership could have been considered absent, even though the EU state aid rules prevent a public–owned entity to compete *"aggressively with private sector bank"*. This would have eventually reduced the capability of HBOS of providing loans and services, restraining its competition power. Furthermore, the Financial Service Authority had talked with other potential acquirers of HBOS, but none of them actually showed the ability to acquire it, therefore the Authority came to the conclusion that the proposed merger was the best solution to keep the financial stability and to sustain the confidence of HBOS creditors, providing also a sensitive medium-term future for HBOS, that it seemed impossible to maintain differently.

[9] The case does not fall under Para. 3 of Schedule 7 of the EA 2002.

The third Authority to express its opinion on the subject matter was the HM Treasury, which actually summarised the views of the two abovementioned authorities. However, it stressed that the merger would bring about improved confidence, business model and credit rating, better capital base, reduced reliance on wholesale funding, broader business base and it would address funding issues.

Having had regard to the findings of the OFT, the merger would have likely raised competition concerns, but having regard also to the opinions expressed by the other authorities, the operation was seen as essential for the UK financial stability. Therefore the Secretary of State had to consider if the anticompetitive effects would have been outweighed by the public interest concern, namely the financial UK stability. Eventually, he concluded that the financial stability have to be safeguarded and cleared the merger.[10]

As a conclusion, having analysed the issues related to the Lloyds/HBOS merger, it should be stressed that, although the OFT would have referred the case to the Competition Commission, in the crisis scenario, the UK Government intervened and created a new public interest (the UK's financial stability), against the concerns of the OFT, that actually deemed that the merger would have created a substantial lessening of competition. This has been a particular merger operation which has made experts think about a new and may be more relaxed approach to mergers involving a failing firm in a near future. In order to better understand the current approach towards merger assessment under UK competition law, it is interesting to analyse the recent acquisition of 15 Zavvi's stores by HMV Plc.

Zavvi /HMV Merger

The Parties

HMV Group plc is active in the entertainment products market, selling DVDs, CDs, books related to music artists, games and MP3 players. Zavvi retail Limited was active in the same market until it went under administration on 24 December 2008. Zavvi was not able to meet its creditors' liabilities after Zavvi's supplier went into administration in late November 2008.

[10] Lord Mandelson, Decision 31/10/2008.

Transaction

HMV acquired 15 Zavvi's stores, the last one in March 2008. The investigation about the takeover was carried out by the OFT on its own initiative. The turnover of the acquired stores between December 2007 and November 2008 did not meet the criteria set out in the EA 2002. However, HMV and Zavvi stores overlapped in the bricks and mortar supply of home entertainment products, therefore the share of supply test in section 23 of the EA 2002 was met in those markets. Moreover, the OFT considered whether the acquired stores were enterprises within the meaning of the Act and whether they should be aggregated together as required by Section 27(5) of the Act and treated as a single relevant merger situation. After having carried out the investigation and having had consultations with Zavvi's administrators, the OFT deemed that arrangements in progress resulted in the creation of a relevant merger situation.

Competition Assessment

The fact that Zavvi went into administration raised the question if the counterfactual scenario was the appropriate one to start the competitive analysis. The OFT considered that the pre-merger conditions of competition were not the appropriate counterfactual in this case on the basis that the acquired stores would have inevitably exited the market in the near future, and that there was no other realistic and substantially less anti-competitive purchaser for the stores. Furthermore, according to HMV, the correct counterfactual for the consideration of the acquisition of the overlapping stores should be that, absent the merger, Zavvi would cease to operate, at least as a retailer of entertainment products. It argued that the operation was not the cause of the competitive harm, because this would have taken place in any event.

On the other hand, the OFT position on the failing firm defence was restated in December 2008, stressing that the OFT would clear a merger involving a failing firm only when sufficient compelling evidence was submitted. Furthermore, the OFT stated in its guidance that *"it may also be better for competition that the firm fails and the remaining players compete for its shares and assets than that the failing firm shares and assets are transferred wholesale to a single purchaser"*. However, in this case, the OFT did not believe that the closure of the overlapping stores and the exit of the assets in the local markets would have been a substantially

better outcome than the acquisition of the stores by HMV. The post merger outcome did not, therefore, result in a reduction of competing fascia, not, in any event, if the assets were to exit the market.

Decision

After a careful analysis, the OFT decided that the usual counterfactual scenario to assess mergers effects did not apply in the *Zavvi/HMV* merger, and it was satisfied that there were no realistic prospect of any alternative buyer for the overlapping stores, nor for any other outcome that would be substantially better for competition than an acquisition by HMV. Therefore, the right scenario to assess the merger was the one in which the competitive threat from Zavvi was lost in any event. Accordingly, the merger itself could be regarded as the cause of any lessening of competition. For all these reasons, the OFT decided not to refer the case to the Competition Commission under Section 33(1) EA 2002[11].

The OFT decision on Zavvi/HMV merger has been very controversial and has provoked debates on the OFT analysis about the issues concerned. Furthermore, the fact that the investigation was started by the OFT independently is a sign of the prompt response from the UK Authority.

One of the most interesting merger cases that has been concluded in June 2009 and has attracted the world attention is the Fiat/Chrysler merger. The US Government and the US President Barack Obama personally played a big role in the conclusion of the deal.

Chrysler/Fiat merger

The parties

Fiat S.p.a. is an Italian auto manufacturer, active in the car production market. Chrysler, a US based company is active in the same market.

The transaction

The negotiation between the two auto manufacturers started in early 2009, when the firms agreed on the acquisition by Fiat of stake in Chrysler. On 30 March, Barack Obama expressed a favourable opinion on the merger stating, that the operation was a *condicio sine qua non* to obtain state aids up to six billion dollars for Chrysler.

[11] Decision OFT 29/4/2009

On 9 April, Sergio Marchionne, Fiat chief executive started negotiations with the United Auto Workers (Uaw) to reduce the labour force cost; being it part of the agreement with the banks to meet their credits. On 13 April, Marchionne was viewed as a possible candidate to serve as Chrysler's executive director. In late April Marchionne participated at a meeting with syndicates and financial analysts. On 24 April, a first agreement with the Canadian syndicate (Caw) was reached. Soon after the Canadian syndicate signed the agreement to reduce the work force cost. On 28 April 28, the US Treasury reached an agreement with Chrysler's four main creditors to manage the company's debts. Then the negotiations went on only with small creditors. On 30 April, members of Chrysler's Uaw syndicate ratified the agreement. President Obama announced it on the same day.

In May, Chrysler's retailers, through a legal advisor, defended their rights. Meanwhile, three pensions funds in Indiana asked the tribunal to block the merger because it violated their rights. The judge rejected the instance; the funds appealed to the US Supreme Court. In the interim, Fiat announced that it would wait until 15 June, otherwise the terms and condition should have been reviewed. The Supreme Court rejected the appeal. On 10 June, Fiat and Chrysler sealed the deal; Sergio Marchionne was designated as executive director.

The Competitive assessment

The operation was the rescue of Chrysler; it was clearly facing the bankruptcy, when the negotiations with the Italian company were announced. In order to have the merger cleared it invoked Chapter 11 of the Bankruptcy Act, one of the conditions to get a merger with a failing firm cleared in the US. In this particular case even Obama pushed in favour of the operation. He wanted to give a start to a major rescue operation involving the car-manufacturing sector in the US; General Motors was also facing problems during this economic downturn period.

The decision

As it is mentioned above much opposition was made to the agreement from different stakeholders. Nevertheless, eventually the agreement was reached in June 2009, following the Supreme Court's rejection of the appeal put forward by the Indiana funds[12].

[12] Tomasetti P., Chrysler/Fiat merger

This operation has occurred in this particular period and has made some experts reflect on the use of the failing firm defence around the world to rescue companies facing bankruptcy. Likely, in the Lloyds/HBOS and Chrysler/Fiat there has been an explicit political intervention. It was put forward in the course of the operation in order to try to pave the way for the rescue of the failing companies and easing the takeover.

In front of large companies failures, governments around the world have chosen not to set aside but to push and support the operation in order to save the national economy as in UK, or a particular economic sector as in US.

3. New trends/adjustments in the failing firm defence (ex.: the OFT Restatement)

In the previous part three controversial merger operations have been analysed. This has been done to turn to the analysis on the drawbacks that those major operations have brought about, with particular regard to the response of the competition authorities and the interest of the practitioners around the world.

The EU and UK response

It is noteworthy to observe that the OFT has (18 December 2008) restated its position on the failing firm defence issue. According to practitioners, there is no doubt that the failing firm defence will be raised much more frequently in the current economic climate. Also, the authorities will be much more prone to giving confidential informal advice. The European Commission has explicitly stated that it will take full account of the economic environment in assessing failing firm defence cases.

The OFT restatement was laid out just after the Lloyds/HBOS operation, as the authority wanted to shed light on the failing firm issue. The UK authority after having pointed out that *"meritorious failing firm cases should be allowed to proceed relatively swiftly through clearance by OFT,"* noticed that only few FFD cases had been cleared so far under the EA 2002.

This means that it would have cleared cases in which there were facts and evidence produced. However, the OFT is willing to consider applications *"where the acquired company is not yet in liquidation or administration."* In its restatement, the OFT has firstly cleared its position on the assessment of a causal link between the merger and any competitive harm. It points out that the requirement of compelling evidence where merging parties put forward arguments such as the prevailing conditions of competition are not the appropriate scenario to assess the operation because the acquired business would have exited the market anyway. Moreover, the OFT has clarified that it will only clear transactions when: (1) the target business will inevitably exit the market in the near future; and (2) there is no realistic and substantially less anticompetitive alternative purchaser. However, in some cases it is better for competition that the failing firm's assets are left in the market and the players compete to acquire shares. This position stresses how the OFT - not barely - takes into account the fact that the firm would exit the market, but also that the operation does not result in a substantive lessening of competition; as compared to other realistic scenario following exit of the target business. Furthermore, the OFT remarked that it will not treat completed acquisitions more leniently than anticipated ones. According to the decision in *Thermo/GVI* case, completed mergers could be referred to the CC and no regard was to be taken of the costs for the parties, if remedies were proportionate.

The most interesting part of the restatement regards the application of the failing firm criteria during the prevailing economic and market conditions. It stresses the fact that the OFT will not relax the sufficient compelling evidence standard required to demonstrate that a merger between close competitors is not itself the cause of any SLC. The OFT has observed that:

> *"Although merging parties may find their business under financial pressure as a result of changing conditions, their customers may well be in a similar position. Weakening evidentiary standards to allow anticompetitive mergers is likely to bolster operators with market power at one level of the supply chain, only to increase pressure downstream as result of anticompetitive price increases, or other anticompetitive conduct, resulting from the merger. The creation of, or increase in, market power in UK markets, where this is far from inevitable, will also fail to serve productively of the UK economy."*

> *There is no reason why owners of struggling business should be permitted to sell to another close competitor simply because it is prepared to pay the highest price for the target business. Business wishing to exit the market must be aware that to advance a failing firm argument, they will need to adduce evidence to demonstrate the absence of any realistic and substantially less anti competitive purchaser".*

However, in the last part of the restatement document the OFT showed itself aware of the significant changing in the economic market conditions. The OFT is willing to provide assistance and guidance in term of the regulatory assessment where it is opportune. It stresses the fact that with regard to FFD, it is already providing informal advice and inviting parties to provide as much information about the merger as possible, in order to assist them with the most punctual informal advice, which are non binding of course[13].

Notably, the FFD cannot be applied in every acquisition but only in appropriate cases. In the UK's *Lloyds/HBOS* the government decided to introduce a new intervention category, namely the stability of the UK financial system (legislation passed on 24 October 2008). This means that the government would be able to decide whether to clear the transaction, falling outside the EC Merger Regulation, rather than leaving it to the merger authorities (the OFT). According to Matthew Hall this new public interest consideration could be used to override the competition analysis; enabling the transaction to proceed despite competitions concerns, as it happened in *Lloyds/ HBOS* merger. As it has been observed, the operation fell outside the competence of the EC Merger Regulation 139/2004 and it was reviewed under the UK merger regulation. It was convenient for the parties, because, UK merger review avoided difficulties that could have arisen between national and EC provisions on the subject matter.

In fact in the ECMR there is no public interest contemplated. The Commission applies a standard review of the operation. Thus the merger would have likely been blocked. However, lately the Commission has stated that it will operate under the ECMR to allow derogations from the normal suspension obligation. Therefore, it will allow full or partial completion before clearance. In order to do that, the Commission must balance the interests involved in the operation to consider: (1) the effects of the suspension obligation on the parties of the transaction (if a party is going outside of the market if not acquired); (2) third parties; and (3) the threat of competition deriving from the transaction.

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[13] OFT Restatement, 18/12/2008

The Commission is known to be, against its normal practice, giving non-binding advices about its own likely assessment to a particular purchaser of assets or business. Most importantly, it must be stressed that there is no public interest test, which has been or will be applied in relation to transactions reviewed under the ECMR. Although there might be political pressure on rescue's operation during this particular period, the competition analysis may not be overruled. According to Matthew Hall, it is even difficult to introduce a similar "test" for emergency situations, because it would be hard to identify who - on EC wide basis - would be able to take a decision as to what can be considered a "public interest exemption".

However, Hall points out a recent Commission position to keep its standard competition analysis of the financial sector; including rescue and mergers notified during the economic downturn. However, the timeline in which the Commission has operated in certain transaction was very unusual and demonstrates the lengths to which the Commission has gone to assist in relation to issues arising out of the credit crunch (such as the *Banco Santander* case and *BNP Paribas*). According to Hall the general framework of competition law has not changed, but the current conditions are making the old rules adapting to the new scenario [14] .

The US Response

With regard to the United States, Botti in his comment has pointed out the different procedure for the notification process in the US, which has a "file and wait" pre-merger notification system. If the parties reach a predetermined threshold as set out in the Clayton Act, they must file a notification with the Federal Trade Commission and the Department of Justice, Antitrust Division (The Agencies). Subsequently after which they might wait 30 days, which are compulsory before implementing the deal. Thus, to allow the agencies to start a deeper investigation if any competition concern arises. However, the 30 days waiting period can in certain circumstances be reduced by a discretionary decision of an "early termination".

[14] Hall M., *Competition law and the Credit Crunch; do the usual merger control rules still apply?*, PLC magazine March 2009

Obviously, parties tend to get the early termination, but to obtain that, they need a prompt collaboration by the agencies. In order to do that, parties should try to involve both Agencies in the process before filing the notification; making presentation rather than waiting for clearance. According to Botti, in order to clear operations, during the financial crunch the agencies have been very engaged so far in the early termination process. From Botti's point of view, sometimes even too early, such was the case when Wells Fargo & Company acquired Wachovia Corporation. The transaction cleared the day following the notification. Similarly, in Mitsubishi UFJ Financial Group's $9 Billion equity investment in Morgan Stanley for 21% interest in the company, the clearance was passed in just four days.

Although it could be seen as a "relaxation" of the strict competition rules, actually merging parties still need to submit all the compelling evidence proving that the operation does not affect the competition. According to Botti, although authorities are facing even more failing firm cases the financial crisis does not change the rules.

Currently, there are three particular scenarios that authorities are examining. First, the failing firm defence in which the focus is on the fact that acquiring the failing firm does not cause harm to competition. Second, General Dynamics defence, often claimed when the struggling firm is unlikely to play an important competitive role in the future. Third, invoking the failing firm defence when a merging company is in financial distress, but not exiting the market and its competitive constraints will be reduced to such extent that its elimination from the market will not have a deep impact [15].

The *Fiat/Chrysler* merger represents a complex operation; prompt intervention from the authorities as well as government was needed to save the Detroit car manufacturer. Not clearing the transaction would have had a worst impact in the sector. On the other hand, for the Italian company it represented a great deal both in terms of business itself and pride; to undertake and lead one of the largest American auto manufacturers.

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[15] *Botti M., Competition law and Credit Crunch: do the usual merger control rules still apply?, PLC magazine March 2009*

3.1 Assessment of the Authorities' approach: need for further reform?

The issue of the failing firm defence and its application by competition authorities around the world has taken the interest of practitioners who are advising failing firms in the current economic crisis. They have the tasks of dealing with and seeking clearance from the authorities. In fact, they provide significant and more practical comments about the authorities' approach on the renovating and ever more increasing failing firm defence practice.

A lawyer from Stevens Bolton LLP, Rebecca Holmes-Siedle, reflects in one of her comments; whether the OFT is more likely to relax its requirements for maintaining competition in the market. Particularly, when there is evidence that, absent the operation, a competitor is unlikely to stay in the market. What Rebecca Holmes-Siedle really wants to shed some light on, is whether, except for the Lloyds/HBOS takeover, in which there has been the intervention of the Secretary of State, the OFT is willing to offer a *green light* to takeovers, in the attempt to avoid insolvency.

She remarks that – post-Lloyds/HBOS - the OFT, foreseeing a wave of FFD notifications, has published the restatement on the failing firm defence. However, Holmes-Siedle, notes that, since enactment of the EA 2002, the OFT has cleared only four cases claiming a failing firm defence. In the OFT restatements, the UK authority makes it clear that it will not relax its criteria in light of the current economic and market conditions. Rather, the OFT is willing to provide informal advice to parties in cases that are deemed appropriate[16].

In another comment to the recent OFT restatement, two other practitioners have noted that in the current economic downturn, there is an increase in the likelihood of circumstances that will support claims regarding the first two conditions: (1) inevitable exit; and (2) absence of an alternative purchaser. In this regard the OFT has stated that it will not relax the sufficient compelling evidence standard. It does not consider the FFD a free pass, but a counterfactual submission against which a merger must be judged. However, the OFT has also stated that it will be prone to give informal guidance on the application of FFD[17].

On the other hand, as it has been argued in the previous section, the European Commission does not provide with a ground for public interest to be claimed in order to clear a rescue operation falling within the ECMR 2004 (even though the Commission feels the pressure of Member State governments to introduce it as *ultima ratio*.) However, during this period, the Commission is expecting more cases invoking the failing firm defence.

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[16] Holmes Siedle R., *Will the failing Firm Defence help you to acquire your competitor in credit crunch times,* Insolvency Intelligence Magazine, 2009.
[17] Brophy V., Guyett J., *United Kingdom codifies" Failing Firm Defence to Mergers,* Jones day, 24/12/2008

Therefore, Members States, practitioners, and parties are expecting further relaxation of the rules, if not reform; at least an increase in cooperation by the Authorities. Thus, more increased flexibility in a way or in another [18].

4. Conclusions

This work has had the aim of providing an insight on the controversial and ever more utilised issue of the failing firm defence and its use in this period of financial crisis. It has been shown that, for one reason or another, the failing firm defence has never been an instrument very much utilised. On one hand, because it is difficult to meet the criteria needed to obtain it. On the on the other hand, because the impact and the equilibrium in the market can be easily altered by these complex operations, authorities have always been slightly suspicious or reluctant to accept and implement it. Therefore, if the authorities are not 100% sure of the positive outcome (in the sense of no harm to competition), they do not clear the operation.

Moreover, the article has focused on the evolution of the defence by comparing the European/UK way to deal with the defence and the US method. Furthermore, this work has had the scope of analysing the current use of the FFD in the current financial scenario, where it is being invoked ever more often in order to rescue firms that otherwise face the risk of failure. For this purpose, in order to focus on the adjustments, transformations, adaptation and evolutions of the FFD, some controversial and criticised mergers have been discussed. The British government's intervention in the clearance of Lloyds/HBOS merger has been an important sign in a period of great instability to save the British economy. The government interfered into the analysis carried out by the UK competition authority. It has been a phenomenon that has caught the attention and comments of the world as well as the governmental intervention in US for the Chrysler/Fiat operation.

[18] Hall M., Competition Law and Credit crunch : do the usual merger control rules still apply?, PLC magazine March 2009

Since the strong impact of those political interventions, it could be argued that the restatements published by the OFT on 18 December 2008 can be seen not only as a non-binding clarification of the OFT practice, but also as a sort of reaffirmation of authority. The OFT carefully examined the operation; it issued its relation on the competitive concerns and the consequential harms to competition in the UK. Following the merger between Lloyds and HBOS, the OFT was overruled its opinion in few days by the British Secretary of State. Although this is allowed by a special provision under Section 23 EA 2002, it could be argued that the OFT has felt a diminution in its power and therefore has needed to clarify its views on the Failing Firm issue. For this reason, many practitioners have pointed out the fact that the OFT has stressed that it will require the compelling evidence to clear a merger with a FFD and that it does not intend to relax the stringent rules on the issue. However, the fact that the OFT is willing to provide informal advice allows parties to hope that the OFT is accepting a wave of flexibility on the argument.

As a conclusion, the debate on whether authorities should or should not relax their rules to allow mergers that might cause harm to competition, to save companies, employees, stakeholders and the economy in general, is still ongoing. The right answer to this can be predicted only to some extent. Still, for a precise assessment of the effects post-merger on competition, it is necessary to wait.

It could be argued that authorities should slightly relax their provisions during this critical period bearing in minds the competition outcomes of the operations on the relevant markets, and should issue recommendations which pave the way to a stronger collaboration between parties and authorities.

Furthermore, authorities could invite parties to submit research and predictions on the possible outcomes of the prospected merger. This would create a common platform on the basis of which a common understanding would be reached as well as an agreed and rational plan to rescue the firm. Only when the situation stalls should the government step in and give a solution as *deus ex machina*.

Private Antitrust Enforcement Review of Recent Cases on Abuse of Market Dominance

MICHAEL ZHENGPING GU[1]

1. Background

The Anti-Monopoly Law (the "AML") of the People's Republic of China (the "PRC") has entered into force for more than one and a half years. Dubbed China's "economic constitution", the AML is the country's first comprehensive competition law. After nearly 13 years of preparation and discussion, the AML was finally passed on 30 August 2007, and became effective on 1 August 2008. . China's antitrust enforcement agencies are showing their determinations and authorities to supervise and investigate monopoly behaviors. The State Administration for Industry and Commerce (the "SAIC") and the National Development and Reform Commission (the "NDRC"), are responsible for the public enforcement against the monopoly agreement and abuse of market dominance. Local bureaus of NDRC in Guangxi province have taken the first action against a cartel among local rice noodle producers in early 2010. Thirty-three rice noodle producers collaborated and jointly increased the price of rice noodle in the local market. The concerted conduct was investigated by local bureaus of NDRC and was found as constituting a price cartel[2]. However, at the time of writing, there is no any other public information on any investigation against cartel members or any market dominant company in addition to the above rice noodle case. The SAIC and NDRC have released a series of draft implementing regulations to seek public comments in 2009. Apart from two procedure rules with respect to AML enforcement[3], issued by the SAIC on 5 June 2009, currently the SAIC and NDRC are still revising and updating the draft regulations[4]. Meanwhile, the Supreme People's Court is also preparing a judicial interpretation on hearing and handling procedures with respect to civil antitrust litigations[5]. Despite lack of sufficient rules (either procedural or substantive) and established decisions as mentioned above, several private actions on abuse of dominant market positions were in the limelight last year. According to public reports, by the end of 2009, the PRC courts have rendered three judgments for antitrust cases. Coincidently, all three plaintiffs failed in these cases (one case pending appeal) against giant companies. The court decisions provide certain guidance on how the AML will be enforced in the judicial system and will have significant impact on the current antitrust practice and the draft implementing rules. In this article, the author will summarize key points of these cases and analyze the court's views of the crucial concepts under the AML such as "dominant market position" and "abuse of dominant market position". The author will also discuss some procedural issues, e.g., qualifications of the plaintiff and burden of proof.

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[2] See: http://www.ndrc.gov.cn/xwfb/t20100330_338105.htm (in Chinese).

[3] One is Procedural Rules for Administration for Industry and Commerce to Investigate and Dispose of Cases Involving Monopoly Agreement and Abuse of Dominant Market Position; the other is Procedural Rules of Administration for Industry and Commerce on Prohibition against the Abuse of Administrative Powers to Eliminate or Restrict Competition. See:http://www.saic.gov.cn/zcfg/xzgzjgfxwj/fgs/200908/t20090805_69632.html (in Chinese).

[4] The draft regulations are available on the website of the SAIC (www.saic.gov.cn) and NDRC (www.ndrc.gov.cn).

[5] See: *Intellectual Property Protection by Chinese Courts in 2009* III.(1), the Supreme People's Court of the PRC, available at http://220.181.27.220:8080/pub/zscq/znss/201004/t20100426_4545.html

2. Cases Summary

i. Shusheng v. Shanda[6]

Beijing Shusheng Electronic Technique Co., Ltd. ("Shusheng") is an online Internet publisher. Shanghai Shanda Internet Development Co., Ltd. ("Shanda") is listed on Nasdaq and one of the largest Internet companies in China in terms of market value. Shusheng commissioned two authors to write a sequel to a novel series originally published on www.qidian.com, a website operated by Shanda. However, the authors of the sequel later changed their mind and refused to write the sequel. Shusheng alleged that Shanda had abused its dominant market position in Internet literature market to intimidate the authors into pulling out of the sequel. The action was filed with Shanghai No. 1 Intermediate People's Court in April 2009. The court of first instance ruled against Shusheng on October 23, 2009. Then Shusheng appealed to Shanghai Higher People's Court which dismissed the appeal on December 25, 2009.

ii. Renren v. Baidu[7]

Tangshan Renren Information Service Co., Ltd. ("Renren") is an operator of a medical information website. Baidu Online Network Technology (Beijing) Co., Ltd. ("Baidu") operates the largest Chinese online search portal. Renren claimed that the number of page views of its website had significantly dropped due to Baidu's manipulation since it reduced expense on Baidu's paid listing. Therefore, Renren filed an action on the ground that Baidu abused its dominant market position by deliberately blocking Renren's website in the search results. The action was filed with Beijing No. 1 Intermediate People's Court on December 25, 2008 and the court rendered a judgment and dismissed the action on December 28, 2009. Renren appealed to Beijing Higher People's Court, the trial is still in process.

iii. Li v. Beijing Netcom[8]

Li Fangping("Li") is a user of the fixed-line telephone service provided by the Beijing branch of China Netcom (Group) Co., Ltd., ("Beijing Netcom"), one of the three major telecommunications companies in China. Li claimed that he was unable to obtain the post-paid telephone service since he had no Beijing *Hukou* (*Hukou* is an official household registration which officially records and identifies a person as a resident of a geographic area within China containing information such as the name of the person, family address, date of birth, and the names of family members.), while such service was available to customers with Beijing *Hukou*. Li argued that Beijing Netcom had treated its customers discriminatorily based on its dominant market position, thereby constituting an abuse. The action was filed with Beijing No. 2 Intermediate People's Court on August 1, 2008, and a decision, made on December 18, 2009, dismissed the action. So far no further information is available on Li's appeal.

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[6] Civil Judgment (2009) Hu Gao Min San (Zhi) Zhong Zi No.135, Shanghai Higher People's Court.

[7] Civil Judgment (2009) Yi Zhong Min Chu Zi 845, Beijing No.1 Intermediate People's court (available at http://blog.sina.com.cn/s/blog_4730054c0100ghhs.html); see press news at http://bj1zy.chinacourt.org/public/detail.php?id=675 (in Chinese).

[8] Civil Judgement (2008) Er Zhong Min Chu Zi No.17385, Beijing No.2 Intermediate People's Court.

3. Key Points and Implications of the Cases

i. Qualifications of Plaintiffs

In the present cases, the plaintiffs include costumers as well as a competitor of the defendants. In Shusheng v. Shanda case, Shusheng is a qualified plaintiff launching a civil lawsuit against its competitor (Shanda), while in cases of Renren v. Baidu and Li v. Beijing Netcom, individual consumer and corporate customer are plaintiffs claiming damages against their service providers.

The AML only contains one article (Article 50) in relation to the civil litigation which implies that any person suffering losses from the monopoly activity is eligible to bring a lawsuit against such anti-competitive behavior. Before these cases, some commentators had questioned this clause and suggested setting certain restrictions or pre-conditions for acceptance of civil antitrust cases, for example, only cases followed by a decision of infringement of the AML by the anti-monopoly agencies can be accepted[9]. Acceptance of the present cases implies that there should be no additional requirement on qualifications of the plaintiffs other than the basic criteria provided under the general civil procedure rules stipulated in the PRC Civil Procedure Law.

Another notable point is that in Li v. Beijing Netcom case, the court ruled that a customer claiming damages based on infringement of the AML of a company holding a dominant market position is a qualified plaintiff. According to the court, such ruling was made on the basis of Article 1 of the AML, which defines the purpose of the AML is to "prevent and deter monopoly conducts, ensure fair market competition, increase economic operation efficiency, protect consumer interests and social public interest, and facilitate the healthy development of the socialist market economy". This further indicates that an indirect purchaser of the product might also initiate a lawsuit against the producer as well as the direct purchaser.

ii. Burden of Proof

Under the PRC Civil Procedure Law, the burden of proof is generally upon the party who claims. Normally, the plaintiff shall bear the burden of proof for its alleged facts and claims while the defendant shall bear the relevant burden of proof if the defendant denies the plaintiff's allegation. The claims will be rejected if the plaintiff cannot present sufficient evidence supporting its allegation. However, in certain exceptional circumstances, the principle of "the reversed burden of proof" is applicable. This means, the defendant rather than the plaintiff has the obligation to provide evidence which can overturn the plaintiff's allegation. Such exceptional cases include damages action arising from the environmental pollution, tort action against the manufacturer of the defective product, etc. However, there are no rules or judicial interpretation as to whether the civil antitrust litigation shall apply the special rules concerning the burden of proof.

The decisions of current cases make it clear that the plaintiff of antitrust cases shall comply with the normal civil procedure rules, i.e. the burden of proof is upon the plaintiff. In the Renren v. Baidu case, the court concluded that Renren shall provide evidence that Baidu holds a dominant market position. Similarly, the plaintiff in the other two cases were also required to prove key facts such as the scope of relevant markets, market share of the defendants in such markets, and anti-competitive behaviors of the defendants.

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[9] See Chen Jianxun, *Observation on Certain Issues concerning Civil Antitrust Litigations Lodged by Consumers*, http://51zy.cn/548064399.html (in Chinese)

From the judgments of the present cases, the courts seem to adopt strict rules concerning effectiveness and merit of the evidence. For example, the plaintiffs were required to provide the court with objective and comprehensive evidence to prove the dominant position of the defendants. The court ruled in Renren v. Baidu case that media reports and Baidu's own report claiming Baidu has the largest share in China's online search market were not sufficient, since no calculation method and supporting statistics were provided. Actually, the current rules favoring defendants were made primarily on the ground that the plaintiffs failed to provide sufficient and objective evidence to prove defendants' dominant positions even these companies claimed themselves having over 50% market share.

Since much of the key evidence necessary for proving antitrust damages is usually held by the defendant or by third parties, it is often unknown in sufficient detail to the plaintiff. The plaintiffs, particularly individuals and small-medium enterprises who are the victims of the breach of competition law by big-name offenders, usually have limited ability to acquire information of the market, and other key evidence. Without improvement of victim's access to relevant evidence, the current practice of "burden of proof" may act as a disincentive to stand-alone antitrust litigations.

iii. Substantive Review of Facts

The courts basically followed the same method in finding the key facts in each of the three cases, i.e. whether the abuse of dominant market position exists. The courts' analyses can be divided into the following three steps: (1) identification of the relevant market concerning the dispute; (2) identification of a dominant position in the concerned relevant market; and (3) identification of the abusive behavior.

(1) Identification of a relevant market

In identifying a relevant market, the decision for Li v. Beijing Netcom expressly indicated that the court followed the "Guidelines of the Anti-Monopoly Committee of the State Council on Defining Relevant Markets" ("Market Defining Guidelines") issued by the Anti-monopoly Commission under the State Council. Without specific reference, the Market Defining Guidelines were also applied in Renren v. Baidu case and Shusheng v. Shanda case.

In Li v. Beijing Netcom, the court stated that according to the guidelines, a relevant market shall mean the product scope or geographical scope within which an operator participates in competition during a certain period of time with respect to a specific product or service. The court further pointed out that from the consumers' point of view, higher substitutability between products gives rise to intense competition, thus, it is more likely that such products fall within the same relevant market. The court's view of market definition is in line with the current practice adopted by the Ministry of Commerce when it reviews merger control cases.

(2) Identification of dominant market positions

In Shusheng v. Shanda case, the court clarified that identification of a market dominant position of Shanda shall be supported by factors showing that Shanda was capable of exercising market influence. The factors proving market dominance may include a higher market share and pricing power. The plaintiff shall also prove authenticity and objectivity of the factors leading to market dominance. In this case, the court ruled that the promotional materials regarding Shanda's market share, even from the Shanda, are not convincing evidence to conclude that Shanda holds a dominant position.

In Renren v. Baidu case, the court took a similar approach. The court expressly indicated that when making presumptions of undertakings' dominant market positions according to Article 19 of the AML, the plaintiff shall provide sufficient evidence to support calculation or testifying methods of the defendant's market share. The plaintiff shall provide the court with specific calculation basis and sources of fundamental statistics to ensure scientific and objective identification of the market share.

(3) Identification of abuse of dominance

In accordance with the results of all cases, the most crucial criteria in identifying abuse of dominant market position is whether the defendants' conducts have "justifiable causes" as stipulated in Article 17 of the AML. If the defendant's conducts have justifiable causes and do not result in any damage of market competition order, such conducts shall not be identified as abusive even if the defendant holds a market dominant position.

In all three cases, the defendants argued that they have appropriate reasons to take the restrictive measures against the plaintiffs. In Renren v. Baidu case, Baidu stated that it intentionally reduced Renren's listing order in the search results in order to filter false page views made by Renren through the so-called "junk links". Baidu insisted that by doing so it intended to safeguard objective search results for Internet users. The court found for Baidu and concluded that Baidu's punitive measures against Renren have legitimate reasons. Likewise, in cases of Shusheng v. Shanda and Li v. Beijing Netcom, the courts also recognized defendants' explanations of "justifiable reason". In particular, Beijing Netcom argued that the "pre-paid" and "post-paid" telephone services were made available to different customers (the former for people without Beijing resident permits and the latter only for Beijing resident permit holders or non-resident permit holders with guarantee) for the purpose of maintaining a normal operation to prevent any potential credit risks associated with people without official Beijing household registration.

It seems that the scope of "justifiable causes" has no specific limit, even "control of credit risks" can be regarded as a justifiable reason. It is obvious that the courts have extensive discretionary power over identification of justifiable causes. Due to lack of detailed criteria under existing laws and established precedents, whether a reason is justifiable or not should be assessed on a case-by-case basis.

4. Observation and Conclusion

These cases are the first batch of civil antitrust litigations which have been heard and decided by the courts. Although all the plaintiffs failed to prove existence of defendants' dominant market positions and thus obtained unfavorable judgments, such pioneering cases have put to test the AML and efficiency of the juridical system on private enforcement of the AML. The courts' decisions clarified certain procedural issues such as qualifications of plaintiffs and burden of proof as discussed above. Also, the courts' decisions demonstrate that the enforcement approach taken by judicial bodies is generally consistent with the current practice of the anti-monopoly enforcement agencies. On the one hand, due to lack of detailed rules and precedents, the courts show a cautious and reluctant attitude in identifying the dominant market position. On the other hand, the court is innovative and flexible in dealing with certain practical issues, such as determination of "justifiable reasons" of restrictive measures imposed by the alleged dominant market player.

According to these decisions, it would be time-consuming and even costly for the plaintiff to present a successful stand-alone civil action against the competition infringer. Unlike in some western jurisdictions where discovery or disclosure process is available, under China's current judicial system, the individuals or small or medium-sized companies have no sufficient sources to collect evidence and thus may face great uncertainty in proving anti-competitive behaviors of the completion law violators without a pre-decision of such infringement by an anti-monopoly enforcement agency. Therefore, it would be logical that the follow-on antitrust cases might be more common in the future should there be any competition infringement findings rendered by the anti-monopoly enforcement agencies.

The court's practice might also influence the development of public enforcement of the competition law. The draft implementing rules of the SAIC and the NDRC regulating anti-monopoly agreements and abuse of market dominance are expected to be finalized and published in 2010. Also, the judicial interpretation on civil antitrust litigation is reportedly under discussion and may also be adopted soon. Taking all these developments together, we would expect a more efficient and transparent civil antitrust regime in the near future.

Poland – Decision No DOK-7/09 of the President of the Polish Office of Competition and Consumer Protection (hereinafter Decision) The highest fine ever imposed by the Polish Office amounting to EUR 100 000 000 on the producers of cement

SZYMON SYP[1]

Summary

This cartel case is worth examining due to many interesting antitrust issues. The most spectacular is the amount of fines that was imposed by the President of the Polish Office of Competition and Consumer Protection – PLN 411 million (Polish zlotys) which is about EUR 100 million - on the producers of cement in Poland. Other aspects of the case are also notable such as the leniency procedure that enabled two producers to escape from being fined and the legal basis of the proceedings that were Polish (national) and European Laws.

Case facts

The President of the Polish Office of Competition and Consumer Protection (hereinafter POCCP) undertook the market research inspection from 2003 until 2006 on the Polish market of production and trade of cement. Gathered information indicated that there might be collusion between the producers of cement in the form of price fixing cartel in the cement market.

Accordingly, the POCCP instituted preliminary proceedings on 26 April 2006 followed by the biggest dawn-raid in the history[2] of the Polish Office of Competition and Consumer Protection (hereinafter OCCP).[3]

Two applications for leniency were filed in the meantime: the first by Lafarge Cement S.A.[4] (hereinafter Lafarge) and the second by Górażdże Cement S.A. (hereinafter *Górażdże*) in June 2006.

On the basis of the established information during the preliminary proceedings, the POCCP instituted antimonopoly proceedings on the matter of alleged anticompetitive agreement between Lafarge, Górażdze, Ekocem Sp. z o.o.[5] (hereinafter Ekocem), Grupa Ożarów S.A. (hereinafter Ożarów), Cementownia Rejowiec S.A. (hereinafter Cementownia Rejowiec), Cemex Polska Sp. z o.o. (hereinafter Cemex), Cementownia Chełm S.A.[6], Cementownia Nowiny Sp. z o.o. (hereinafter Dyckerhoff[7]) Cementownia Warta Sp. z o.o. (hereinafter Cementownia Warta), Cementownia Nowa Huta S.A. (hereinafter Cementownia Nowa Huta) and Cementownia Odra S.A. (hereinafter Cementownia Odra) on 28 December 2006 (all the companies hereinafter referred to as Parties).

Moreover, in 2008 the POOCP developed the basis of the proceedings to the European Law (hereinafter EU Law) beside the Polish Antimonopoly Law.

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[2] See at: http://www.uokik.gov.pl/aktualnosci.php?news_id=172 (in Polish).

[3] The news about Polish Competition Law can be reached at the website of OCCP: http://www.uokik.gov.pl (last visited 7 March 2010).

[4] S.A.(Polish name – Spółka Akcyjna) Polish short name of the joint-stock company.

[5] Sp. z o.o. (Polish name – Spółka z ograniczoną odpowiedzialnością)– Polish short name of limited liability company.

[6] Since 2008 lacked the legal personality according to the Polish law and it was no party of the proceedings anymore.

[7] In 2007 Cementownia Nowiny Sp. z o.o. changed its company name to Dyckerhoff Polska Sp. z o.o.

Legal Basis

The Parties of the proceedings were charged for the infringements of: the Act of 15 December 2000 on Competition and Consumer Protection[8] (hereinafter Polish Competition Law) and the Article 81 of the Treaty Establishing the European Community[9] (hereinafter European Competition Law).

The POOCP found that the anticompetitive agreement began in 1998 and lasted for over 11 years. As a result, Polish Competition Law is applicable to the whole period of infringements, while European Competition Law is applicable since 1 May 2004.[10]

Relevant Market

According to the Polish Competition Law, the relevant market consists of the relevant product and the geographical area.[11] The study concluded that the relevant product market was the production and trade of grey cement. Two main arguments for that were:

a) There are no known products that could be used as the substitutes to the grey cement from the consumers' point of view,

b) There is no need to divide the grey cement into subcategories.[12]

Furthermore, the relevant geographical market was found to be the area of the Republic of Poland. The POOCP concluded that the trade of grey cement is based on the national level. Moreover, the imports and exports of the cement were on a very low level – they ranged from about 1% to 3 %.

Effect on Trade between Member States

The POOCP stated that the factual backgrounds of the case indicated that the agreement concluded between the cement producers in Poland could affect the trade between Member States. Moreover, the Parties' (excluding Cementownia Nowa Huta) total grey national cement market production shares amounted to almost 100 %, the Parties (excluding Ekocem) colluded in order to control the selling amounts by the new entrant to the relevant market. Moreover, the Parties belonged to the international holding companies, acting in various Members States of the EU.

Infringement of Competition Laws

The POOCP concluded that the participants of the prohibited collusion were: Lafarge, Górażdże, Grupa Ożarów, Cemex, Dyckerhoff, Cementownia Warta and Cementownia Odra (hereinafter Participants). The Participants colluded *inter alia* through fixing the markets shares for each market Participant, maintaining minimal resale prices for the cement, the timetables, the amounts and the order of applying the increases in prices for cement and exchanging sensitive information. The Cartel operated through numerous multilateral and bilateral meetings, talks, exchanging the statements including the confidential commercial information.

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[8] Journal of Laws 2005 No. 244, item 2080. On 21 April 2007 New Antimonopoly Act came into force – Act of 16 February 2007 on Competition and Consumer Protection, Journal of Laws 2007 No. 50, item 331 as amended – which is not applicable to the Noted Case because of Polish Proceedings Rules. Nonetheless, the text of the new Act is available at http://www.uokik.gov.pl/competition_protection.php (last visited on 7 March 2010).

[9] Before the Decision was made, the Lisbon Treaty came into force as of 1 December 2009, but the Case Comment refers to the Treaty Establishing the European Community.

[10] The date of accession Poland to the European Union.

[11] Article 4 of the Polish Competition Law.

[12] Conclusion based on the European Commission decision in Skanska/Scancem case from 11 November 1998 (IV/M.1157).

Evidence

The factual findings in the Decision were based mainly on: a) the leniency application submitted by Lafarge with the supplemental documents and the answers to the POOCP questions; b) the leniency application filled by Górażdże with the supplemental documents and the answers to the POOCP questions; and c) other documents provided by the Parties and gained by the POOCP itself. The gathered evidences were found consistent and with minor differences that would not affect its certainty.

Charges

The Participants were found to collude in the following manner:

a) Price-fixing and other trading conditions-fixing for the cement,
Article 5 (1) (1) Polish Competition Law as well as Article 101 (1) (a) TFEU prohibit the agreements of price fixing, directly or indirectly and other trading conditions. The Parties at least from 1998 fixed prices for the cement, the purpose of which was to maintain the *status quo* among them.

b) Production and trade of cement market sharing,
Article 5 (1) (3) Polish Competition Law as well as Article 101 (1) (c) TFEU forbid market sharing agreements of sale or purchase. The Parties reached the conclusion as to the production and trade of the grey cement market shares for each company. The conclusion was based on the historical data of the relevant market shares.

c) Exchanging confidential commercial information.
Although, Polish Competition Law does not prohibit exchanging confidential commercial information, the Polish Courts rulings and interpretations of Polish Competition Law expanded on the list of prohibitions stipulated therein and ruled that it is not exhaustive. The POOCP invoked EU cases and decided that the character and scope of the exchange between the Participants were sufficient to find the practice as anticompetitive.

Final Outcome

As a result, the Decision was issued on 8 December 2009 where the practices of the Parties were found to restrict competition and infringes both, Polish Competition Law and EU Competition Law. The POOCP issued an order to the Parties to cease these practices and refrained from imposing fines on the first leniency applicant and a partial fine on the second amounting to 5 % of the total revenue earned in 2008.[13]

[13] Polish Competition Law provisions state that the maximum fine that can be imposed on the undertaking amounts to 10% of the revenue earned in the accounting year preceding the year within which the penalty is imposed.

The other Participants - Grupa Ożarów, Cemex, Dyckerhoff, Cementowania Warta and Cementownia Odra – were fined an amount of PLN 411 586 477 (Polish zlotys) (about EUR 100 000 000). The fine is the maximum penalty possible according to Polish Competition Law as well as the highest fine ever imposed in Poland. Finally, Ekocem and Cementownia Rejowiec were acquitted.

Since the Decisions of the POOCP are appealable to the Court of Competition and Consumer Protection (hereinafter Court of Appeal), all the fined Participants decided to appeal that Decision.

Interesting Issues

Following the legal proceedings launched by the OOCP in 2006, the POOCP ordered Grupa Ożarów to pay fine of PLN 2 000 000 (Polish zlotys) for withholding information and obstructing the inspection process. This is only the second case where the POOCP has decided to enforce this measure.

Reflections and Observations

Having in mind that the Decision is not final yet, it includes many interesting issues for many reasons. The POOCP addressed many complex legal aspects in a reasonable manner, a few of which should be highlighted: the leniency applications which enabled two of undertakings to escape from the fines (a Polish leniency program has been introduced to the Polish legal system as of May 1, 2004, as for now there has been little practice regarding the leniency program), the interaction of national and EU Competition Law (the decision was based on both what seems to develop the future trend and practice of the POOCP in applying EU Competition Law to the national cases), the amount of fines imposed on the Participants – PLN411 000 000 (For instance, the total amount of fines imposed on undertakings by the POOCP in 2009 reached PLN 556 000 000). It is expected that the Court of Appeals will uphold the Decision as there are sufficient legal arguments that were presented.

In any event, for final decision by the Court of Appeals, the Participants will have to wait for few years, while the POOCP seems to continue its high –fine politics and anti-cartel actions.

All things considered, the Cement Cartel case proved that Polish Competition Law is up to date and no major further amendments should be made. The only suggestion that may be made in this regard is that private enforcement should be encouraged under Polish Competition Law to increase the efficiency of the competition regime.

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[18] Decision DOK - 3/2008 *Xella*, p. 24.

[19] Although in all cases regarding RPM the Polish competition authority stresses that pricing agreements are considered to be hardcore restriction, one can notice that even in Polish guidelines on the method of setting fines, RPM is qualified only a "serious" and not "very serious" infringement. Guidelines are available at Polish competition authority's website at: http://uokik.gov.pl/leniency_programme.php .

[20] See the decision of FTC in *Nine West* case regarding RPM practices: http://www.ftc.gov/opa/2008/05/ninewest.shtm. Also, the Spanish competition authority has applied in December 2009 *de minimis* rule to RPM practice in *El Corral de las Flamencas* case

Romania - Decision No. 15 as of 12.03.2008 issued by the Romanian Competition Council Bid-rigging on the insulin market

SIMINA ALEXANDRA SUCIU*

The present case analysis examines the Romanian's Competition Council's decision no. 15 as of 12.03.2008, which established: (i) breach of Art. 5(1) (c) of the Romanian Competition Law no. 21/1996 by Eli Lilly Export S.A., A&A Medical S.R.L., Mediplus Exim S.R.L. and Relad Pharma S.R.L. through the establishment and implementation of an agreement and/or concerted practice on the insulin market and (ii) breach of Art. 9 of the Romanian Competition Law no. 21/1996 by the Romanian Public Health Minister through the avoidance of organising annual bids for the National Diabetes Program between 2004-2006.

1. BACKGROUND

As a result of the investigation conducted[1] by the Romanian Competition Council (hereafter **CC**) on the Romanian insulin market, in July 2005, it was established that the joint stock company Eli Lilly Export S.A. (hereafter **Eli Lilly**) and its distributors: the limited liability company A&A Medical S.R.L. (hereafter **A&A**), the limited liability company Mediplus Exim S.R.L. (hereafter **Mediplus**) and the limited liability company Relad Pharma S.R.L. (hereafter **Relad**) had concluded an anti-competitive agreement and/or a concerted practice[2], by sharing Eli Lilly's diabetes portfolio of products and by eliminating intra-brand competition among them.

It was considered that the agreement and/or concerted practice lasted from April/ May 2003 to May 2005.

The anti-competitive behaviour of the undertakings on the insulin market was discovered at the national bid organised by the Romanian Public Health Minister (hereafter **RPHM**) and by the National Health Insurance Authority (hereafter **NHIA**) in 2003.

Pursuant to the applicable Romanian legislation, as part of the national diabetes program, auctions should have been organised annually for the acquisition of insulin products. The year 2003 was the first and the last year when such an electronic bid (hereafter the **Bid**) was organised by the Romanian public health authorities[3] as: *(i)* between 2001-2002 the market was a decentralised one: each health unit had to acquire its necessary medicinal products through its own auctions, by respecting the applicable legislation for public acquisitions and *(ii)* between 2003-2005 RPHM and NHIA did not pursue the bidding procedures and, as a result, they amended the agreements concluded with the distributors in 2003; moreover, during this period, hospitals organised their own electronic bids.

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[1] The investigation was initiated by Order no. 157/07.07.2005, issued by the President of the Romanian Competition Council

[2] The term *„agreement and/or concerted practice"* shall be used for the anti-competitive behaviour of the undertakings, as the Decision makes reference to „agreements" and „concerted practice" without any consistency. In *Van Landewyck v Commission,* cases 209/78 [1980] ECR 3125, [1981] 3 CMLR 134, Advocate General Reischl stated that the point where an agreement ends and where a concerted practice begins, is of no importance. In complex European cases (e.g. *Cimenteries CBR SA v Commission*, cases T-25/95 etc, [2000] ECR II-491, [2000] 5 CMLR 204), the anti-competitive behaviour is referred to as the *„single, overall agreement"*.

[3] The measure was implemented through the Common Order no. 172/113/2004 regarding the approval of health programs in 2003, issued by Health Ministry and the President of NHIA.

1.1 Agreement and/or concerted practice concluded between Eli Lilly and its distributors

Eli Lilly is part of Lilly Group and is one of the biggest worldwide manufacturers of medicinal products. A&A, Relad and Mediplus are limited liability Romanian companies and they operate especially at the wholesale level in the medicinal products' market. All these three distributors had concluded non-exclusive distribution agreements with Eli Lilly.

In accordance with RPHM's specifications, the Bid comprised the request of 36 lots of human insulin products (these lots comprised all the insulin products on the Romanian market) and 27 oral anti-diabetes products. Eli Lilly participated in the Bid through its distributors in the following way: *(i)* A&A with the human insulin entitled Humulin, *(ii)* Relad with analogous human insulin product entitled Humalog and *(iii)* Mediplus with oral anti-diabetes products entitled Actos. Each of the distributors was authorised by Eli Lilly to offer in the Bid different human insulin products; therefore, the parties did not compete with each other.

Considering that for each of the above-mentioned products there was only one bidder, the auction should have been repeated. However, each of the distributors requested the Evaluation Committee for the National Diabetes Program of RPHM to conclude direct negotiations. Distributors invoked that they were the only distributors having authorisations issued by Eli Lilly for taking part in the Bid for the mentioned products and that Eli Lilly was the only producer of these medicinal products. As a result, supply agreements were concluded between the distributors and public bodies.

By virtue of Art. 5(1)(c) of the Romanian Competition Law no. 21/1996[4] (hereafter **Law 21/1996**), the correspondent of Art. 101(1)(c) of the Treaty on the Functioning of the European Union (hereafter the **TFEU**), *„any express or tacit agreements between undertakings or associations of undertakings, any decisions by associations of undertakings and any concerted practices, which have as their object or may have as their effect the restriction, prevention or distortion of competition on the Romanian market or on a part of it, shall be prohibited, especially those aimed at: […] allocating distribution markets or supply sources according to territorial criteria, sales and purchase volume or other criteria".*

CC considered that the four undertakings breached Art. 5 (1) c) of Law 21/1996 by way of concluding and implementing different agreements and/or concerted practices, which had the same anti-competitive object of sharing the markets concerning Eli Lilly's portfolio of diabetes products.

[4] As this law was re-published in the Official Gazette Part I, no. 742/16.08.2005. It should be noted that the present case analysis is made under the provisions of Law 21/1996, in the form this law was in force on the date when the present Decision was issued and prior to its latest amendment from 2010. Law 21/1996 was modified by Emergency Governmental Ordinance no. 75/2010, published in the Official Gazette no. 459/06.07.2010.

The undertakings were fined as follows: *(i)* Eli Lilly approximately EUR 1,040,000[5] *(ii)* A&A approximately EUR 1,180,000, *(iii)* Relad approximately EUR 7,150,000 and *(iv)* Mediplus approximately EUR 13,379,000.

1.2 Romanian Public Health Minister's breach of competition provisions

As a public authority, one of the main responsibilities of the RPHM is to organise, implement and coordinate the national health programs with the NHIA. The national health programmes are regulated[6] with the purpose of preventing and treating diseases that may have significant negative effects upon population (e.g. AIDS, heart diseases, diabetes).They are financed from the state budget and the social insurance fund, in the limits established by virtue of the state budget law issued annually.

Pursuant to Art. 9 (1) a) of Law 21/1996 *„any actions by the central or local public administrative body which have as an object of may have as an effect the restriction, prevention or distortion of competition are prohibited, especially by: a) making decisions that limit the freedom of trade of undertakings' autonomy, which are being exercised under law"* (hereafter **Art. 9**).

The CC investigation revealed that from 2003 to 2006 the RPHM did not conduct annual auctions for the acquisition of medicinal products in the national diabetes program. Instead, the acquisition agreements concluded in 2003 were prolonged *"artificially"*[7] (in the terms of the CC) by monthly addenda and through governmental decisions. The distributors' offers were not modified since 2003.

Moreover, after 2003 the effective supply of insulin products through the national diabetes program represented 99% of supply of these products on the market. As stated at para. 507 of decision no. 15/12.03.2008 (hereafter the **Decision**), this situation may be considered to be a *de facto* monopsony held by RPHM, where the RPHM is the acquirer of the medicinal products from the distributors and the NHIA is the public body responsible for the payment from the national state budget. One should note that the insulin market is a regulated one, where the supply and acquisition is organised by auctions; hence, it can be said that competition on this market „happens" only when the bids are held.

Considering the above-mentioned statements, the CC concluded that RPHM prevented the existence of competition on the Romanian insulin market by restricting the distributors which had not won the Bid to access the market (by limiting the number of distributors to those which had won the auction in 2003) and by constraining the commercialisation of new insulin products which appeared on the market meanwhile. Actions which prevent entry on the market have the nature of restraining or even eliminating the competitive constraints between competitors and have negative effects on prices and/or quality of products.

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[5] The amounts of the fines were converted into EUR at the medium ROL/EUR exchange rate for 2008: 1 EUR=3.6827 ROL, as this exchange rate is posted on the National Bank of Romania's website: http://www.bnr.ro/Cursuri-medii-3544.aspx

[6] RPHM is entitled to project, implement and coordinate the national health programmes, as per art. 34 of Law no. 145/1997 regarding social health insurance, which was repealed by the Governmental Emergency Ordinance no. 150/2002 regarding the organisation and functioning of health social insurance system

[7] As the CC evidenced, pursuant to the applicable legislation the auctions may be extended only expressly and in exemptional circumstances, until the auctions for the following year are organised.

1.3 "Overview" document

During the dawn-raids conducted by the CC in Eli Lilly's headquarters, a document entitled „Overview" was found (hereafter the **Document**). The Document included the following: a list of the sales from that moment, especially with regard to its 3 distributors; references made to the diabetes health program (e.g. maximum product quantities, proposal of price for the Bid), the market before the Bid and the scenarios willing to be followed during the Bid. Particular importance should be given to these scenarios, as they revealed an intention to collude and were considered to be at the heart of the agreement and/or concerted practice on the insulin market.

The first scenario consisted in offering all portfolio of insulin products by one distributor; the second scenario (which was considered by the CC to be the anti-competitive one and which was implemented) consisted in the share of the portfolio of products among distributors; the third scenario permitted each distributor to participate in the Bid with all its products and the fourth scenario comprised a consortium concluded between Eli Lilly and one distributor. Each scenario had its own advantages and disadvantages mentioned. The means of presenting the products and the possible sales made by its distributors were also set forth. Interestingly, scenario no. 2 evidenced the following disadvantage (from Eli Lilly's perspective): the possibility of internal competition with regard to Eli Lilly portfolio of products.

2. LEGAL ASSESSMENT

2.1 Definition of relevant markets in the pharmaceutical sector

In its assessment to this effect, CC by reference to the *Romanian Guidelines regarding the definition of the relevant market*[8] *and the Commission Notice on the definition of relevant market for the purposes of Community competition law.*considered the following criteria:

(i) Characteristics of the pharmaceutical market
The medicinal products are generally classified by their therapeutic indications (so called functional substitutability). The market is highly regulated (e.g. the establishment of maximum prices entitled „CANAMED prices", a product shall be authorised by the Medicinal Products National Agency before being released on the market). Furthermore, from the demand point of view, patients have little influence on the market, as medicinal products are prescribed by doctors.

(ii) ATC (Anatomical Therapeutic Classification) system
The ATC system classifies medicinal products in 5 groups according to their therapeutic, chemical and pharmaceutical properties[9]. The level considered by CC in its analysis is the 3rd level of ATC, which groups medicinal products considering their therapeutic indications. The European case-law[10] usually uses this level of ATC as an upfront point in defining the relevant pharmaceutical product markets. Other levels may be used, if further competitive constraints exist among the undertakings active on the market.

[8] Published in the Official Gazette Part I, no. 288/2004
[9] The World Health Organisation and the European Pharmaceutical Marketing Research Association use the therapeutic indications criteria when classifying medicinal products.
[10] E.g.: *Sanofi/Synthelabo case COMP/M.1397, Astra/Zeneca case COMP/M.1403, Pfizer/Pharmacia* case COMP/M.2922

Other factors considered by CC were: the prescription of medicinal products, their discounts, the way the human insulin and analogous human insulin products act, duration of action and their establishment in human body.

In analysing the substitutability between *human insulin products and analogous human insulin products,* CC asked the advice (*i.e.* whether products from the same group would have close properties, their mixture would lead to new properties) of the Diabetes and Endocrinology Committee of RPHM. Additionally, the Medicinal Products' National Agency stated that the replacement of the type, trade mark and concentration of these medicinal products should be done only by the endocrinologist. Furthermore, the surveys conducted in different hospitals concluded that these 2 types of medicinal products are not substitutable and that the analogous human insulin products would have better results and that they are superior in quality.

(iii) Definition of relevant product markets
The CC defined the relevant product markets by taking year 2003 as a reference. The relevant product markets for 2002-2003 before the Bid[11], comprised the following relevant product markets: *(i)* the relevant product market for human insulin products with rapid action, *(ii)* the relevant product market for analogous human insulin products with rapid action, *(iii)* the relevant product market for human insulin products with intermediate action, *(iv)* the relevant product market for human insulin products with rapid and intermediate action, *(v)* the relevant product market for analogous human insulin products with rapid and intermediate action, *(vi)* the relevant product market for analogous human insulin products with prolonged action.

The relevant product markets for 2003-2006: each lot of products (which corresponded to a single product) represented a relevant product market. Considering the composition of the medicinal product, the concentration and its packaging, it was quite easy for one to recognise the producer of the medicinal products in question and therefore which company offered in the Bid.

2.2 "Overview" document – the most important proof of the agreement and/or concerted practice

The Document represents the main proof of the breach of competition law provisions committed by CC. The finding was supported by the fact that Eli Lilly tried to modify the original version of the Document which was taken/copied? by the competition inspectors during the dawn-raids, when it was asked to provide it. Eli Lilly incurred a fine for this illegal behaviour.

The CC based its conclusions on the anti-competitiveness of the arrangements at stake on the *Adalat case*[12] , where Bayer AG implemented a unilateral commercial strategy with the scope of preventing parallel imports. However, the European Commission did not prove adequately that Bayer France and Bayer Spain imposed their distributors a restriction to export the Adalat product, established a systematic monitoring of Adalat sale, imposed a sanctioning or threatening policy towards their distributors etc.

[11] The CC considered that the relevant market shall be defined differently before 2003 and after 2003, as the means of acquisition of the medicinal products has changed.
[12] *Bayer AG v Commission*, cases T-41/96 [2000] ECR II-3383 and Cases C-2/01 P and C-3/01 P *Bundesverband der Arzneimittel-Importeure eV v Bayer AG*

CC states at para. 283 of the Decision that Eli Lilly was not in the same situation as Bayer, as the manufacturer could not implement by itself the unilateral policy, considering that it had to participate in the Bid through its' distributors (Eli Lilly did not meet the eligibility criteria to participate itself in the Bid).

The Document was the first indication that the unilateral behaviour implemented by Bayer in the European case corresponded with the behaviour of Eli Lilly. The Decision is very interesting from this point onwards, as it reveals the arguments of the distributors in evidencing that Eli Lilly's unilateral behaviour has not been tacitly or expressly accepted and implemented by them. Much debate is upon an address[13] issued by the commercial manager of Relad, Mr. Sorin Chiutu, and sent to Eli Lilly, in which he thanks for the decision of Eli Lilly to be represented in the Bid for the diabetes national program with the Humalog product by Relad and requests the re-analysis of the discounts mechanism for two products. The CC was of the opinion that this address represented the proof that Relad has accepted the 2nd scenario, which Eli Lilly intended to carry out. The distributors tried to rebut the CC's assumptions, by stating that each party conducted unilaterally and that they were not aware of the strategy that the manufacturer was willing to be implemented.

2.3 „Per se" restriction of competition

According to para. 425 of the Decision, the CC states that any agreements and/ or concerted practices having the object of restricting competition cannot benefit from the exemption under art. 5 (2)[14] of Law 21/1996[15]. Moreover, art. 8 (1) of Law 21/1996 establishes a *de minimis* rule: if certain market share thresholds are met, the undertakings restricting competition would not be sanctioned. Art. 8(2) of Law 21/1996 provides that the *de minimis* rule would not be applied in the case of agreements and /or concerted practices with regard to prices, sharing markets or bid-rigging. Para. 426 of the Decision states that the case at hand falls under art. 8(2) and it is a restriction of competition by object. It can be concluded therefore that the case at hand could not be analysed under art. 5(2) of Law 21/1996 and constitutes a per se restriction of competition[16].

Pursuant to para. 41, point 2 of *the Guidelines regarding the application of article 5 of Law 21/1996 with regard to vertical agreements*[17], in case of restrictions by object, as those mentioned at art. 5 of the Block Exemption Regulation, it is unnecessary to prove the effect of the agreement and/or concerted practice.This provision was invoked by the CC when it assessed the restriction of competition of the undertakings' agreement and/or concerted practice.

[13] Document no. 44 from the minutes no. 789/03.05.2006, 790/03.05.2006, respectively, concluded on 03.05.2006, at Relad headquarters and discovered in Mr. George Darie PC (Relad's Manager with regard to relations with suppliers).
[14] the correspondent of art. 101(3) of the TFEU
[15] Another difference between the Romanian and the EU competition regime is that in Romania is maintained the individual notification for obtaining an exemption from the CC. Conversely, in practice few undertakings undertake this way, as the CC is not willing to use it. It is expected that the amendments of Law 21/1996 willing to be undertaken will repeal this provision.
[16] The expression *„per se"* is used in the present article in the sense that no exemption or defence in light of art 5(2) of Law 21/1996 could be raised by the undertakings.
[17] Adopted through Order no. 77/14.04.2004, published in the Official Gazette Part I no. 437/17.05.2004

Moreover, CC's **White Charter of free competition in Romania**[18] (hereafter the **White Charter**) (a non-binding explanatory document providing guidance on the Romanian competition policy) states that a *per se* prohibition is reinforced by article 8(2) of Law 21/1996, according to which *"anti-competitive practices related to prices, tariffs, market division agreements or auctions are not subject to the limits imposed by the law concerning the turnover and market share level and consequently, are not exempted from the enforcement of the law" (the de minis rule)*. Additionally, it is mentioned that with regard to concerted practices at horizontal level, they are generally forbidden *"per se […] (as they are, by definition). […] this mean that their anti-competitive effects are so evident that they do not need to be demonstrated, the only proof necessary in these cases being the fact that they indeed occurred and had an anti-competitive object even if they did not produce effects"*.[19]

The European jurisprudence has clearly established that when applying Article 101(1) TFEU, if the agreement and/or concerted practice contains a restriction, prevention or distortion of competition by object, there is no need to further demonstrate its effect on competition[20]. Market - sharing agreements and/or concerted practices are considered to be anti-competitive as they isolate markets and prevent the single market integration - a primary aim of the TFEU.

Pursuant to para. 20 of the *European Commission's Guidelines on the application of article 101(3) of the Treaty* (hereafter the **Guidelines on 101(3)**), *„the distinctions between restrictions by object and restrictions by effect is important. [...] Article 101(3), on the other hand, does not distinguish between agreements that restrict competition by object and agreements that restrict competition by effect"*. Even though restrictions by object are considered to impede competition by their very nature (market sharing is mentioned expressly as an example of object restriction in para. 21 of the Guidelines on 101(3)) and even if, in practice, are considered not to fulfil conditions of Article 101(3) TFEU, they can still be assessed under the Guidelines on 101(3), in order to fall outside of Article 101(1) TFEU.

In light of the above, one should consider CC's approach towards market sharing as being a per se infringement (with the effect that no assessment can be made under art. 5(2) of Law 21/1996 and hence the agreement and/or concerted practice would not be able to fall outside art. 5(1) of Law 21/1996) too narrow. Even if the White Charter makes reference to horizontal agreements between undertakings as being per se infringements, one should note that even these types of agreements may theoretically fall under Article 101(3) TFEU. Even if, in the case at hand, the agreement and/or concerted practice was considered to be a vertical one, the per se approach is too restrictive. One may conclude that the CC -- the restriction, prevention and distortion of competition *by object* with the idea of *per se* infringement. One should emphasize that this matter should be addressed in CC's ?(future legislation amendments).

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[18] http://www.competition.ro/documente/ro/carteaalba.pdf
[19] P. 24.
[20] *Volkswagen AG v Commission* [2000], ECR II – 2707, case T-62/98, para 178; *Societe Technique Miniere v Maschinenba Ulm,* Case 56/65 [1966] ECR 235, para. 249
[21] Issued by the CC, approved by Order no. 107/2004 and published in the Official Gazette Part I, no. 439/17.05.2004

2.4 Establishment of fines

In the assessment of fines, the CC considered art. 51 and 52 of Law 21/1996 and *the Guidelines for individualising the sanctions for infringements under art. 56 of Law 21/1996*[21] (hereafter the **Guidelines**).

The CC's analysis comprised: *(i)* the gravity of the breach (in the present case medium gravity anti-competitive actions, due to the significant effects on the market, even though the agreement was a vertical one), *(ii)* the duration (between 1-5 years) and *(iii)* the effects on competition. With regard to the last criterion, it was found that all supplies of human insulin products on the Romanian market were affected: those supplied through the national diabetes program and outside the program; moreover the undertakings offered maximum prices in the Bid.

The CC calculated fines by applying a basic amount (gravity plus duration) and adjusting it upwards or downwards, if there are any aggravating or mitigating circumstances. Pursuant to the Guidelines, when assessing the **gravity** of a competition law violation, the following shall be considered: the nature of the act, the impact of the act on the market and the extent of the geographical market. The acts were established to be medium-gravity ones, for which the sanction is usually between 2%-4% of the turnover of the undertaking in question. The parties argued that the acts were imposed by Eli Lilly individually and that they were not aware of the other distributors' allocations. However, the CC invoked repeatedly a provision from the Guidelines mentioning that undertakings of a certain magnitude have the knowledge and the legal and economic expertise to assess their anti-competitive behaviour. The **duration** was considered to be a medium one, as it lasted from 2003-2005 and hence an appraisal of 50% of the amount established by the gravity was applied.

3. COMMENTS

3.1. Breach of competition provisions by a public authority

(i) Object or effect?

In its analysis with regard to the breach of Article 9 by the public authority, the CC evidenced the two conditions that were met: *(i)* the action of breach should be performed by a central/local administrative body and *(ii)* the action should have the object/effect of restricting, preventing or distorting competition. The CC did not make any assertion whether the analysis is made in light of an object or an effect breach of the competition provision.

Interestingly, the breach found under Article 9 in the case at hand, can be compared with a similar previous one handled by the Romanian Competition Authority. In Order no. 131/2006 (hereafter the **Order**), by which the CC closed its investigation into the oncologic products[22] market,[23] when the activity of the RPHM is analysed, it is considered that the extensions of the agreements concluded after the auctions held in 2003 are only barriers to the market[24]. At the end of the Order, the CC issued the recommendations after the investigation, among which, the one for the RPHM was to pursue the auctions on a yearly-basis in order to "normalise" the competition environment[25].

[22] The case was closed as there was no breach of competition law provisions.
[23] The oncologic products were acquired by the RPHM through a National Health Program. The only auction held was in 2003 and afterwards the agreements were extended artificially on an annual basis.
[24] Point 4 letter c) of the Order
[25] Art 2 of the Order

Moreover, Article 9[26] provides that *"any **actions** […] which have as an object of may have as an effect the restriction, prevention or distortion of competition are prohibited"*. However, para. 515 of the Decision mentions about the passivity of the public authority with regard to organising the auctions, not about an "action". Could the artificial extensions of the concluded agreements be considered as the "actions", as this term is needed under Article 9, even if the breach is assessed more from the inactivity point of view? The answer might be found in CC's "discovery" that the provision encounters a lack, as in the proposed amendments of Law 21/1996[27], Article 9 comprises *"**actions and in-activities** […] which have as an object of may have as an effect the restriction, prevention or distortion of competition are prohibited"*.

(ii) No fine imposed to the Romanian Public Health Minister
Unlike the undertakings, the public authority was not fined for breaching Article 9. In Romania there are no sanctions to be applied to public authorities that do not respect the competition law provisions[28]. The fact the CC mentioned in the Decision that a public body breached Law no. 21/1996, might have relevance for the follow-on actions[29] by third parties or by the undertakings that incurred fines from the CC. Considering this and that actions in Romania are usually avoided because of the huge amount of time and costs that they imply, one should doubt the efficiency of the Article 9 in practice.

(iii) Is Romanian competition law different?
The way Article 9 is drafted evidences a unique approach of the Romanian competition law towards the infringements undertaken by public authorities.

Even if the European competition law provisions do not comprise such a straightforward approach towards the anti-competitive actions pursued by public authorities, through an express mentioning in article 101 of the TFEU, the European practice makes a distinction between: *(i)* the situation where state bodies qualify as an undertaking when they are engaged in economic activities and consequently can fall under Article 101 TFEU and *(ii)* the situation where their behaviour is connected to the exercise of powers of a public authority[30].

A very good example is the *Fenin case*[31], where the GCJ[32] asserted that when health care is provided to citizens, the public authorities act on the basis of solidarity[33] and therefore the act is not an economic one.

[26] The present case-analysis is made in light of the provisions of Law 21/1996, as this law was in force at the date when the Decision was issued and prior to its latest amendment from 2010. Law 21/1996 was modified by Emergency Governmental Ordinance no. 75/2010, published in the Official Gazette no.459/06.07.2010.
[27] The amendments of Law 21/1996 are found in the Emergency Governmental Ordinance no. 75/2010, published in the Official Gazette no.459/06.07.2010...
[28] It is questionable whether this approach will be changed with the amendments that are willing to be made on Law 21/1996. The amendments are currently being analised by the CC.
[29] Article 61 of Law no. 21/1996.
[31] Case T – 319/99 [2003] ECR II-357, [2003] 5 CMLR 34
[32] The decision was upheld by the ECJ.
[33] This term was defined by Advocate General Fennelly in the case Sodemare v Regione Lombardia [1997] ECR I-3395, [1997] 3 CMLR 591, para. 29, as being *„the inherently uncommercial act of involuntary subsidisation of one social group by another". If „social protection is provided on the basis on solidarity, it is not provided by an undertaking" – R. Whish in „Competition Law"*, 6th edition, page 86

It was concluded that the activity of purchasing goods should be analyzed in light of their purpose. As health care activities were not economic, the ancillary act of procurement was not as well. There is no distinction made between the purchase of goods offered in health-care sponsored programmes (like in the case at hand, where through the national diabetes programme, medicinal products are offered for free to patients) and purchase of goods offered by charging certain patients (the correspondent of the situation where the insulin products would be offered outside the national diabetes programme).

Additionally, other Member States of the EU sustain the approach of the European practice with regard to the anti-competitive practices pursued by public authorities. For example, in **UK** the Competition Act 1998 does not make any reference to this matter in its statutory provisions. Section 2 of the act or the Chapter I Prohibition, how it is also entitled, mirrors nearly 100% article 101 of the TFEU. However, the UK seems to approach in the same manner this matter. For example in *OFT's Guideline on agreements and concerted practices*[34], it is mentioned that the *"key consideration in assessing whether an entity is an undertaking for the application for the article 102 and/or Chapter I Prohibition is whether it is engaged in an economic activity"*. Like one should observe, no distinction is made between public and private undertakings. Therefore, indirectly said, the UK is upholding EU's approach.

In **France**, art. L410-1 of the Commercial Code establishes that the competition law provisions apply to all production, distribution and services agreements, comprising also the ones pursued by public authorities[35]. In its 2008 Report, the Conseil de la Concurrence asserts that the practice established that it can sanction also the public authorities for anti-competitive behaviours[36]. Conversely, no assessment shall be made under the competition provisions for activities performed under public scope. It might be concluded that the French competition authority is in the same line as the UK and EU decisional practice.

Moreover, the German Act against Restrictions of Competition[37] in its Section 1 Prohibition of agreements restricting competition, specifies that *"agreements between undertakings, decisions by association of undertakings and concerted practices, which have as their object or effect the prevention, restriction or distortion of competition, shall be prohibited"*. Moreover, in Section 130 of the ARC entitled *"Public undertakings, scope of application"* provides that the act will also apply to undertakings *"which are entirely or partly in public ownership or are managed or operated by public authorities"*. Conversely, German practice makes the same distinction as in EU[38].

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[34] Paras. 2.5-2.6 of the guideline

[35] http://www.legifrance.gouv.fr/affichCode.do;jsessionid=6ED45C13B0A612F0BAFEBE400919BF8C.tpdjo04v_2?idSectionTA=LEGISCTA000006133183&cidTexte=LEGITEXT000005634379&dateTexte=20100531

[36] http://www.autoritedelaconcurrence.fr/doc/pratique_decisionnelle_ra08.pdf, page 7

[37] The Act can be found at http://www.bundeskartellamt.de/wEnglisch/Legal_bases/Legal_basesW3DnavidW2625.php

[38] GWB § 130, Unternehmen der öffentlichen Hand; Geltungsbereich, Emmerich/Rehbinder/Markert, editors Immenga/Mestmäcker, "Wettbewerbsrecht: GWB" 4, edition Auflage 2007

The definition of the relevant product markets based on the reference period of 2003 and the moment of the Bid raises questions. Considering that, as mentioned above, before 2003, the auctions were organised by each health unit in a decentralised manner and seeing how the relevant product markets are defined for that period (*i.e.* by their way of action and divided in human insulin products and analogous human insulin products), one might question the definition of the relevant product markets after the Bid up to 2006. The definition of the markets during the Bid seems fair enough, however the extension of the supply agreements concluded with the distributors in 2003 should not be considered to be the starting point for defining the relevant product markets after the Bid. The de facto situation reveals that after the Bid until 2006, health units held individual bids and the distributors even made offers in some of them. If the automatic extension of the agreements concluded during the Bid was considered not to be in accordance with the relevant legal provisions, hence it means they were illegal. Is the CC's definition of the relevant product markets after the Bid up to 2006 appropriate, considering that it is based on non-valid agreements? And, should the individual bids held after 2003 up to 2006 and the automatic extension of the agreements after 2003 have any impact on the definition of the relevant markets?

In a public procurement procedure, the procurer determines the product; consequently there is no demand side substitution[39]. With regard to supply side substitution it should be analyzed how many undertakings can provide the same relevant product. If there are a few undertakings that are willing to submit an offer, they represent the supply side.

Noting:

(i) how the relevant product markets were defined before 2003 - there was no separate market defined for the oral tablet Actos,

(ii) that despite the relevant product market definition before 2003, Actos was distributed prior to 2003, hence it should have been considered in the definition,

(iii) that there is a separate definition of Actos relevant market after 2003,

(iv) that the Decision makes reference to the agreement and/or concerted practice with regard to insulin products and analogous human insulin products, but when analyzing the allocation of products beside these two, also the Actos tablet is mentioned, one might presume that Actos is part of one of the following groups: the insulin products and the analogous human insulin products. This might represent that Actos is substitutable with one of these two. In the tender procedures, products are part of the same relevant product market if they are "reasonable interchangeable"[40]. If the CC considered that previous 2003 Actos was substitutable with one of the insulin groups, it means that it would be during the Bid as well. It is not clear how this product Actos was taken into consideration by the CC when it defined the relevant markets.

Should the CC have defined the relevant product markets for 2003-2006 as it has done it for 2002-2003? How would another definition of the relevant product markets have impacted the agreement and/or concerted practice?

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[39] As this was decided in SAP v Gazdasagi Versenyhivatal Unreported November 5, 2008 (Hungary) – Pal Szilagyi "Case *Comment Hungary: antic-competitive agreements – bid-rigging"*, European Competition Law Review, 2009

[40] P. B. Work, *"Antitrust issues relating to arrangements and practices of government contractors and procuring agencies in markets for specialized government products"* (1988) 57 Antitrust Law Journal.543, 548

Would another definition of the relevant market have had an influence over the fine imposed to the undertakings, considering that, by virtue of the Guidelines, the relevant geographic market is one of the factors considered in the assessment of gravity of the infringement and that in many parts the Guidelines reference is made to the impact of the infringement on the market? The CC remained reluctant in its Decision towards this issue[41].

Additionally, the inclusion by a public body of medicinal products in a bid, in such a manner that would restrict competition on the market (by the elimination of the inter-brand competition, at the producers' level), do not change the characteristics and the prices of the medicinal products. Hence, should the interference of the RPHM, through an administrative act, have an economic and legal effect on the structure of the market (*i.e.* by defining it in another manner than based on the ATC level)[42]?

3.3. "Overview" document

The document issued by Relad's representative comprised the following assertion: *„we would like to thank very much for the decision to be represented by Relad to the tender for Diabetes Care"*.

Having in mind that the authorisation offered by Eli Lilly to its distributors, in order to allow them to participate to the Bid with specific medicinal products, was an unilateral document representing an unilateral decision, one may state that Relad's address may be a normal business answer that any distributor may give to its supplier, especially when its purpose is to obtain further discounts[43].

Furthermore, the distributors tried to evidence that they did not meet the transport and deposit capacities, thus they could not have participated in the Bid with offers for more medicinal products. Conversely, this argumentation was not sustained as the proof was contradictory.

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Whether the definition of the relevant product markets in the case at hand is correct and whether the proof on which the CC based the finding of an anti-competitive agreement and/or concerted practice on the Romanian insulin market is enough, is still left open for debate[44].

Conversely, one thing is for sure: the CC will pay further specific attention to the pharmaceutical market as *"there are some aspects of facilitating the anti-competitive practices with regard to the acquisitions of medicinal products by hospitals"*[45]. In this light, the CC requested the RPHM not to use the "dealer authorisations[46]" as a necessary document in a tender, as it is considered to restrict intra-brand competition.

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[41] The definition of the relevant product markets based on the reference period when the Bid has been held was debated by Eli Lilly in para. 208 of the Decision. Conversely, the CC's answer is no more than a repetition of the facts already invoked when defining the relevant product markets.
[42] This issue was raised by Mediplus at para. 209 of the Decision
[43] Paras. 298 and 299 of the Decision
[44] The case is being appealed; the final judgement of the court might answer the debatable questions.
[45] http://www.consiliulconcurentei.ro/documente/Raport%20concurenta_18423ro.pdf
[46] The authorisation is usually issued by the manufacturer of medicinal products in order to grant distributors the opportunity to participate in tenders.

Generally speaking, about competition in the pharmaceutical market, after the investigations conducted on markets such as the insulin market or the dialysis market, currently the CC is addressing the problems that may exist in this sector and the artificial barriers that may have arisen over time.[47] It is expected that the CC will issue a report of its investigations at the end of 2010.[48] Sanctioning the anti-competitive behaviours on the pharmaceutical market is indeed a paramount and first step in solving the current issues; however, legislation in this area should be re-considered, as it encounters gaps where anti-competitive practices can easily find a warm blanket to develop.

[47] The CC opened a general investigation on the market for wholesale distribution of medicinal products and further individualized 4 investigations.
[48] http://www.consiliulconcurentei.ro/documente/Raport%20concurenta_18423ro.pdf

Book Review: Article 82 EC: Reflections on Its Recent Evolution Edited by Ariel Ezrachi, Hart Publishing, 2009

THALIA ZAGOU[1]

The book authored by Ezrachi is a compilation of ten presentations of guest lecturers on competition related discussions, organized at the University of Oxford. The common starting point of all ten chapters is the Guidance[2] on the application of Article 102 TFEU (ex. Article 82 EC), published by the European Commission and the relevant recent judgments of the European Courts. This book analyzes different perspectives of the new effect-based approach of Article 102 introduced by the European Commission and draws a comparison with the formalistic approach, traditionally applied.

The first chapter provides an introduction to the new economic approach of Article 102 and expands on the reasons behind this development. Moreover, the author stresses on the crucial role that should be played by the European Courts` as a leading driver of this reform.

The second chapter critically assesses how the effects-based approach is being implemented. Furthermore, the relevance of the classification pertaining to abuses of dominance and examines whether they can be considered appropriate yet was presented. An interesting contribution is comparing the enforcement policy in Europe with the U.S. rule of reason approach.

In the light of these considerations, the third chapter describes the difficulties that arose from the effects-based approach of Article 102 in relation to the non binding nature of the recent Guidance of the Commission. Moreover, since the latter is subrogated to the European judicature, a balance between the need for a reform and the precedent system is discussed. The overview of the relevant case law is really helpful for the reader to understand how the European Courts have reacted to the new approach.

The following chapter traces how the European Courts have shown preference to protecting competitors' interests over that of final consumers. It further illustrates how effectively the new economic approach has been implemented as far as the consumer interest is concerned. Moreover, it urges the courts to check the effects of alleged infringements of Article 102 on consumer welfare before issuing a final decision.

The discussion carries on with different issues triggered by the Microsoft case . In chapter five, the test of "exceptional circumstances" and its development in the Microsoft case [3] are discussed. Although this topic is of special nature the author succeeds in presenting the concept of 'essential facilities' clearly.[3]. Chapter six examines the interaction between Intellectual Property and Antitrust Law to maximise consumer welfare. In addition, this chapter deals with the peculiar features of software and how interoperability between different software can be readdressed according to Article 102.

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[2] "Guidance on the Commission's enforcement priorities in applying Article 102 of the Treaty to abusive exclusionary conduct by dominant undertakings"

[3] CFI, T-201/04, Case Microsoft Corp. v Commission

The debate from there on would be whether this could mark the beginning of a new antitrust era, where mandatory licensing will be a frequent and massive phenomenon.

In chapter seven, special responsibility of the dominant firms not to impair undistorted competition is examined, focusing mainly on its consistency with the effects-based approach of Article 102. Indeed, it proceeds with a transatlantic comparison; between the EU competition law and the US courts' diverging approaches. Hence, it allows the reader to understand in depth the ideological differences between those leading jurisdictions when dealing with dominant undertakings.

The next chapter takes the discussion a step further into the examination of the criteria and the economic analysis of tying and bundling. More specifically, it assesses whether the Guidance and Microsoft case reflect the effects-based approach as far as these two types of conduct are concerned. The rational structure of this chapter provides a clear comprehension and understanding of these concepts.

Although Article 102 focuses on exclusionary practices, chapter nine deals with the most common exploitative abuse, i.e. excessive pricing and the main reasons for non intervention in such cases. The author proposes a post-entry price-cut benchmark. However, it seems that this chapter is substantially theoretical unlike the other practical issues discussed in the book which does not make it fit neatly therein.

In chapter ten, the relationship between the sanction of voidance as a legal consequence of the breach of EU antitrust rules and the right to seek damages, are examined in the light of the absence of any relevant provision under Article 102. The study also discusses the necessity to reconsider these measures following the recently published White Paper on damages.

This book will find its primary audience among practitioners and students. It can also be useful for those interested to engage in an in-depth discussion on how Article 102 is implemented. It should be noted that this book is not advisable for those who are unfamiliar with Antitrust Law in general and Article 102 in particular. Moreover, it opens more doors for further discussions on the selected topics and highlights a number of challenges.

In summary, this book contains a sceptical approach towards many different issues that arise from the timely debate on the balance between the formalistic approach of the European Courts and the economic analysis proposed by the European Commission. The chapters are not restricted to presenting the different approaches and explaining how they are implemented in practice. The authors have rather offered insights through comparison of different practices, proposal of new schemes and description of new perspectives. The conclusions as drawn are supported with thorough and comprehensive arguments and innovative proposals. Therefore, the peculiar structure of the chapters of the book allows the reader to have an in depth overview of the issue s/he is interested in, since every chapter is meant to deal with one specific issue. At the same time this arrangement might not be helpful to a reader that looks for a coherent study of Article 102. In any case, the fact that there have been recently a lot of debates on the implementation of Article 102 makes the book a valuable contribution to reform and further develop Article 102 which also makes it worth reading.

Book Review: Telecommunications Law and Regulation, Edited by Ian Walden, Oxford University Press, 3rd Edition, 2009
ISBN 918-0-19-955935-0

MOSTAFA S. HASSAN[1]

The main purpose of this book is to address several issues related to the liberalisation trend in the telecommunications sector in the EU with special emphasis on the UK. The authors contributing to this edited book focus on the need of having sector specific rules (i.e. *ex ante* regulations) to supplement those of general competition (i.e. *ex post* regulations). This to address market failures such as interconnection arrangements and universal services obligations (USO) and also introducing the concept "Significant Market Power" (SMP) which supplements the concept of 'Dominance' that exists in competition law.

The book is divided into six parts each of which contains several chapters. The first part introduces the background on the sector concerned. It summarises successfully the key issues pertaining to the telecommunications law. Although very elaborated and cumbersome, the technical jargon that practitioners must be aware of is briefly presented. This part also deals with the various economic models and structures of pricing the services provided on all the distribution levels. In addition, it assures that the economic regulations must be in place so as to mimic the likely operation of a competitive market. Many mechanisms have been introduced to force the incumbent to treat all the downstream businesses non-discriminatorily and to charge cost-oriented prices to its services for the sake of fostering competition and opening the market for new entrants. It may be argued that the final chapter in this part is introduced at a very early stage as many concepts mentioned therein were left to be defined in subsequent chapters and hence it was difficult to understand it on its own.

The second part highlights the main regulatory regimes. It begins with the historical developments of the telecommunications regulatory regime in UK and how it was liberalised. Afterwards, the European regulatory regime is examined with reference to its historical developments and the current EU framework. The last chapter in this part which presents the U.S. regulatory regime was expected to provide more comparative analysis rather than being mostly descriptive.

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Following the description of the different regimes, the third part discusses, the most important questions related to *ex ante* and *ex post* regulations. It sheds some light on authorisation and licensing process. In this regard, operators must provide telecommunications networks and/or services in a way that is in conformity with the EU 'Framework Directive' and 'Authorization Directive' to allow more market access. It also discusses the most eminent issues related to ex ante regulations, namely, access and interconnection and how it is regulated in the 'Access Directive' of the EU and its implementation in the UK. It then focuses on the application of Articles 101 and 102 TFEU (ex. 81 and 82 EC) (Section 2 and 18, respectively, of the Competition Act in the UK) in that market. This part provides a clear justification why there is a need to have special competition rules in this regime to deter the anti-competitive behaviours that might not be covered by the general competition framework. For example, access and interconnections have special importance in the field of telecommunications. Generally, this sector is interdependent in the sense that undertakings therein have the upper hand over the call termination even those who do not enjoy a dominant position. This is due to the fact that all operators are obliged to connect the customers of its competitors to its network and vice versa according to the principle of "all-to-any". Moreover, certain rivals may have control over essential facilities of national networks which adds more entry barriers and has an adverse effect on the competitiveness of the market. The last chapter discusses other aspects such as Mergers and State Aid. In short, it has a clear structure and well suited for persons who are not familiar with the basic concepts of competition.

Part four covers the telecommunications transactions including the capacity agreements and communication outsourcing. It also provides an illustration on how they are regulated under the current EU regime to achieve a more competitive environment. This is through providing an opportunity for new entrants of special types of services like Mobile Virtual Network Operators (MVNOs) without discrimination and on cost-oriented basis.

The fifth part deals mainly with the communications content and privacy issues. As for the sixth part it outlines the international telecommunications law focusing on the role of the World Trade Organization and the International Telecommunications Union. Finally, the last three chapters consider the historical developments of the telecommunications sector in the developing countries and how it is being privatised.

In short, the book identifies the trajectory of regulating the telecommunications sector in the EU with special emphasis on the period following 2002. The current framework governing this sector can be described as 'policy-neutral' so as to be more consistent with the technological convergence that is currently taking place.[2]

Indeed, it is suitable for any person interested in the field who is not necessarily familiar with the concepts of telecommunications or competition. Not only it focuses on the EU regime but also it extends its relevance and comparative analysis to cover the developing countries and the future prospects of the telecommunications regulations worldwide.

[2] Technology convergence is the tendency for different technological systems to evolve towards performing similar tasks.

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Aim:

The *ICC Global Antitrust Review* aims at encouraging and promoting outstanding scholarship among young competition law scholars by providing a unique platform for students to engage in research within the field of competition law and policy with a view to publishing the output in the form of scholarly articles, case commentary and book reviews. The Review is dedicated to achieving excellence in research and writing among the competition law students' community around the world.

Scope:

The *ICC Global Antitrust Review* is intended to become a leading international electronic forum within which students engage in debate and analysis of the most important issues and phenomena in the global competition law scene. The *Review* welcomes contributions dealing with competition law and policy in all jurisdictions as well as those addressing competition policy issues at regional and international levels. In particular, it welcomes works of interdisciplinary nature discussing and evaluating topics at the interface between competition law and related areas such as economics, arbitration, information technology, intellectual property, political science and social geography. Only scholarship produced by students – whether at undergraduate or postgraduate level (taught and research) – will be considered for publication in the Review.

Form and Output:

The *Review* will be published annually in electronic format. Each yearly volume will consist of a maximum of five long articles, two short essays, a case note section and a book review section. Further information on submission guidelines can be found in the *Review's Guidelines for authors.*

Editorial Board 2010

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