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EDITORIAL BOARD'S MESSAGE

In a quickly developing legal environment, the present issue tried to cover topics that have triggered much of the competition law scholars' and practitioners' attention. All contributions have been carefully selected, so that they reflect the aim of the GAR to bring together outstanding discussions on competition law and policy from around the world.

In this spirit, this year's topics are quite diverse and controversial. Information exchange among competitors, patent settlement disputes and private labels are the three issues covered in the articles. All the authors provided an excellent legal insight on the current state of art and the economic theories behind each topic offering at the same time their own opinion on the proper way to 'push' the law further either by creatively interpreting the existing rules or by drawing some inspiration from the US practice, or by examining the current case law on these hotly-debated topics. Procedural developments in the field of competition law are also covered in this volume. The CJEU's recent ruling on the standing of the Commission to bring an action for damages incurred by the European Union because of a competition law breach is expected to further pave the way for private enforcement of the antitrust rules. Finally, an international 'touch' is provided by an interesting contribution on the challenges the Pakistan's competition regime faces, while a case comment from Malta sheds some light on the role of the competition authority in competition litigation before the national tribunals.

At this point, we should say a big 'thank you' to all the referees for their invaluable feedback and comments and for the time they devoted to thoroughly read through all the contributions submitted. We are very happy to have received a lot of requests for publication from many enthusiastic authors, and although we regret not being able to include all of them in this year's issue, we strongly encourage those who missed the chance to contribute in the present issue to submit their work for the next volume. We already look forward to receiving excellent submissions from promising young scholars on issues of international competition law and policy.

Last but not least, we would like to especially thank Prof. Maher Dabbah, the director of the ICC, for his kind guidance and support in our first steps and most importantly, for giving us the opportunity to be part of the GAR. We wish we did meet the expectations and we are ready to work even harder to take the GAR a step further.

The GAR Editorial Board
December 2012

Object Analysis in Information Exchange Among Competitors

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In the last few years, the substantive assessment of information exchanges among competitors has become a hot subject of debate. Despite the well-known pro- and anti-competitive effects of information sharing, recent developments show an increasing trend of EU competition authorities, including the Commission itself, to assess certain information exchanges under the 'object approach'. This view has officially been expressed by the Commission in its recently published horizontal cooperation Guidelines. This article analyses from an economic and a legal perspective whether it is appropriate to identify certain types of information exchanges as 'restrictions by object', which automatically violate article 101(1) TFEU.

I. Introduction

The legal treatment of information exchange among competitors has long been a controversial subject in the field of EU competition law and policy.[1]

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[1] See for instance, Antonio Capobianco, 'Information Exchange under EC Competition Law' (2004) 41(5) Common Market Law Review 1247; Florian Wagner-von Papp, 'Who is that can inform me? – the exchange of identifying and non-identifying information' (2007) 28(4) European Competition Law Review 64; Hans-Jorg Niemeyer, 'Market information systems' (1993) 14(4) ECLR 151; Eugenio Bissocoli, 'Trade Associations and Information Exchange under US and EC Competition Law' (2000) 23(1) World Competition 79; Cristoforo Osti, 'Information exchanges in the obscure light of Woodpulp' (1994) 15(3) European Competition Law Review 176; Florian Wagner-von Papp, 'Information Exchange Agreements' in D. Geradin and I. Lianos (eds.), *Research Handbook on EU Antitrust Law* (Edward Elgar Publishing, forthcoming) <http://www.ssrn-.com/abstract=2015674> accessed 12 December 2012.

As it is well known, information exchanges can have both pro- and anti-competitive effects. In certain cases, the availability of information enables firms to enhance the efficiency of their distribution systems improves their marketing activities and stimulates new investments in capacity or research and development (R&D). Furthermore, through benchmarking against each other's 'best practice', companies can increase their productive efficiency.[2] Conversely, it has also been demonstrated that information exchanges may present significant risks for the competitive process. Most importantly, information exchange can play an important role in facilitating collusion and, thereby, considerably harm competition and consumers.

The wide-ranging effects of information exchange would not be problematic for enforcement agencies if there were a method to draw a clear line between its pro- and anti-competitive types.[3] The major difficulty lies in the fact that, as the economist Kai-Uwe Kühn notes, 'Almost under any circumstances information exchange could be good or bad'.[4] For instance, if companies share information about their pricing activities, such exchange may lead to higher prices in the market and, thus, restrict competition or, on the contrary, it may lead to intensified price competition among the market rivals, which can be extremely beneficial for consumers. Logically, these varying and, at times, conflicting effects resulting from information sharing pose a real challenge for the substantive legal assessment conducted by competition authorities. In this context, the question of 'what is the appropriate legal standard to judge the flow of information among competitors' represents, indeed, an important issue.

Given the acknowledged pro- and anti-competitive effects of information exchanges, in principle, it may seem appropriate to assess these practices case-by-case under the so-called effect-based approach, in order to

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[2]See, for instance, OECD, Policy Round Tables: Information Exchanges Between Competitors under Competition Law (DAF/COMP(2010)37), Note by the Delegation of the European Union, 308. <http://www.oecd.org/dataoecd/12/52/48379006.pdf> > accessed 12 December 2012. For a brief overview of the benefits of information sharing, see Matthew Bennett and Philip Collins, 'The Law and Economics of Information Sharing' (2010) European Competition Journal 311, 314-320.

[3] See Jorge Padilla, 'The elusive challenge of assessing information sharing among competitors under the competition laws' in OECD, Policy Round Tables: Information Exchanges Between Competitors under Competition Law (DAF/COMP(2010)37), 435; see also Wagner-von Papp, 'Information Exchange Agreements' (n 1) 4.

[4]Kai-Uwe Kuhn, 'Designing Competition Policy towards Information Exchanges – Looking Beyond the Possibility Results' in OECD, Policy Round Tables: Information Exchanges Between Competitors under Competition Law (DAF/COMP(2010)37) 416.

determine whether the conduct has any adverse impact.[5] However, it appears that national competition authorities and the European Commission (Commission) itself are fully prepared to embrace the idea that certain types of information sharing can – and should – constitute restrictions of competition by object. This recent tendency is well illustrated by the enforcement practice of some competition authorities[6] and, particularly, by the recently published *Guidelines on horizontal cooperation agreements,*[7] in which the Commission clearly states its view that certain types of information exchange should be considered restrictions of competition by object.[8] Predictably, this approach has been criticised by a number of authors who expressed their concern that the Commission's approach to the types of information exchange that fall within the scope of *object* restrictions is too wide. [9] Moreover, it has been argued that since the effects of information exchanges may significantly vary depending on the

[5] See Padilla (n 3) 435.

[6] For example, in the UK, the Office of Fair Trading (OFT) qualified certain exchanges as anticompetitive by object. See e.g. decision of the OFT No CA98/05/2006, 'Exchange of Information on Future Fees by Certain Independent Fee-paying Schools', 20 November 2006 (Case CE/2890-03); OFT press release 34/10, 'RBS Agrees to Pay £28.5 Million Penalty for Disclosing Pricing Information to Competitor', 30 March 2010. In Spain, the SCA adopted the same approach in the STANPA case. See SCA decision of 7 February 2011, Case number S/0155/09. Also the Portuguese Competition Authority issued an decision regarding the exchange of information on bread prices which had the object of restricting competition in the Lisbon Bakers' case (Associação dos Industriais de Panificação de Lisboa, see press release at <http://www.concorrencia.pt/-vPT/Noticias_Eventos/Comunicados/Paginas/Comunicado_AdC_200821.aspx> accessed 12 December 2012. See also Decision ref.: R 126/2008/01-3227/2009/310/ADr of March 18th 2009, regarding a case in the Czech Republic in which the 'Funeral associations' issued price recommendations.

[7] Communication from the EU Commission — Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] OJ C11/1 (Cooperation Guidelines).

[8] ibid paras 73 –74.

[9] Such suggestions were, for instance, intensely made in the context of the consultation of the draft of the Guidelines which the Commission published in May 2010 and put forward for public consultation. See, for instance, Allen & Overy, 'Response to the European Commission - Draft revised rules for the assessment of horizontal co-operation agreements', para 2.16 *ff.* <http://ec.europa.eu/competition/consultations/2010_-horizontals/allen_overy_en.pdf> accessed 12 December 2012. More precisely, they observed that 'the Commission's approach is (…) too broad and goes beyond the Commission's position in the General Guidelines and current European court case law, especially since no reference is made to the need to consider the underlying facts of the agreement and the characteristics of the market involved'.

economic context and the characteristics of the market, this practice should not be approached under the 'object' analysis.[10]

This work is primarily concerned with the question whether, in the context of the substantive assessment of information sharing activities, it is indeed pertinent to identify certain types of information exchanges as restrictions by object which automatically infringe article 101(1) of the Treaty on the Functioning of the European Union (TFEU). In order to answer this question, this analysis approaches the issue from both a legal and an economic perspective. This article is structured as follows. First, it presents an analysis of the notion 'object restriction', which is mainly based on the relevant case law of the European Court[11] and the Commission's policy. This examination principally aims at providing a better understanding of the (not always simplistic) object approach, while helping us to determine whether in principle such assessment can be considered as an adequate legal standard in the complex area of information sharing. Secondly, it discusses the potential adverse effects of information exchanges on competition by drawing on economic theories of harm. Based on the implications of the economic considerations for the legal analysis of information exchange, this section also seeks to identify which types of information sharing (if any, at all) should fall within the scope of application of the object category from an economic perspective. The third section turns again to the legal discussion and examines the main principles offered by the case law on information exchanges as restrictions by object. Finally, the last section deals with the issue whether the approach adopted by the Commission in its Guidelines is consistent with economic theory and the established vision of the European Courts.

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[10] See RBB Economics Brief n. 31, 'Catch-22: The Role of Economics in the Assessment of Information Exchanges under Article 81', September 2008, <http://www.rbbecon-.com/publications/downloads/rbb_brief_31.pdf> accessed 12 December 2012. See also Dennis Carlton, Robert Gertner and Andrew Rosenfeld, 'Communication among competitors: Game theory and antitrust' (1997) 5 George Mason Law Review 423, 424. These authors argue that 'in the absence of direct evidence to form a naked cartel to restrict output or to raise price, the appropriate standard to judge the flow of information among competitors is the rule of reason'.

[11] For the purposes of this article, the term 'European Courts' refers to both the General Court and the Court of Justice of the European Union (CJEU).

II. Understanding the General Concept of 'Object Restriction'

To properly understand whether the object criterion constitutes an appropriate legal standard to analyse information exchanges, the precise purpose and function of the object assessment should be first explored. This is the objective of the present section which focuses on the following aspects. First, since the concept of object restriction can only be understood within the general structure of article 101 TFEU, some attention is given to this framework, and particularly to the relationship between article 101(1) and 101(3) TFEU. Next, the function and concept of the object analysis is elucidated by distinguishing it from the effect-based approach. The last part focuses on the assessment elements that are taken into account to determine whether an agreement or practice has an anticompetitive object.

1. The Application of Article 101(1) and 101(3) TFEU: No 'Per Se' in Europe

Article 101 TFEU is principally designed to ensure that each economic operator determines the commercial policy which it intends to adopt on the marketplace independently.[12] This provision is divided into three sections, with article 101(1) and 101(3) TFEU being the relevant rules for the substantive analysis of business conduct.[13] Article 101(1) TFEU prohibits agreements[14] between undertakings which have as their object or effect the prevention, restriction, or distortion of competition within the internal market and which are apt to affect trade between Member States in an appreciable manner. Article 101(3) TFEU, on the other hand, provides a legal exception to the principal prohibition of the first section. Pursuant to article 101(3) TFEU, the prohibition may be declared inapplicable when the agreement fulfils four cumulative conditions. Namely, (*i*) it entails efficiency gains (*i.e.*, improve the production or distribution of goods or promote technical or economic progress); (*ii*) it allows consumers a fair

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[12] Case T-8/89 *DSM NV v Commission* [1991] ECR II-1833, para 209.

[13] Pursuant to article 101(2) TFEU agreements falling under the prohibition article 101(1) TFEU shall be automatically void. The CJEU has declared that the automatic nullity of an agreement only applies to those parts of the agreement affected by the prohibition, or to the agreement as a whole if it appears that those parts are not severable from the agreement itself. See Case C-56/65 *Société Technique Minière (L.T.M.) v Maschinenbau Ulm GmbH* (M.B.U.) [1966] ECR 235.

[14] In this article the term 'agreement' should be understood as covering agreements, concerted practices and decisions by associations of undertakings.

share of the benefit; (*iii*) it only contains indispensable restrictions to attain such benefits; and (*iv*) it does not eliminate competition.

The interaction between article 101(1) and 101(3) TFEU, and in particular the question how the analysis should be conducted under each part, has long been subject to debate.[15] One of the most contentious questions has been whether the assessment of an agreement under article 101(1) TFEU has to, or for that matter should, be conducted by applying a 'rule of reason', equivalent to the analysis carried out in the United States under section 1 of the Sherman Act of 1890.[16,17] Basically, the US 'rule of reason' requires an economic assessment of the agreement in question, in order to ascertain its possible effects in the market. In other words, it is necessary to weigh both the pro and anti-competitive effects of an agreement to establish its overall

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[15] This debate was fundamentally developed prior to the 'modernisation and economisation' of EU competition law. In this context, numerous authors generally argued that the Commission had to remodel its approach to agreements under both article 101(1) and article 101(3) TFEU by adopting a more economic and less rigid method of assessment. Diverse formulas were suggested in order to clarify and achieve consistency in the relationship between the two sections. See, for instance, Alison Jones, 'Analysis of agreements under the US and EC Antitrust Law – Convergence or Divergence?' (2006) 51(4) The Antitrust Bulletin 691, 744 *ff*. See also Okeoghene Odudu, *The Boundaries of EC Competition Law, the Scope of Article 81 EC* (Oxford University Press, 2005) chapters 5-7; Okeoghene Odudu, 'A new economic approach to Article 81(1)?' (2002) 27(1) European Law Review 100; Manzini Pietro, 'The European Rule of Reason - Crossing the Sea of Doubt' (2002) 23(8) European Competition Law Review 392.

[16] Section 1 of the Sherman Act provides that '*every* contract, combination ... or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal' (emphasis added).

[17] For an examination of the application of the US-style rule of reason, see Philip Areeda, 'The Rule of Reason - A Catechism on Competition' (1987) 55(3/4) Antitrust Law Journal 571. For different perspectives as to how the rule of reason could (or should) be applied within article 101(1) TFEU (prior to the entry into force of Regulation 1/2003) see, for example, Rene Joliet, *The Rule of Reason in Antitrust Law, American, German and Common Market Law in Comparative Perspective* (Martinus Nijhoff 1967); Ian Forrester and Christopher Norall, 'The Laicization of Community Law: Self-help and the Rule of Reason: How Competition Law is and could be applied' (1984) 21(1) Common Market Law Review 11; Ernst Steindorf, 'Article 85 and the Rule of Reason' (1984) 21(1) Common Market Law Review 639; Stephen Kon, 'Article 85, para. 3: A Case for Application by National Courts' (1982) 19 Common Market Law Review 541; Luc Gyselen, 'Vertical Restraints in the Distribution Process: Strength and Weakness of the Free Rider Rationale Under EEC Competition Law' (1984) 21 Common Market Law Review 647. Against the adoption of a US-style rule of reason in the context of article 101(1) TFEU, see Richard Whish and Brenda Sufrin, 'Article 85 and the Rule of Reason' (1987) 7(1) Yearbook of European Law 1; Wouter Wils, '"Rule of Reason": une regle raisonnable en droit communautaire?' (1990) 1(2) Cahiers du Droit Européen. 19; Pietro Manzini, 'La rule of reason nel diritto comunitario della concorrenza: una analisi giuridico-economica' (1991) 31(4) *Rivista di diritto europeo* 859.

(anti)competitiveness. However, the European Courts have made clear that within the system of application of article 101(1) TFEU, there was no room for a European equivalent to the US-type 'rule of reason'. This position was formalised in the case *Métropole Télévision v. Commission*, in which the General Court specifically stated that '[i]t is only in the precise framework of [article 101(3) TFEU] that the pro- and anticompetitive aspects of a restriction may be weighed. [Article 101(3) TFEU] would lose much of its effectiveness if such an examination had to be carried out already under article [101(1)] of the Treaty'. The Court further added:

> [i]t is true that in a number of judgments the Court of Justice and the [General Court] have favoured a more flexible interpretation of the prohibition laid down in article [101(1)] of the Treaty. Those judgments cannot, however, be interpreted as establishing the existence of a rule of reason in Community competition law. They are, rather, part of a broader trend in the case-law according to which it is not necessary to hold, (…) that any agreement restricting the freedom of action of one or more of the parties is necessarily caught by the prohibition laid down in article [101(1)] of the Treaty.[18]

This approach, which is also consistent with the bifurcated design of article 101 TFEU, implies that the overall analysis of agreements under this provision involves two different sub-examinations, which are conducted respectively under article 101(1) and article 101(3) TFEU. To establish the

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[18] Case T-112/99 *Métropole télévision, Suez-Lyonnaise des eaux, France Télécom and Télévision française 1 SA v Commission* [2001] ECR I-2459, para 74 *ff*. Furthermore, the European Commission has also clarified its position as regards the 'rule of reason' in its White Paper on Modernisation by stating that 'the structure of [Article 101(1) TFEU] is such as to prevent greater use being made of this approach: if more systematic use were made under [Article 101(1) TFEU] of an analysis of the pro and anti-competitive aspects of a restrictive agreement, [Article 101(3) TFEU] would be cast aside, whereas any such change could be made only through revision of the Treaty. It would at the very least be paradoxical to cast aside [Article 101(3) TFEU] when that provision in fact contains all the elements of a 'rule of reason'. […] Lastly, this option would run the risk of diverting Article [101(3)] from its purpose, which is to provide a legal framework for the economic assessment of restrictive practices and not to allow application of the competition rules to be set aside because of political considerations'. EU Commission, White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty, Commission Programme No. 99/027, point 57; see also EU Commission, Guidelines on the application of Article 81(3) [now 101 (3) TFEU] of the Treaty [2004] OJ C101/97 (Guidelines on the application of Article 101(3) TFEU). Therefore, the shift to the present system of legal exception of Regulation 1/2003, according to which cooperation within the meaning of Article 101(1) is permissible as long as the conditions of article 101(3) are fulfilled, did not make the 'rule of reason' debate (fully) obsolete.

(in)compatibility of an agreement within the internal market, it should first be examined whether such conduct restricts competition appreciably by its object or effect. Only when this question is answered in the affirmative, economic balancing is to be conducted in order to enquire whether, within the framework laid down by article 101(3) TFEU, the agreement objectively produces procompetitive benefits that outweigh its (previously established) anticompetitive impact, and in light of which a general exemption from the general prohibition can be obtained after all.

Although object restrictions are rather frequently compared to, and confused with, the US per se illegality,[19] the possibility of conducting a defence under article 101(3) TFEU implies that under the EU system the so called 'per se' prohibition, in theory, does not exist. Article 101(3) TFEU applies to all agreements that fulfil the four conditions contained therein, but the burden will shift from the party alleging the infringement to those claiming the applicability of article 101(3) TFEU. As demonstrated beneath, these considerations have important implications for the assessment of information exchanges under the object approach.

2. Object and Effect: Alternative Assessment Methods with the Same Goal

The prohibition of article 101(1) TFEU is applicable to agreements that have a restriction of competition as their object, as well as to those that have a restriction of competition as their effect. The distinction between the object and effect approach is important because, as indicated by the conjunction 'or', these two requirements are of alternative nature. As early as 1966, the CJEU explained in *Société Technique Minière* that:

> [t]he fact that these are not cumulative but alternative requirements (…) leads first to the need to consider the precise purpose of the agreement, in the economic context in which it is to be applied. This interference with competition referred to in Article [101] (1) must result from all or some of the clauses of the agreement itself. Where, however, an analysis of the said clauses does not reveal the effect on

[19] See for instance OECD, Policy Round Tables: Information Exchanges Between Competitors under Competition Law (n 2) Contribution by BIAC, 394. 'As noted above, there is an important distinction between so-called *per se* illegal information exchanges (also called 'restrictions by object' or 'naked restraints') and information exchanges that require a case-by-case analysis under the rule of reason, or restrictions by effect'.

> competition to be sufficiently deleterious, the consequences of the agreement should then be considered.[20]

The substantive approach to agreements under article 101(1) TFEU is, thus, a staggered one. The first step consists, in essence, of determining whether an agreement has an anticompetitive object. If it can be confirmed that this is *not* the case, it should subsequently be assessed whether the conduct has restrictive effects on competition. As it was set out in *Consten and Grundig,* this means that there is no need to take into account the concrete or actual effects of an agreement, when the party alleging the infringement has been able to demonstrate that it has as its object the restriction of competition.[21]

The fact that finding a restrictive object suffices to establish an infringement of article 101(1) TFEU makes of the object approach an extremely useful instrument for competition authorities. As the Commission advances, 'a full economic analysis of every case would be very costly and might not be justified by gains in identifying market situations (…) that were detrimental to competition. In those circumstances, competition policy may have to resort to relatively simple rules of thumb and do without a full economic analysis of every case'.[22] By qualifying certain agreements as restrictive by object, the Commission and the Courts can enhance procedural economy by avoiding certain costly proof requirements, such as proof of market power.[23]

The distinction of object and effect cases hence has significant implications for both enforcers and companies concerned. Once the anti-competitive object is found, enforcers do not have to look further to the effects. Companies found to be engaged in object cases may, however, find it quite hard to adduce (convincing) evidence that their cooperation is worthwhile.

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[20] *Société Technique Minière* (n 13), para 249. See for confirmations, *e.g.* Case C-234/89 *Stergios Delimitis v Henninger Bräu AG* [1991] ECR 935, para 13; Joined Cases T-374/94, T-375/94, T-384/94 and T-388/94 *European Night Services* [1998] ECR II-3141, para 136.

[21] Joined Cases 56 and 58-64 *Établissements Consten and Grundig-Verkaufs-GmbH v Commission* [1966] ECR 429, para 342.

[22] EU Commission, 'Green Paper on Vertical Restraints in EC Competition Policy' COM (96) 721 final, 22 January 1997, para 86.

[23] See also Olav Kolstad, 'Object contra effect in Swedish and European competition law, A Report written for the Swedish Competition Authority', 4 <http://www.kkv.-se/upload/Filer/Trycksaker/Rapporter/uppdragsforskning/forsk_rap_20093_object_contra_effect.pdf> accessed 12 December 2012; Saskia King, 'The object box: law, policy or myth?', (2011) 7(2) European Competition Journal 269, 273; Matthew Bennett and Philip Collins, 'The Law and Economics of Information Sharing' (2010) 6(2) European Competition Journal 311, 313.

Yet, it is equally important to keep in mind that by prohibiting cooperation – regardless of whether it is restrictive by object *or* effect – article 101(1) TFEU seeks to safeguard competition as a 'process' and to promote consumer welfare.[24] Since both aspects of the prohibition have the same objective, this necessarily implies that they also share a common vision on what constitutes a restriction of competition. When the CJEU, in *Société Technique Minière v Commission*, ruled that 'article [101(1) TFEU] is based on an assessment of the effects of an agreement from two angles of economic evaluation',[25] it indeed confirmed that both the 'object' and 'effect' approach are designed to identify the same outcome of collusion: the restriction of competition. The key difference between 'object' and 'effect' thus resides in the method used to establish that competition is restricted.[26]

3. The Concept of Restriction by Object

As long ago as in 1966, the CJEU in *Société Technique Minière v Commission* defined the basic guidelines of the concept 'object restriction'. In this case it established that an agreement is considered to be restrictive by object when the analysis of its clauses 'reveal[s] the effect on competition to be sufficiently deleterious'.[27] More recently, in *BIDS*, the Court explained the concept by referring to the differences between object and effect cases. It held that '[t]his distinction arises from the fact that certain forms of collusion between undertakings can be regarded, *by their very nature*, as being injurious to the proper functioning of normal competition'.[28]

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[24] See Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P *GlaxoSmithKline Services Unlimited* v. *Commission* [2009] ECR I-9291, para. 63. Along similar lines Case C-8/08 *T-Mobile Netherlands BV, KPN Mobile NV, Orange Nederland NV and Vodafone Libertel NV v Raad van bestuur van de Nederlandse Mededingingsautoriteit* [2009] ECR I-4529, paras 36-39.

[25] *Société Technique Minière* (n 13), para 248.

[26] See Odudu, *The Boundaries of EC Competition Law: The Scope of Article 81 EC* (n 15) 160; Okeoghene Odudu, 'Restrictions of Competition by Object: what's the beef?' (2009) 9(1) Competition Law Journal 11, 13. See also Kolstad (n 23) 3. And for the view that the object and the effect approach require a different meaning of what constitutes a restriction of competition, see Oliver Black, *Conceptual foundations of Antitrust* (Cambridge University Press 2005) chapter 3.

[27] *Société Technique Minière* (n 13), para 249.

[28] Case C-209/07 *Competition Authority v Beef Industry Development Society Ltd and Barry Brothers (Carrigmore) Meats Ltd* [2008] ECR I-8637, para 17 (emphasis added).

The intrinsic damaging nature of certain agreements is thus presented as the main feature of restrictions by object. This aspect was also emphasized by the Commission in its Guidelines on the application of article 101(3) TFEU, in which it described 'restrictions by object' as 'those that by their very nature have the potential of restricting competition'. According to the Commission, 'these are restrictions which in light of the objectives pursued by the Community competition rules have such a high potential of negative effects on competition that it is unnecessary for the purposes of applying article 101(1) to demonstrate any actual effects on the market'.[29] Moreover, in *T-Mobile* the CJEU clarified that this inherent capacity or potential to have a negative impact on competition is sufficient to qualify a practice as having an anticompetitive object.[30] When, in other words, an agreement is capable, as such of resulting in a restriction of competition, it is irrelevant whether the agreement actually results in such an anticompetitive outcome.[31]

This discussion shows that the notion of 'restrictions by object' is exclusively reserved for agreements which are extremely likely to have a significant negative impact on competition. Because a restriction of competition will be the 'most probable' effect of the agreement, there is no need to conduct a fully-fledged economic evaluation of the conduct. It would, however, be inappropriate to maintain that *all* agreements which are potentially capable of harming the competitive process constitute restrictions by object, without the need to consider their effects on the market at all. As the Court recognised in its seminal case *STM*, in order to establish the damaging nature of an agreement, the object approach necessarily requires taking into account its effects, even if such consideration is limited to the finding that effects are 'sufficiently deleterious'.[32]

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[29] Guidelines on the application of Article 101(3) TFEU (n 18) para 21.
[30] *T-Mobile* (n 24), para 31. See further section 4.
[31] ibid para 31. It should also be taken into account that the object approach entails the risk of being over-inclusive or producing the so called false positives. This risk, however, can be counteracted by applying Article 101(3) to agreements producing countervailing effects. See Jones (n 15) 761 *ff*; Kolstad (n 23) 5.
[32] *Société Technique Minière* (n 13) para 249. See also Bruno Lebrun and Thibault Balthazar, 'Definition of Restrictions of Competition by Object: Anything New Since 1966?' (2011) International Comparative Legal Guide Series - Cartels & Leniency 16, 17. King (n 23, 274) notes that 'it is clear that the effects of an agreement will usually have to be considered, in one form or another, under the object criterion in any event'.

The object approach can be seen, in fact, as a presumption that certain agreements automatically produce adverse effects on competition. Once 'object' is established, the negative impact of the agreement will be presumed, regardless of whether it actually materialises.[33] A prohibition constructed upon such a presumption is justified when, based on experience and/or economic analysis, it can be inferred with a high degree of probability that certain agreements have a considerable negative impact on the market and, thus, jeopardize the objectives pursued by the European Union (EU) competition system.[34] Those invoking the infringement do not have to actually prove any concrete (negative) effects because it is assumed that when the clauses of an agreement are as such *designed* to restrict competition, the probabilities that it actually does so will be remarkably high. Put differently, a restriction of competition is extremely more likely to occur when a practice *aims* at effectively doing so, than when the agreement pursues a different (competitive) goal. Consequently, if it can be confirmed that an agreement *aims* at restricting competition, this will be enough to justify a straightforward prohibition under article 101(1) TFEU.[35] This brings us to the next question: how should an anticompetitive aim be established?

4. The Establishment of Restriction by Object

The object or aim of an agreement is not a substantive requirement that can be determined by solely referring to the subjective intention of the parties, but a criterion that should be discerned on the basis of the objective features of the agreement.[36] In this connection, since the *Société Technique Minière*-case the European Courts have frequently held that to find an object restriction, regard must be had, *inter alia*, to the provisions of the

[33] This line of reasoning has also been embraced by the Commission, which describes 'object' as a 'presumption (…) based on the serious nature of the restriction and on experience showing that restrictions of competition by object are very likely to produce negative effects on the market'. Furthermore, the Commission distinguishes the object and effect analysis based on the fact that '[i]n the case of restrictions of competition by effect there is no presumption of anticompetitive effects'. See Guidelines on the application of Article 101 (3) TFEU (n 18), paras 21 and 24. The Horizontal Cooperation Guidelines also reiterate this vision by indicating that the 'object' analysis is that applied to 'agreements (…) presumed to have negative market effects' (see Cooperation Guidelines, para 18).
[34] See *e.g.* Guidelines on the application of Article 101(3) TFEU (n 18) para 21.
[35] See for a similar reasoning King (n 23) 292.
[36] See also ibid 292.

agreement, the objectives it seeks to attain and the economic and legal context of which it forms a part.[37]

Accordingly, an anticompetitive purpose can in principle not be established by using an abstract standard. Instead, it appears that the CJEU opts for an individual or case-by-case analysis of whether an agreement aims at restricting competition, which must be assessed in its *legal and economic context*. Following this reasoning, it can be confirmed that, in essence, the object approach is not designed to invariably cover particular categories of agreements. Theoretically, any agreement can be held to have an anticompetitive object. The decisive question is actually whether an objective examination of the agreement – considering its precise background and circumstances – shows that the substantive conditions of article 101(1) TFEU are present.[38] It is, indeed, true that establishing the purpose of an agreement necessarily requires an assessment of the legal and economic context to establish the presumption of anticompetitive effects. However, very frequently the content of an agreement reveals the existence of such an inherent restriction, that this assessment can be conducted on a fairly summary basis.[39]

This abridged approach has been reflected in a number of judgements. One of the most representative cases of this trend is *Montedipe v Commission.*[40] This case concerned an appeal against a Commission decision fining a series of agreements fixing prices and controlling volume quotas.[41] The applicant submitted that the Commission should have appraised the agreement in

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[37] See e.g. *GlaxoSmithKline Services Unlimited* (n 24), para 58; Case C-551/03P *General Motors* v *Commission* [2006] ECR I-3173, para 66; *T-Mobile* (n 24), para 31. In all these cases the Court refers to the 'specific legal and economic context'. Furthermore, the list of factors set out by the Court does not appear to be exhaustive in nature.

[38] See also Jonathan Faull and Ali Nikpay 'Article 81' in J. Faull & A. Nikpay (eds), *The EC Law Of Competition* (2nd edn, Oxford University Press 2007) 223; King (n 23) 279 citing Paul Lasok QC's article presented to the Law Society on 8 October 2007, 'Recent Developments in the Rule of Reason in EC Anti-trust Law'.

[39] See Faull & Nikpay (n 38) 223. See also Case T-168/01 *GlaxoSmithKlineServices Unlimited* v. *Commission* [2006] ECR II-2969, para 119. In this case the General Court stated that the analysis of object 'may be abridged when the clauses of the agreement reveal in themselves the existence of an alteration of competition'. However, this analysis 'must, on the other hand, be supplemented, depending on the requirements of the case, where that is not so'.

[40] Case T-14/89 *Montedipe v Commission* [1992] ECR II-1155.

[41] See *Polypropylene* (IV/31.149) Commission Decision 86/398/EEC [1986] OJ L 230/1.

relation to its economic context, thereby applying a rule of reason.[42] The General Court in its examination of the object of the agreement found that

> the fact that the infringement of article [101(1) TFEU], in particular subparagraphs (a) and (c), is a *clear one* necessarily precludes the application of a rule of reason, assuming such a rule to be applicable in Community competition law, since in that case it must be regarded as an infringement *per se* of the competition rules.[43]

It is difficult to overlook the practical importance of this verdict. For the first time, the concept of object was explained by comparing certain types of agreements (these enumerated in subparagraphs (a) and (c)) with *per se* infringements under US antitrust law. According to the American *per se* rule, 'there are certain agreements (…) which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use'.[44] By making such a comparison, the Court clearly acknowledged that certain agreements will be *automatically* associated with restrictions by object and, therefore, prohibited by article 101(1) TFEU. Furthermore, since the *per se* approach only applies to agreements with a lack of redeeming virtues, the Court also clarified the scope of application of article 101(3) TFEU. A comparable interpretation of article 101(1) TFEU can be found in *European Night Services.*[45] In this case, the General Court noted that when assessing the effects of an agreement,

> account should be taken of the actual conditions in which it functions, in particular the economic context in which the undertakings operate, the products or services covered by the agreement and the actual structure of the market concerned, *unless* it is an agreement containing *obvious* restrictions of competition such as price-fixing, market-

[42] The Commission, on the other hand, disputed the applicant's analysis of the American and Community case-law on the rule of reason. The Commission did, however, accept that the application of article 101(1) TFEU requires examination of the cartel's economic context and its probable or actual effects. In this case that examination is contained in points 2 to 13 and 89 to 94 of the Decision. See also *Montedipe* (n 40), para 261.

[43] *Montedipe* (n 40) para 265; see also Case T-148/89 *Tréfilunion SA v Commission* [1995] ECR II-1063, para 109, confirming this statement.

[44] The *per se* approach was defined by the US Supreme court in *Northern Pacific Railway Co v United States* 356 US 1, 5 (1957).

[45] See *European Night Services* (n 20).

> sharing or the control of outlets.[46] In the latter case, such restrictions may be weighed against their claimed pro-competitive effects only in the context of article 101(3), with a view to granting an exemption.[47]

The language of the General Court in this case arguably supports the view that two paths of assessment can be followed when scrutinizing the object of an agreement. First of all, where the anticompetitive consequences of a certain agreement are not immediately apparent, it is necessary to conduct a careful and close analysis of its content appraised in its legal and economic context, in order to build a solid presumption of its negative impact. This approach differs from the second 'more abridged assessment' used for the most obvious restrictions of competition.[48]

As these judgements illustrate, the European Courts seem to accept the principle that certain categories of agreements – including practices designed to fix prices, share markets and limit output – have by definition the (almost) invariable effect of restricting competition. When a restriction of competition is the inherent consequence of a certain type of agreements, it is considered that the agreement in question restricts competition 'as such'. Once an agreement of a certain type is classified as restrictive, it may be deduced, based on the premise that similar agreements lead to similar effects, that the agreement has the natural tendency to restrict competition. In essence, the classification of the agreement as falling within a certain category will then trigger the presumption of anticompetitive effects.[49]

In the analysis of these clearest infringements, the role of the legal and economic context of an agreement will, therefore, be rather limited. The approach of the European Courts, in effect, supports the theory that 'the inherently anticompetitive object which characterizes the conclusion of certain agreements, more specifically those expressly prohibited under article 101(1)(a)-(c) TFEU, cannot be altered by an analysis of the economic

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[46] Referring to *Tréfilunion SA* (n 43) para 109.
[47] *European Night Services* (n 20) para 136.
[48] See also King (n 23) 288. See for a different opinion Arianna Andreangeli, 'From Mobile Phones to Cattle: How the Court of Justice Is Refraining From the Approach to Article 101 (Formerly 81 EC Treaty) of the EU Treaty' (2011) 34(2) World Competition 234 *ff*.
[49] See *GlaxoSmithKline Services Unlimited v Commission* (n 24), Opinion of AG Trstenjak, para 91. 'This standardised approach certainly creates legal certainty. However, it is always subject to the provision that the legal and economic context of the agreement to be examined does not preclude application of this standardised assessment'. See also Kolstad (n 23) 6.

context in which the agreement is situated'.[50] In other words, an economic analysis cannot override the inescapable reality that some categories of agreements have the (almost) invariable effect of restricting competition.[51] The result is that, in contrast to more ambiguous practices, in cases which are typically seen as involving 'obvious' restrictions, an examination of the legal and economic context will only be relevant to determine whether such context excluded any possibility of effective competition. If, for instance, the national legislation in a Member State has the effect of restricting competition and companies have no margin at all to compete effectively, the infringement of article 101 TFEU cannot be established (either by object or effect) even if the agreement contained an 'evident' restriction.[52] Consequently, only on very rare occasions, if at all, will undertakings involved in such serious restrictions be able to escape the prohibition of article 101 TFEU based on an analysis of the legal and economic context in which an agreement is to be applied.

5. Conclusions on the Object Approach

Given the impossibility to distinguish beneficial exchanges of information from harmful exchanges of information, the legal assessment of this activity represents a number of difficulties. On the one hand, a *per-se* or absolute prohibition would not be recommendable, as this would lead to an exclusion of exchanges that have pro-competitive or neutral effects (Type I Errors).

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[50] Joined cases 8 to 11-66 *Société anonyme Cimenteries C.B.R. Cementsbedrijven N.V. and others v Commission* [1967] ECR 93, para 1088, citing Case T-141/89 *Tréfileurope Sales SARL v Commission* [1995] ECR II-791, para 109 and *European Night Services* (n 20) para 136.

[51] See *European Night Services* (n 20) para 136.

[52] In *Société anonyme Cimenteries* (n 50) para 1088, the Court held that '[t]he conformity of conduct with Article [101(1)] of the Treaty must be assessed in its economic context. However, even if the applicants' assertions were well founded, they are not of such a nature as to prove that the economic context excluded any possibility of effective competition'. This argumentation was also adopted in *Montecatini* (Case C-235/92 P *Montecatini SpA v Commission* [1999] ECR I-4539, para 127 ('[I]nasmuch as Monte's criticism is intended to show that, as a result of circumstances beyond the control of the undertakings involved, the agreements and concerted practices which were the subject of the Polypropylene Decision could not have had an anti-competitive object, it must be pointed out that, even if well founded, Monte's claims are not such as to prove that the economic context excluded any possibility of effective competition') relying on Joined Cases 209 to 215 and 218/78 *Van Landewyck and Others v Commission* [1980] ECR 3125, para 153 and Joined cases 240, 241, 242, 261, 262, 268 and 269/82 *Stichting Sigarettenindustrie and others v Commission* [1985] ECR 3831, paras 24-29. This argumentation became known as the 'State action defence'. See also Ingeborg Simonsson, *Legitimacy in EU Cartel Control* (Hart Publishing 2010) 117-119.

On the other hand, if companies were simply free to engage in information exchange-activity with complete impunity, anti-competitive exchanges may be left unchallenged, leading to under enforcement (Type II Errors).[53]

Following this line of reasoning, it seems, at first sight, that an effects-based assessment may be helpful to avoid both types of errors. However, as noted by Bennett and Collins, an individual analysis places a high cost and burden on firms, as well as on competition authorities and private claimants. Companies may not be in a position to carry out complex economic analysis for every individual situation, meaning that they may be unwilling to engage in certain activities, even if they are beneficial. Furthermore, bringing in cases could become considerably more difficult for enforcement agencies and private claimants, which could result in under-enforcement. As a result, an individual approach might similarly lead to both types of errors.[54] In these circumstances, it appears opportune to examine whether the object assessment offers any advantage compared to a *per se* prohibition and the effects-based analysis.

As observed earlier, the object assessment is not to be set on the same par, nor to be confused with the more radical US *per se* approach. The finding of a restriction by object basically consists in a presumption of anti-competitiveness. The European jurisprudence suggests that this presumption can be established according to two different methods. Firstly, the most severe and straightforward types of agreements, this is, agreements which have inherently damaging effects, can be directly 'classified' as object restrictions. Secondly, agreements which have a more diffuse anticompetitive nature or are more dependent on the precise circumstances of the case, need to be appraised in their *legal and economic context* in order to confirm their anticompetitive object and, thereby, their presumed anticompetitive nature.[55] If an agreement is found to have a restrictive object according to one of these two methods, its actual effects will no longer be relevant and the presumption of illegality under article 101(1) TFEU will effectively be established. Once an agreement is found to constitute a restriction by object, the burden to prove that the practice is not anticompetitive under article 101(3) TFEU, shifts to the parties to the agreement. Taking into account this background in the field of information

[53] See Padilla (n 3) 435.
[54] Bennett and Collins (n 23) 313. See also Padilla (n 3) 435.
[55] See also King (n 23) 294-295.

exchange, as it is next examined, the object system entails a number of benefits for companies and enforcement agencies alike.

Since the object assessment is based on the inherent and predicted harm resulting from a certain type of activity, it can be an extremely useful instrument in enforcement terms because it allows competition authorities to prohibit the most likely harming kinds of agreements at a reasonable cost.[56] This approach can be considered suitable from a policy perspective because, simply said, there is little to lose by establishing a presumption of illegality when in the great majority of cases the actual effects of the type of activity in question turn out to be detrimental for competition.[57] Moreover, a system based on the probable effects of a certain category of agreements will not only enable competition authorities to enforce the competition rules in an efficient manner, but can also provide legal certainty for undertakings in this complex area.[58]

It should, however, be noted that the object assessment is not intended to be a perfect rule, designed to predict the negative effects of certain sorts of agreements with 100% certainty. In fact, while the object approach may be able to reduce type I and/or type II errors, no rule is completely capable of eliminating all errors.[59] Therefore, even if a category of agreements (e.g. price fixing) is generally classified as 'object restriction', it is of course possible that, in an individual, case one agreement within this category has a neutral effect or even leads to benefits. Still, a general classification under the object approach will make sense in policy terms when the category of agreements falling under the 'object' heading 'more often than not, turns out

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[56] Padilla (n 3) 435.

[57] Bennett and Collins (n 23) 313, referring to Matthew Bennett and others, 'Resale Price Maintenance: Explaining the Controversy, and Small Steps Towards a More Nuanced Policy' in B.E. Hawk (ed), *International Antitrust Law & Policy: Fordham Competition Law* 2009 (Juris Publishing 2010). See also Padilla (n 3) 436; Kai-Uwe Kühn, 'Fighting collusion by regulating communication between firms' (2001) 16(32) Economic Policy 169, 171. Kühn adds that '[f]ocusing on communication has two advantages over focusing on the behaviour in the product market. First, it is far more frequent that we can observe communication between firms than that we have appropriate data to be able to infer behaviour on the product market. Despite its illegality, communication about future conduct often takes place in written form. Written evidence can be found by competition policy authorities and is clear evidence for communication. Even oral communication is to some extent verifiable through witness evidence in court. Secondly, (…) certain types of communication can be suppressed at little economic cost (…)' (footnotes omitted).

[58] See also King (n 23) 273.

[59] See also Padilla (n 3) 436.

to be harmful' under an individual assessment.[60] Moreover, since the agreements falling under such an assessment will frequently not satisfy the conditions of article 101(3) TFEU, the object approach enhances the preventive nature of competition law by establishing a presumption of illegality for conducts which only seldom generate benefits for the economy and consumers.

Furthermore, even if the object criterion is not a perfect rule in the economic sense, one should bear in mind that this type of assessment, in contrast with the US *per se* approach, offers two 'filters', which help to reduce the risk of false positives (Type I Errors). The first filter is implied in the object approach, and regards the possibility to examine the agreement by reference to the 'legal and economic context'. This examination is meant to elucidate whether or not, given the precise circumstances of the individual case, the anticompetitive objective of an agreement can still be confirmed. In other words: is the agreement 'designed' to restrict competition in its economic and legal context? If this question cannot be answered in the affirmative, the practice cannot be presumed anticompetitive by being qualified as restrictive by object, but should be carefully assessed under the effects-based approach.[61] The second filter regards the application of article 101(3) TFEU. More specifically, even if an agreement is qualified as restrictive by object under article 101(1) TFEU, the exemption door is still open for all information exchanges which actually produce countervailing benefits and fulfil the conditions of article 101(3) TFEU. Accordingly, it is reasonable to point out that this regime of rebuttable presumptions can, in effect, be an adequate instrument to differentiate the alarming types of information-sharing from the beneficial ones in an affordable manner.[62]

Yet, one of the major challenges in the area of information sharing is to establish which types of exchanges may and should, in principle, be considered as object restrictions. This aspect is certainly relevant because a wrong object-rule will logically lead to unjustified decisions or, at least, to a

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[60] Bennett and Collins (n 23) 314.

[61] In contrast, it is not necessary to analyse whether or not the presumption of anticompetitive effects can be correctly established in the individual case; the only relevant criterion will be whether the context of the agreement may modify its aim. This observation is consistent with the fact that once the anticompetitive object of an agreement has been found, it is not necessary to evaluate its economic effects.

[62] See also Matthias Pflanz, 'The economics of information exchange' (CRA International GCLC Lunch Talk, Brussels, 6 October 2008) 13. < http://www.crai.com/ecp/assets/(2008-10-06)_Pflanz.pdf> accessed 12 December 2012.

misguided application of the competition provisions. The first step to substantiate the more intense use of the object approach in these cases is to demonstrate that information exchanges can entail likely and significant anticompetitive risks. If the concerns about information sharing turn out to be minor, there are no reasons to adhere to the object analysis. In that case, competition authorities should no longer waste their limited resources on the detection and punishment of a trivial conduct.[63]

III. The Anticompetitive Risks of Information Sharing From an Economic Perspective

Economic analysis has become an extremely useful tool to illustrate the anticompetitive damage that can result from information sharing practices. If we were able to determine the main concerns potentially stemming from information sharing activities, it would be considerably easier to identify the types of exchanges which give rise to such concerns and which should, consequently, be analysed with more caution. Thus, setting a ranking of the most harming effects and the respective types of information exchange entailing such risks will help us to determine what forms of information sharing qualify for an assessment under the 'object' approach from an economic perspective. The following section explores the theoretical predictions on the anticompetitive effects of information exchange, and evaluates the main implications for the construction of a coherent and effective assessment of object restrictions.[64]

1. Game Theory and Collusion

Exchanges of information among competing companies increase market transparency, which can promote allocative and productive efficiencies. However, enhanced transparency in the market not only produces benefits, but can also entail significant anticompetitive risks. The primary way in which information exchange among competitors can harm the competitive process is through the creation of coordinated effects, *i.e.* when this activity

[63] Kühn, 'Fighting collusion by regulating communication between firms' (n 57) 169-170, 181.

[64] See also among others *ibid*; Xavier Vives, 'Information sharing: economics and antitrust' in *The Pros and Cons of Information Sharing* (Swedish Competition Authority, Stockholm 2006) 83-100; Bennett and Collins (n 23); Kai-Uwe Kühn and Xavier Vives, 'Information Exchanges Among Firms and their Impact on Competition' (Institut d'Anàlisi Econòmica CSIC, Barcelona, June 1994) < http://blog.iese.edu/xvives/files/2011/09/Information-Exchanges-and-their-Impact-on-Competition.pdf>; Padilla (n 3) 424.

has the effect of facilitating collusion in the market.[65] The existence of collusion is currently mainly explained on the basis of game-theoretic[66] oligopoly theory.[67] Game theorists envision the market play between competitors as a game where the competing agents are rational players in the market, attempting to maximize their profits. The whole point is to find a possible equilibrium, that is to say, a combination of (individual) strategies that represent the best strategy for each player.[68] In non-cooperative games[69] such equilibrium will be 'competitive' only within a static setting. In effect, economic theory shows that, within a static one-shot game framework, even if companies have a collective incentive to collude and increase their joint profits, the individual interest of each firm in charging a price inferior to the collusive supra-competitive price, which allows them to significantly

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[65] Economic theory additionally indicates that anticompetitive harm can also derive from *non-coordinated effects* of information exchanges. In this context, it is recognized that information exchange can lead to foreclosure in the market. By sharing information, companies may place potential new entrants (which are not part of the information sharing scheme) at a significant disadvantage. These effects can only occur when the information shared concerns highly strategic conduct and the exchange covers a great part of the market (See *e.g.* OECD, Policy Round Tables: Information Exchanges Between Competitors under Competition Law (n 3), Executive Summary, 11. Since these effects are, however, rather unlikely and generally conceived as a minor concern, this work will only focus on the coordinated effects of information exchange.

[66] The interdisciplinary research field of game theory was first created in 1944 by Von Neumann and Morgenstern (John Von Neumann and Oscar Morgenstern, *Theory of Games and Economic Behavior* (Princeton University Press 1944). However, this work did not receive much interest until the 1970's. Since then, game theory has been evolving and today is considered the key method to study oligopolies.

[67] Oligopolistic models are used to study interaction among firms in the market because the likelihood that competitors attempt to raise prices by cooperating will be much higher in an oligopoly than in a perfectly competitive industry. See further *e.g.* John Connor, *Global Price-Fixing* (Springer 2007) 19-20.

[68] The concept of equilibrium in oligopoly theory is the Nash, non-cooperative equilibrium. This notion was firstly developed in 1950 by the American mathematician John F. Nash Jr. See John Nash, 'Non-Cooperative Games' (1951) 54 (2) The Annals of Mathematics 286; see also Luis Kaplow, 'On the Meaning of horizontal agreements in competition law' (Discussion Paper No. 69105/2011 Harvard Law School Cambridge) 85-86. <http://www.law.harvard.edu/programs/olin_center/papers/pdf/Kaplow_691.pdf> accessed 12 December 2012.

[69] Game theory is divided into the *non-cooperative* branch and the *cooperative* branch. In cooperative games, competitors may communicate and make binding agreements. In non-cooperative games each company determines its market strategy independently, based alone on the predicted behaviour of its competitors. Since oligopolistic markets are considered problematic because firms do not (even) need to communicate to collude, oligopolies are normally analysed using non-cooperative game theory. See Sigrid Stroux, *US and EC oligopoly control* (Kluwer Law International 2004) 13. For an analysis of both branches, see James Friedman, *Oligopoly and the Theory of Games* (North-Holland, Amsterdam 1977).

increase their market share, will be the dominant strategy.[70] The equilibrium in these circumstances will be reached when none of the companies can lower their prices without incurring losses.

However, the evolution of economic theory has demonstrated that it is preferable to study oligopolistic business behaviour from a dynamic repeated game perspective, rather than from the static framework provided by one-shot games.[71] In contrast to the model within which companies interact only once and the overriding strategy is that each firm deviates, within this new dynamic framework any collectively beneficial outcome (supra-competitive pricing) can be achieved and maintained as equilibrium when agents interact repeatedly.[72] In a model of infinite interaction between competitors, the fact that firms interact frequently and repeatedly, and that they perceive this reality, may modify the player's strategies and, thereby, the final outcome.[73] If companies sense that the short-term profits resulting from an individual price reduction will not compensate for all the future losses produced by retaliation, all firms will be reluctant to deviate, and supra-competitive prices will be maintained as a result.[74] In order to secure the unprofitability of deviation and, thereby the stability of a common line of conduct, it is essential that deviations can be *detected* within a small time lapse and that a *punishment* mechanism exists that can outweigh the potential profits from deviation. This obviously implies that such

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[70] In static one shot game models each firm can only 'move once' without knowledge about the moves of the rest of the players. In the market, this means companies will only have two choices: to cooperate with their competitors or to compete independently (see *e.g.* Jonathan Baker, 'Two Sherman Act section 1 dilemmas: parallel pricing, the oligopoly problem, and contemporary economic theory' (1993) 38(1) *The Antitrust Bulletin* 143, 153). From the game theory perspective, the model of a 'prisoner's dilemma' illustrates the choices of oligopolists, and their respective pay-offs. In a 'one-shot' setting, the outcome of the dilemma will always be that each undertaking behaves independently.

[71] Repeated games can be played infinitely or finitely, but without any previous knowledge of the last game. Games which are repeated finitely and the *last game is known,* are rather comparable to one-shot games than to repeated games. See Baker (n 70) 153. See generally Drew Fudenberg and Jean Tirole, *Game Theory* (The MIT Press 1991) 145-206; David Kreps, *Game Theory and Economic Modelling* (Oxford University Press 1990) 97.

[72] An official statement of this fact is known as the Folk Theorem. The Folk Theorem states that when players are patient enough, a cooperative outcome which satisfies all the features required by a Nash equilibrium can be reached under a non-cooperative game. See further Fudenberg and Tirole (n 71) 152-154.

[73] In effect, when firms compete in a market they are well aware of the fact that they will 'keep on playing the game' repeatedly with the same opponents. See Baker (n 70) 154.

[74] See e.g. Kaplow (n 68) 98; OECD, Policy Round Tables: Information Exchanges Between Competitors under Competition Law (n 2) Submission of France, 172.

punishment must be severe enough to make firms stick to collusion, but also that such threat of punishment is (perceived as) credible.[75, 76]

It follows from this discussion that, in order to collude, companies are confronted with three principal obstacles. First, they must reach a unanimous vision on the terms of coordination; second, they should be able to monitor the adherence to the agreed principles of coordination; and third, they must be able to effectively punish firms which deviate from the terms of coordination. Bearing in mind these observations, the next part explains how increased market transparency, achieved through information exchange, may have different functions in facilitating collusive behaviour. First, it may facilitate firms to achieve a supra-competitive pricing strategy. Secondly, it may allow firms to effectively detect and punish deviations from the collusive terms.

2. Reaching a Point of Coordination through Information Exchange

In the vast majority of cases where collusion is viable, there is a multiplicity of possible equilibriums that can be sustained through a collusive scheme. This wide array of equilibriums, ranging from the competitive price to the monopoly price, immediately raises one of the most difficult and important questions for the involved companies: which equilibrium should be

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[75] The previous perception assumed, in contrast, that since firms are generally more interested in future profits (than in the short run profits) they would automatically charge the collusive price. The reasoning behind this assumption was that if a firm decided to cheat, its rivals would never be willing to cooperate again and, thus, the firm would *never* receive the cartel benefits in the future. Since companies will normally not be only interested in the short term profits, they will decide to never deviate. Further evolution in economic theory (since the Folk theorem) has, however demonstrated that detection and punishment mechanisms can make cooperation possible even after cheating. See Baker (n 70) 155; Carl Shapiro, 'Theories of Oligopoly Behaviour' in R. Schmalensee and R. Willig (eds), *Handbook of Industrial Organization* (Elsevier 1989) 329-414.

[76] See Stroux (n 69) 14. Stroux comments that '[a]s punishment is costly also for the punishing firms the punishing firms need to possess or be able to produce low cost excess capacity in order to lower the prices. While below cost pricing might not constitute a credible threat for punishment, as the punishing firms also have to suffer losses, the threat to return to competition instead might be convincing. This strategy is however only credible if it is more profitable for the punishing firms to return to competition than to passively accommodate, i.e. allowing the cheating firm to deviate. To enhance the credibility of punishment firms can tie their hands by making irreversible (sunk) investments, i.e. in order to acquire excess capacity, or commit themselves to most favored customer clauses or meeting competition clauses in sales contracts'.

selected?[77] This question becomes more pertinent when the equilibrium strategies among companies are not common knowledge due to the lack of communication which often results in general strategic uncertainty.[78]

If communication is absent, it is still possible that companies share the same preferences regarding the selection of equilibrium and, thus, make a choice which is considered by every company as being the most beneficial outcome from a collective point of view. Nonetheless, there is no guarantee that firms will have a common vision on the equilibrium that should be played. In fact, this situation is rather infrequent because firms generally have different cost structures as well as conceptions on demand, and may also sell dissimilar products. As a result, their individual takings of equilibriums will most likely differ among them.[79] Keeping this in mind, it can be stated that in absence of any communication, the equilibrium selection issue will be a major obstacle for firms, since selecting an equilibrium which is not considered fair or appropriate by *all* participants may trigger retaliation or result in less proficient coordination.[80] In such cases, colluding firms may find in information sharing an extremely useful instrument to eliminate or reduce the strategic uncertainty surrounding this issue, and come to a mutually advantageous and efficient equilibrium.[81, 82]

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[77] Margaret Levenstein and Valerie Suslow, 'Cartel bargaining and monitoring: The role of information sharing' in *The Pros and Cons of Information Sharing* (Swedish Competition Authority, Stockholm 2006) 44; see also Kaplow (n 68) 98; Kühn, 'Fighting collusion by regulating communication between firms' (n 57) 174.

[78] See Kühn, 'Fighting collusion by regulating communication between firms' (n 57) 181. Kühn also argues that communication matters for various reasons. 'The first reason stems from the problem of 'strategic uncertainty' in games that have co-ordination problems. In the definition of a Nash equilibrium it is assumed that in equilibrium the strategies played by every player are common knowledge. In many games with a unique Nash equilibrium this will not be more restrictive than assuming common knowledge of rationality (citations omitted). However, in games with multiple equilibria it cannot be assumed that, in the absence of communication about planned conduct, players can figure out what the rival will play. How can one firm be sure that the other will play the 'right' equilibrium strategy or be sure that the other firm understands that it understands what should be played?'.

[79] Levenstein and Suslow (n 77) 44; see also Kühn, 'Fighting collusion by regulating communication between firms' (n 57) 181; Kaplow (n 68) 98-99.

[80] Bennett and Collins (n 23) 321. In this respect Motta notes that '[i]f firms cannot communicate with each other, they can make mistakes, and select a price (or a quantity) which is not jointly optimal for the firms, and might be difficult to change'. Massimo Motta, *Competition Policy: Theory and Practice* (Cambridge University Press 2004) 141. See also Levenstein and Suslow (n 77) 45.

[81] This consideration is also coherent with experimental studies on co-ordination games which seem to indicate that 'the absence of communication seems to lead to significantly less successful collusion and a downward bias of prices' (Kühn, 'Fighting collusion by

3. Which Information Is Necessary to Reach a Focal Point?

When attempting to coordinate their behaviour, not all kinds of information available to companies have the potential to reduce uncertainty. The characteristics of the information exchanged constitute an essential factor to consider with the view to determining whether such information can – or cannot – be used by companies to achieve coordination.[83] Certain features, such as the subject matter, the age of the information or the level of aggregation, play a decisive role for this assessment, which will be further analysed in the following part.

There is a general consensus among economists on the fact that information exchanges taking place among competitors regarding future intentions on prices or quantities can have an extremely positive value for undertakings who wish to coordinate their conduct.[84] The high instrumentality of this type of information is directly linked with the issues arising from the multiplicity of equilibriums, and the consequent strategic uncertainty. When companies face a set of possible equilibriums and it is not evident for them which hand should be played, information regarding future intentions and sensitive competitive variables, such as prices or quantities, obviously constitutes the key type of information which can help them to solve the equilibrium selection dilemma.[85] The extreme usefulness of this type of exchange relies on the nature of the information itself and more precisely, on the fact that it concerns intended *future* conduct and *key competition parameters* (prices and quantities). Once companies have access to this knowledge, they will no longer have to wonder which strategy their rivals will follow or which equilibrium they should play, because the simple availability of such information automatically provides an answer to these questions. It can, therefore, be affirmed that sharing this category of information does not

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regulating communication between firms' (n 57) 183). In this context it will be irrelevant whether the information is exchanged directly among the companies in question or whether this task is conducted through an intermediary or third-party. See Bennett and Collins (n 23) 321.

[82] It could, however, be argued that undertakings could also reach an equilibrium by simple price signalling without the need of exchanging any information. Nevertheless, in this case there is more room for misinterpretations of such (at times expensive) signals. In effect an attempt to reduce the equilibrium may be seen as a deviation and accordingly, trigger a price war (Kaplow (n 68) 98-99). See also *supra* note 80.

[83] See e.g. OECD, *Policy Round Tables: Information Exchanges Between Competitors under Competition Law* (n 2) Executive Summary, at 11.

[84] ibid.

[85] See for instance Vives (n 64) 89; Bennett and Collins (n 23) 321.

diminish strategic uncertainty but simply eliminates it, thereby solving the equilibrium selection problem. Although other methods (e.g. price signalling) could be used to achieve coordination, this type of exchange offers the advantage of avoiding other inconveniences such as the possibility of triggering a price war or decreasing market share.[86]

The effectiveness of information relating to crucial competitive variables must be contrasted with information which does not directly relate to the strategies of firms, like information about costs or demand.[87] Obviously, these individual types of information sharing will not necessarily reduce uncertainty about the market behaviour of competitors. Since such exchanges are not primarily relevant to solve the equilibrium issue, it is also considerably less likely that they lead to an anticompetitive collusive impact.[88] Similarly, the crucial significance of information exchanges about *future* conduct in reaching an equilibrium must also be distinguished from the function of information regarding past and current behaviour, which is mainly used to sustain a collusive agreement, once such an equilibrium has been selected.[89] However, depending on the circumstances of the case, the

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[86] See for example OECD, Policy Round Tables: Information Exchanges Between Competitors under *Competition Law* (n 2) Note by the Delegation of the European Union, 312.

[87] See, for instance, OECD, Policy Round Tables: Information Exchanges Between Competitors under Competition Law (n 2) Background Paper by the Secretariat, 49; Rainer Nitsche and Nils von Hinten-Reed, 'Competitive Impact of Information Exchange' (CRA, June 2004) 29. <http://ec.europa.eu/competition/consultations/2004_6_reg_4056_-86/note_on_information_exchange_en.pdf> accessed 12 December 2012). 'There is, however, a concern if information about past demand contributes to *sustaining* collusive agreements thereby determining unobservable prices or sales. In a majority of cases such concerns can be addressed by aggregating and anonymising information'.

[88] See also Kühn and Vives (n 64) 117. In addition, these types of information sharing are more likely to lead to efficiency benefits. Nonetheless, it has also been argued that information exchange about cost or demand conditions may also *contribute* to solve the coordination problem by helping to divide the market or to allocate quotas in a more efficient manner. For instance, asymmetric costs among companies represent an important difficulty to allocate production efficiently among firms. Likewise, exchanging information about uncertain demand, can be useful to coordinate on allocative firm efficiency (see Kühn and Vives (n 64) 91). Despite this supporting role, this type of exchange will not be useful – and will therefore not make much sense – if it is not conducted in combination with exchanges regarding prices or quantities. Accordingly, it is preferable to focus on the last mentioned type of exchange.

[89] Peter Møllgaard and Per Baltzer Overgaard, 'Transparency and competition policy' in *The Pros and Cons of Information Sharing* (Swedish Competition Authority, Stockholm 2006) 108-109 and 124.

harming effect of exchanging past and present data can be more tangible, if the information allows companies to infer the future conduct of rivals.[90]

In addition, it is important to note that when information concerning future prices or quantities is only being disclosed among competitors and consumers do not have any access to such data,[91] it is extremely improbable that the exchange is conducted for efficiency reasons.[92] The most probable motivation for such an exchange is to assist rivals in co-ordinating on the right collusive equilibrium. On the other hand, the pro- or anti-competitive nature of public information exchanges is more difficult to discern. The public character of an exchange does not exclude all possibilities of a collusive outcome. Still, its collusive potential may be considerably reduced because new market entrants, clients with buyer power and rivals excluded from the exchange, may undermine the success of the scheme.[93] Moreover, when information is publicly disclosed, all market players including consumers will have access to such information and will be able to benefit from enhanced market transparency. Therefore, it seems reasonable to argue that the pro-competitive effects of public disclosures can frequently offset their collusive risks.[94]

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[90] See Bennett and Collins (n 23) 322. More precisely these commentators state that 'information about past behaviour may still generate focal points through two mechanisms. First, when there is a price leader in the market, public announcements of current price information from this price leader may create a focal point around which similar price increases may be tacitly implemented by other firms. Secondly, sharing information about past or current costs or demand may make it easier for firms to come to a tacit understanding on a focal point for coordination'. It has, however, also been noted that '[w]hile it is not a logical impossibility that firms might spontaneously understand from an exchange of cost information what collusive price to coordinate on, it appears highly implausible'. Padilla (n 3) 424.

[91] That is, information of private nature.

[92] See for instance Møllgaard and Overgaard (n 89) 124; OECD, Policy Round Tables: Information Exchanges Between Competitors under Competition Law (n 2) Note by the Delegation of the European Union 312; see also OECD, Unilateral disclosure of information with anticompetitive effects (DAF/COMP/WP3(2012) February 2012), Background Paper by the Secretariat, 33 <http://www.oecd.org/daf/competition-/cartelsandanti-competitiveagreements/49548583.pdf> accessed 12 December 2012.

[93] OECD, Policy Round Tables: Information Exchanges Between Competitors under Competition Law (n 2) Background Paper, 33.

[94] In particular, Kühn and Vives state that '[p]rice announcements that include a commitment to (maximal) prices facilitate the comparison of prices for consumers and therefore have a pro-competitive effect. Intervention against public announcements of prices does not seem justified in this case. In contrast, when there is no public commitment to prices relative to customers it is hard to see any other purposes in the exchange of information about planned future behaviour than the intent to coordinate (or negotiate)

The effectiveness of exchanges regarding future price or sales intentions is often questioned, because they generally involve 'cheap talk', that is, non-verifiable and non-costly information. The literature suggests that when information is released with the objective of showing a focal point, companies will always have the incentive to exchange false information in order to influence and adjust the focal point to their individual interest.[95] Despite this observation, it is generally accepted that sharing information can be useful to aboard the coordination problem by avoiding that coordinating firms chose different equilibriums.[96] In addition, even if not immediately verifiable, information exchange does matter, as announced plans can be verified on a later moment and wrong announcements can be subsequently punished.[97]

4. Detecting and Punishing Deviations through Information Exchanges

As examined above, reaching a collusive equilibrium is only one of the three main obstacles that companies must surmount to successfully collude. If firms are not capable of detecting and punishing deviations, they will be unable to maintain the internal stability of their collusive behaviour which will then breakdown sooner rather than later. A major complication in this respect is that, depending on the characteristics of the market, companies

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collusive market conduct. Such private communications between producers are in their nature similar to direct negotiations about future conduct in face to face meetings'. (Kühn and Vives (n 64) 118). See also e.g. OECD, Policy Round Tables: Information Exchanges Between Competitors under Competition Law (n 2) Background Paper, 33.

[95] See OECD, Unilateral disclosure of information with anticompetitive effects (n 92) Background Paper, 10-11. See more generally Sandeep Baliga and Stephen Morris, 'Co-ordination, Spillovers, and Cheap Talk' (2002) 105(2) Journal of Economic Theory 450; Bennett and Collins (n 23) 323-324.

[96] See e.g. Møllgaard and Overgaard (n 89) 108-109; P.B. Overgaard and P. Møllgaard, *Information Exchange, Market Transparency and Dynamic Oligopoly* (School of Economics and Management - Economics Working Paper 2007-3, April 2007) 8 <http://ftp.econ.au.dk/afn/wp/07/wp07_03.pdf> accessed 12 December 2012. OECD, Policy Round Tables: Information Exchanges Between Competitors under Competition Law (n 2) Background Paper, 34 (it will be, however, necessary that the veracity of the information can be checked at a later moment).

[97] Nitsche and von Hinten-Reed (n 87) 19; see also OECD, Unilateral disclosure of information with anticompetitive effects (n 92) Background Paper, 10-11. In addition, cheap talk may also play an important role in overcoming trust issues. Once the veracity of the information disclosed by a certain firm can be corroborated, such firm will be considered reliable, which, at the same time, will reinforce the crucial personal relations among the participants. Bennett and Collins (n 23) 324; see more generally Maria Bigoniy and others, 'Trust, Salience, and Deterrence: Evidence from an Antitrust Experiment' (IFN Working Paper No. 859, 2011).

may not be able to observe and verify the past conduct of their rivals. For instance, if the general demand is unstable, or the level of transparency is low, companies will have little knowledge about their rivals' prices. It will then be extremely complicated to ascertain whether a decline in their own sales is the consequence of a deviation, or the result of a general fall in demand.[98] This situation logically hinders the detection of genuine deviations, while, at the same time, it complicates effective punishment.

Thus, by exchanging information and artificially increasing transparency, firms are able to monitor adherence to collusive schemes in a more efficient manner and, thereby, to enhance their ability to detect cheating. Simultaneously, enhanced detection enables firms to improve their punishing skills. Companies will know with more precision which firm(s) should be punished – when punishment is called for, and whether such sanctioning should be brief or sustained. Furthermore, targeted punishment satisfies a contemplated need for 'fair treatment' among colluding companies, while it also contributes to avoiding expensive costs as well as unnecessary price wars that may occur.[99] Overall, sharing information certainly constitutes an effective and efficient device in promoting the internal stability of collusion.[100, 101]

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[98] Kaplow (n 68) 99; Kühn, 'Fighting collusion by regulating communication between firms' (n 57) 173; OECD, Policy Round Tables: Information Exchanges Between Competitors under Competition Law (n 2) Submission by France, 175.

[99] See Bennett and Collins (n 23) 322-323. ('The more wide and indiscriminate punishments have to be (…) the less the coordinating firms will want to implement them. This means that when punishments are very unfocused firms will find it harder to coordinate.') See also Motta (n 80) 151.

[100] While the incapability of effectively detecting deviations will undermine the effectiveness of punishment devices and thereby make collusion more difficult, this obstacle – although important – will not be an absolute impediment to establish collusive conduct (see Edward Green and Robert Porter, 'Non-cooperative Collusion under Imperfect Price Information' (1984) 52(1) Econometrica 87). Nonetheless, in these circumstances, collusion will not be optimal and 'price war' behaviour, designed to eliminate the incentives to cheat, will frequently be observed. See, for instance, Kühn, 'Fighting collusion by regulating communication between firms' (n 57) 173; see also Levenstein and Suslow (n 77) 47.

[101] This functionality of information exchanges in facilitating monitoring and punishment is illustrated in explicit cartel cases. The following decisions demonstrate that companies frequently dedicate extensive efforts to exchange information destined to facilitate the monitoring activities and, as such, reduce the motivation to deviate. See for instance *Graphite Electrodes* (Case COMP/E-1/36.490) Commission Decision 2002/271/EC [2002] OJ L 100/ 1, para. 55; *Vitamins* (Case COMP/E-1/37.512) Commission Decision 2003/2/EC [2003] OJ L 6/1, paras 577, 276 and 359; *Plasterboard* (Case COMP/E-1/37.152) Commission Decision 2005/471/EC [2005] OJ L 166/8, para462; *Sorbates* (Case

Similarly, information sharing can play an important role in supporting and increasing the *external* stability of collusion. When prices are set close to the monopoly level and there are considerable margins of profit, new competitors may be tempted to enter the market. Such entry may destabilize coordination or even keep companies from colluding in the first place. Comparable 'risks' arise when there is sufficient buyer power for the clients to simply refuse the collusive prices. In order to prevent customers or competitors from endangering the success of coordination, information exchanges leading to sufficient market transparency can be used to identify whether new entry will occur, and to determine which companies are likely to attempt entering the market.[102]

5. Information Necessary to Maintain the (Internal and External) Stability of Collusion

While information regarding future actions can be essential to reach an equilibrium, supervising the adherence to a common line of behaviour is not a task that can be performed by sharing data concerning intended actions. Instead, the exchange of information about *current* and *past* behaviour will be far more valuable and often (almost) an indispensable ingredient in detecting and punishing deviations.[103] The more or less effective nature of the information obviously depends on its potential to reveal the *strategic* behaviour of the market participants at the moment of the exchange. Therefore, exchanges of current and past information will be the most useful types of information sharing, provided that such exchanges meet a set of conditions.

COMP/E-1/37.370) Commission Decision 2005/493/EC [2005] OJ L 182/20, para 114; *preserved mushrooms* (IV/27.039) Commission Decision 75/77/EEC [1975] OJ L 29/26, para 4(e)). See also Levenstein and Suslow (n 77) 47. Based on the key role played by information sharing in cartel cases in the context of monitoring, Levenstein and Suslow draw the conclusion that, even if collusion is not completely impossible in absence of perfect monitoring (observability), firms would certainly prefer to coordinate their behaviour according to the efficient collusion model of Friedman (James Friedman, 'A Non-cooperative Equilibrium for Supergames' (1971) 38(113) Review of Economic Studies 1). In Friedman's model with perfect observation, cheating would be immediately detected and, accordingly, timely punished. In this case scenario, companies are not tempted to deviate and price wars are not necessary.

[102] In addition, information sharing could also help to organize a collective response against the new entrants. See *e.g.* OECD, *Policy Round Tables: Information Exchanges Between Competitors under Competition Law* (n 2) Executive Summary, 31, and Note by the Delegation of the European Union, 312; M. Bennett and P. Collins (n 23) 323.

[103] See e.g. Vives (n 64) 92.

In this regard, the first factor playing an important role is the age of the information. Information concerning past actions should be as *recent* as possible in order to allow companies to impose a quick and timely punishment. When information is relatively old, the collusive participants may be unwilling to implement punishment, if a deviation is detected. Such a situation, however, may in turn reduce the credibility of the punishing device. It can be deduced that, in general terms, historical information[104] does not have a decisive utility in the context of collusion.[105] However, given the great relevance of the circumstances of any concrete case to determine which information is considered too old to be effective, assessing the precise utility of old information *a priori*, is not possible. Instead, an individual assessment of each case is required.

A second relevant element concerns the fact that the information must allow companies to identify the *strategic* behaviour of relevant market participants. In order to be effective, the information must concern the sensible competitive variables. This will be frequently the case when the information shared regards the prices being charged or the quantities being sold. Given their great efficiency for monitoring purposes, exchanges of recent or current information regarding prices or quantities are generally essential to maintain the stability of collusion. [106,107]

Thirdly, the level of aggregation is also a significant consideration. Information about past prices and quantities with a high degree of disaggregation will be most effective, since it allows for the detection of any defections with more precision. Refined and early detection will, in turn, enable companies to provide an even more effective and 'fair' punishment,

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[104] ie, information older than one year.

[105] Although the collusive potential of this information can be assessed only on a case-by-case basis. See e.g. OECD, Policy Round Tables: Information Exchanges Between Competitors under Competition Law (n 2) Executive Summary, 50.

[106] Nonetheless, it should be noted that, although this type of information can be classified as the most effective for monitoring purposes, information about aggregate demand may in some cases suffice to discern whether a decrease in individual demand was the consequence of a general drop in demand or of a concrete deviation; ibid 48.

[107] In addition, it has been commented that to be most efficient, the information shared must concern a sufficiently significant share of the relevant market. If this is the case companies will be able to prevent firms not taking part in the exchange scheme from entering the market without being detected. See e.g. OECD, Policy Round Tables: Information Exchanges Between Competitors under Competition Law (n 2) Submission by France, at 176.

while saving the costs of untargeted retaliation.[108] In addition, it seems opportune to note that the economic benefits that may result from exchanges of information of this type do not require sharing very detailed information.[109] Disclosure of aggregated data, conversely, is less problematic as such data is less prone to render the firms' strategic behaviour more identifiable.[110] Finally, if disaggregated information about recent past prices and quantities is verifiable – which is normally the case, the exchange is highly likely to enable companies to control with utmost certainty the strategy of their competitors, thereby minimizing the deviation risk and enhancing the stability of collusion.[111]

Despite the fact that this last mentioned kind of information should be considered as a highly suspicious type of exchange, judging the monitoring efficiency of a certain type of information is not a straightforward task. There are, indeed, other types of exchanges which are also effectively designed to fulfil a monitoring function, but take more discrete forms. For instance, by sharing and combining different types of (at first sight) non-problematic information, the monitoring potential of the exchange can be maximized and enable firms to identify market strategies.[112] Furthermore, the extent to which sharing information will contribute to the stability of

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[108] See Bennett and Collins (n 23) 322-323.

[109] OECD, Policy Round Tables: Information Exchanges Between Competitors under Competition Law (n 2) Executive Summary, 11; Cristina Caffarra and Kai-Uwe Kühn, 'The cost of simplistic rules for assessing information exchange: The Italian jet fuel decision' in *The Pros and Cons of Information Sharing* (Swedish Competition Authority, Stockholm 2006) 142.

[110] Nonetheless as Møllgaard and Overgaard point out 'care should be made to check the effective level of aggregation, i.e. that firms cannot 'invert' the aggregation procedure. The exchange of aggregate industry information may help firms in their planning and in the monitoring of e.g. their sales force and so has a significant efficiency potential' (n 89, 124). Additionally, is interesting to note that the more or less relevance of the level of disaggregation will also depend of the number of companies active on the market. Since each company is obviously aware of its own strategy, in a market with only two market players, an exchange of aggregated information will allow the identification of the competitors' behaviour. See e.g. OECD, Policy Round Tables: Information Exchanges Between Competitors under Competition Law (n 2) Submission by France, 176).

[111] Vives (n 64) 92.

[112] This aspect was also emphasized by the Commission in its maritime transport guidelines, in which it stated that 'in general, it is important to assess all individual elements of any information exchange scheme together, in order to take account of potential interactions, for example between exchange of capacity and volume data on the one hand and of a price index on the other'; Guidelines on the application of Article 81 of the EC Treaty to maritime transport services, para 57. See also OECD, Policy Round Tables: Information Exchanges Between Competitors under Competition Law (n 2) Submission by France, at 176.

collusion is highly dependent on the market structure *i.e.* whether collusion in the market is actually possible and sustainable, and on the potential of the information exchange to facilitate market coordination.[113]

On the basis of the foregoing, it can be concluded that, although sharing aggregate information regarding past or current prices and quantities can, in principle, be considered as an effective monitoring technique, the influence on collusion of past or current information about less relevant competitive parameters or with a lower level of disaggregation is evidently not clear-cut. Therefore, the substantive analysis of information sharing activities would not be reliable if conducted only by reference to the nature or features of the information in question.

6. Which Types of Information Can Be Directly Classified as Object Restrictions From an Economic Perspective?

The foregoing discussion of the economic literature has elaborated on the widely acknowledged view that information sharing activities can be a particularly useful method for (oligopolistic) companies attempting to charge and sustain supra-competitive prices. It has been clarified that there are acceptable reasons why information exchanges should constitute a relevant subject of concern and, accordingly, should not be permitted without any kind of limitations. At the same time, the examination has demonstrated that the standard idea that 'information sharing facilitates collusion' is, as such, too broad. Not every type of exchange has the potential to result in anticompetitive effects and, when it does, the magnitude of such potential varies depending on the nature of information and the features of the market. Taking the previous economic lessons as a starting point, a number of implications for competition policy are to be

[113] Bennett and Collins (n 23) 323. The authors point out that the role of information sharing is especially important in highly fragmented markets where information exchanges directly increase transparency. In markets which are by their very essence favourable to coordination, any exchange of information augmenting transparency in a minimal manner will be decisive and lead to considerable coordination. In contrast, the same exchange may be irrelevant when the market is not prone to coordination at all. It follows that in markets where collusion is difficult to achieve and therefore unlikely, exchanges of information can be directed at addressing the obstacles of the market. In this context, it can also be noted that the competitiveness analysis of information sharing agreement is generally consistent with the assessment conducted within the context of merger analysis. In this sense, in the assessment of coordinated effects, economists firstly examine whether coordination in the market was possible before the merger and how the merger may change the situation.

explored below.[114] More precisely, it will be examined what types of information sharing are so likely to lead to restrictive effects that it is appropriate to qualify them as object restrictions. As it will be observed, while the impact of certain types of exchanges is rather uncontroversial, in many other instances, the prediction of the effects of information sharing is more complex than is usually presented. The analysis of the second section showed that the object analysis is designed to cover practices with an inherent harming nature. According to the 'object' perception, there are practices which are designed to harm the competitive process. The qualification of agreements as restrictions by object is acceptable from an economic point of view when the practice in question is, on the one hand, very likely to produce a significant anticompetitive impact and, on the other hand, unlikely to create efficiencies which may counterbalance such negative effects.

Economic theory indicates that information exchange designed to achieve a collusive equilibrium constitutes the greatest concern for enforcement agencies. In effect, if firms are not capable of reaching a consensus as regards the optimal equilibrium and there is a lack of compromise on this aspect, the coordination scheme will not be probably adopted in the first place, or at least, it will not work properly and will subside sooner or later. For instance, if the chosen equilibrium is not considered as fair by certain members, they will have greater incentives to cheat and thus, to destabilize coordination.[115] Private exchanges of individual intentions for future conduct regarding prices and quantities can be seen as the most effective mechanism to achieve a collusive outcome. Since such exchanging-activity has undoubtedly the largest anticompetitive potential, it should be consequently considered the most hazardous type of information sharing.[116]

In terms of effects, this type of exchange is clearly equivalent to a cartel, within the meaning of article 101(1) TFEU. While given its private nature this activity has the potential to significantly harm both the competitive process and consumers, it is difficult to find efficiency reasons capable of

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[114] See also Møllgaard and Overgaard (n 89) 123 *ff*; Kühn, 'Fighting collusion by regulating communication between firms' (n 57); see Bennett and Collins (n 23) 328 *ff*.

[115] Kuhn, 'Designing Competition Policy towards Information Exchanges – Looking Beyond the Possibility Results' (n 4) 422.

[116] ibid. In addition, Kuhn argues that 'communication that is targeted at coordination can also be much more easily distinguished from communication for efficiency purposes. It is therefore the main candidate for per se policies'.

justifying it. Moreover, even if in certain circumstances a number of beneficial aspects resulting from this type of information sharing could be claimed,[117] that consideration in itself does not deprive the exchange of its collusive potential. Put in a slightly different way: although individual information regarding future prices or quantities could eventually lead to certain advantages for individual consumers, it is far more probable that this information is used with a view to colluding.[118] In addition, pro-competitive effects claimed under 101(3) TFEU can only prevent an agreement from being prohibited, if all (four) conditions enumerated in this section are satisfied.[119]

It follows from the foregoing that, from an economic perspective, it appears acceptable to *automatically classify* private exchanges of companies' individual intentions for future conduct regarding prices and quantities as object restrictions. While under specific circumstances other types of information may possibly contribute to reaching an equilibrium, it seems impossible to identify solely based on the features of the information, another category which would, in a majority of cases, lead to reaching such equilibrium, except for information regarding future pricing intentions or quantities. Adopting the object-classification path in any other case would, therefore, not be appropriate. Nonetheless, economic theory does not stand in the way of finding a different kind of exchange restrictive by object if, following the more nuanced approach, it can be established that such activity aims at restricting competition, in its precise *economic context*. This would be adequate when the information can be used to identify the future intended behaviour of the competitors and, as a result, to reach a collusive equilibrium.[120]

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[117] For instance, it could be useful to firms to improve their sales forecasts.

[118] See also Kuhn, 'Designing Competition Policy towards Information Exchanges – Looking Beyond the Possibility Results' (n 4) 422-423; Bennett and Collins (n 23) 313, 330 citing Bennett and others (n 57).

[119] It is especially important in this context that potential benefits cannot be achieved throughout a less restrictive agreement or practice. See Kühn, 'Fighting collusion by regulating communication between firms' (n 57) 195 *ff*; Padilla (n 3) 436; Bennett and Collins (n 23) 330; See also Kuhn, 'Designing Competition Policy towards Information Exchanges – Looking Beyond the Possibility Results' (n 4) 422-423.

[120] For example, an exchange of current data among suppliers could help firms reaching an equilibrium in a market where a price leader makes public announces of its pricing activities. This could create a focal point around which other companies might implement similar price increase. Bennett and Collins (n 23) 321.

In contrast, exchanges of individualised information among competitors which frequently have a monitoring purpose (e.g. information regarding *current* prices or quantities), should only be considered a secondary issue from an economic perspective.[121] As examined, the problematic nature of this type of exchange resides in the fact that undertakings may use this information to efficiently monitor the market conduct of the rest of the competitors at the time of the exchange. This would allow them to provide an individualized and timely punishment for deviators, which would, in turn, diminish the individual incentive to charge prices lower than implicitly agreed. In these circumstances, the stability of coordination is guaranteed. Despite these acknowledged risks, it should be kept in mind that a mechanism to monitor the adherence to collusion and to detect deviations will only make sense, once a collusive compromise has been reached and put in practice. Consequently, when information is exchanged with the purpose of reaching an equilibrium such exchange is far more important than information exchanged with a monitoring aim. Indeed, competition authorities should pay greater attention to the different functions that information sharing may have.

Furthermore, economic theory tells us that, in the absence of an explicit cartel agreement or facilitating information exchanges designed to soften the obstacles of the market, tacit coordination along past positions on the market is only likely to occur in oligopolistic concentrated markets that are stable and relatively non-complex.[122] In order to assess whether an exchange constitutes an effective monitoring instrument, it should be first examined to which extent the exchange modifies the situation by enhancing the ability to observe the market conduct of competitors. The question whether sharing information regarding *current* prices or quantities can be considered as

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[121] Unless such information is capable of revealing the future strategic conduct of competitors, in which case it should be assessed as a restriction by object *in its legal and economic context*.

[122] The economic literature has identified a range of structural factors that tend to make collusion easier and more probable in particular industries. See e.g. Paul Grout and Siliva Sonderegger, 'Predicting Cartels' (Office of Fair Trading, Economics Discussion Paper. OFT 773, March 2005); Patrick Rey, 'On the Use of Economic Analysis in Cartel Detection' in Claus-Dieter Ehlermann and Isabela Atanasiu (eds.) (2006) 11 *European Competition Law Annual 2006: Enforcement of Prohibition of Cartels* 69. For a more detailed analysis of the logic behind each one of these factors see Motta (n 80) 142 *ff.;* Marc Ivaldi, Bruno Jullien, Patrick Rey, Paul Seabright, and Jean Tirole, 'The Economics of Tacit Collusion' (Final Report for DG Competition, Toulouse, 2003). <http://ec.europa.eu/competition/mergers/studies_reports/the_economics_of_tacit_collusion_en.pdf> accessed 12 December 2012.

dangerous in light of its monitoring potential, can, thus, only be answered by reference to the market structure concerned.

In addition, empirical studies show that, even if companies (may) have a strong collective incentive to collude and the market features are favourable thereto, when they do not explicitly negotiate the terms of coordination, it will be extremely difficult to reach a consensus to charge and maintain prices or quotas at the collusive level. While in explicit cartels open negotiations and communication are decisive to create trust among the participants, (simple) information sharing can be ambiguous and even create confusion. In this sense, economic theory advances that generally the individual interest of each firm to deviate from (or not participate in) the common policy will prevail over the joint interest of collusion.[123]

This discussion indicates that the qualification of information with a monitoring function as object restriction is more controversial. Although the principle could be established that such practice can be generally permitted as long as the exchange does not regard information that bears a connection to the business strategies of market players, such a rule can only be applied following a case-by-case approach, and by taking into account the particular market features, and how the information in question may change the situation.[124] Therefore, it is preferable to conduct the substantive assessment

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[123] See Kuhn, 'Designing Competition Policy towards Information Exchanges – Looking Beyond the Possibility Results' (n 4) 422. Kuhn observes that 'even in very transparent markets collusive conduct is far from automatic**.** (…) We have no good evidence that suggest that tacit collusion is pervasive in highly transparent. In fact, evidence from explicit cartels often shows how fraught with difficulty it is to get different firms to agree on common conduct'. Further, he refers to the economic literature according to which experimental evidence suggests that tacit collusion occurs with two firms but not with more. See Stephen Huck, Hans-Theo Normann and Jorg Oechssler, 'Does Information Sharing about Competitors' Actions Increase or Decrease Competition in Experimental Oligopoly Markets' (2000) 18(1) International Journal of Industrial Organisation 39.

[124] Caffarra and Kühn (n 109, 145-146) observe that while private communication about planned future prices should always be prohibited, private information sharing regarding current or past actions in the market should be assessed under a more economic approach. They suggest four criteria that should be used for this analysis. First, a 'safe-haven' should be used for the types of exchanges which should always be permitted, such as aggregated information and cost data. Second, in order to investigate an information sharing case, competition authorities should have a clear theory of the case, i.e. analyze whether collusion is possible in the market and the role of the exchange in facilitating it. Third, it should be analyzed to which extent the information exchange can improve the monitoring of coordination in the concrete case. If such impact is considerable, the investigation should continue. Fourth, the pro-competitive effects claimed by the parties should be carefully

of information exchanges with a monitoring role under the effects-based approach, and to handle any information sharing facilitating the equilibrium selection as restrictions by object, in order to prevent firms from effectively aligning their conduct in the first place.

IV. Information Exchange as Object Restrictions: Principles Stemming From the Case Law

The previous part has clarified that, from an economic angle, only private exchanges of companies' individual intentions for future conduct regarding prices and quantities should be directly *classified* as restrictions by object. This section summarizes the position of the European Courts on agreements on exchange of information considered as object restrictions, and explores the general principles established in the case law for the assessment of such practices under article 101 TFEU. Moreover, an attempt to connect the case law with the above-described economic considerations is performed.

One important preliminary observation to be made is that, in order to generally assess information exchange under article 101(1) TFEU, it is necessary to have established that the exchange constitutes an agreement, a concerted practice, or a decision by an association of undertakings. In the context of information sharing, this analysis is particularly important. In line with the European case-law, the concept of an agreement within the meaning of article 101(1) TFEU centres on the existence of a joint intention between at least two parties,[125] while the notion of 'concerted practices' has been defined as covering a form of coordination between undertakings which knowingly substitutes practical co-operation between them for the

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considered in order to determine whether they are capable of countervailing the restrictive effects.

[125] The form in which such intention is manifested is unimportant. Case T-56/02 *Bayerische Hypo- und Vereinsbank AG v Commission* [2004] ECR II-3495, para 59-61. For further discussion see e.g. O. Black, 'Agreement: concurrence of wills, or offer and acceptance?' (2008) 4(1) European Competition Journal 103; Albertina Albors-Llorens, 'Horizontal agreements and concerted practices in EC competition law: Unlawful and legitimate contacts between competitors' (2006) 51(4) The Antitrust Bulletin 837; Pais Antunes, 'Agreements and Concerted Practices under EEC Competition Law: Is the Distinction Relevant?' (1991) 11 Yearbook of European Law 57; Odudu, *The Boundaries of EC Competition Law: The Scope of Article 81 EC* (n 15) 72, and Miguel Sousa Ferro, 'Reassessing Borders between Agreements and Unilateral Practices after Case 74/03 Volkswagen II' (2007) 28(3) European Competition Law Review 205.

risks of competition.[126] Yet, a situation in which only one company discloses strategic information to its competitors who accept it, can also constitute a concerted practice.[127]

One of the most recent and central precedents in the field of information exchange is undoubtedly the judgment of the Court of Justice in *T-Mobile*.[128] In this case, the CJEU issued a preliminary ruling in which it further developed how the assessment criteria for object-restrictions should be applied in relation to exchanges of information amounting to concerted practices. The facts of the case can be briefly outlined as follows. Representatives of five mobile telecommunications operators in the Netherlands[129] held one meeting in which they discussed, inter alia, the reduction of standard dealer remunerations for post-paid subscriptions, which was to take effect on 1 September 2001. During the meeting, the participants exchanged confidential information. The competition authority took the view that during this meeting the operators had reached a concerted practice which restricted competition and, accordingly, imposed fines on the respective undertakings. However, the referring Court (the College van Beroep voor het bedrijfsleven) was unsure whether the object of the practice could be considered to be the restriction of competition. In view of these doubts, it decided to ask the CJEU to clarify which criteria must be applied when assessing whether a concerted practice has as its object the prevention, restriction or distortion of competition.

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[126] Case 48/69 *Imperial Chemical Industries Ltd. v Commission* [1972] ECR 619. The Court has also declared that 'the concepts of "agreement" and "concerted practice" are intended to catch form of collusion having the same nature and (…) only distinguishable from each other by their intensity and the forms in which they manifest themselves' (Case C-49/92 P *Commission v Anic Partecipazioni* [1999] ECR I-4125, para 108).

[127] *Cimenteries* (n 50), para 1849: '(…) the concept of concerted practice does in fact imply the existence of reciprocal contacts (…). That condition is met where one competitor discloses its future intentions or conduct on the market to another when the latter requests it or, at the very least, accepts it'. If a firm receives strategic information from a rival, unless it reacts with a clear statement that it does not wish to receive such data, there will be a presumption than it has accepted it and adapted its market conduct accordingly. See also Case C-49/92 P *Commission v Anic Partecipazioni* [1999] ECR I-4125, para 121. See further Albors-Llorens (n 125); Femi Alese, 'The Economic Theory of Non-Collusive Oligopoly and the Concept of a Concerted Practice under Article 81' (1999) 20(7) European Competition Law Review 379; Gerwin Van Gerven and Edurno Navarro Varona, 'The Woodpulp Case and the Future of Concerted Practices' (1994) 31 Common Market Law Review 575.

[128] *T-Mobile* (n 24).

[129] Namely, Ben (T-Mobile), KPN Dutchtone (Orange), Libertel-Vodafone (Vodafone) and Telfort / (O2).

1. The Capacity of Removing Uncertainty and the Principle of Economic Independence

After recalling its well established case law on the concept of object restrictions, the Court held that the exchange of information between competitors is liable to be incompatible with the competition rules if it *reduces or removes* the degree of *uncertainty* as to the operation of the market, with the result that competition between undertakings is restricted.[130]

Although this statement may at first sight seem complex, the problematic nature of an agreement capable of 'removing uncertainty' can easily be explained against the background of the long-standing principle that 'each economic operator must determine independently the policy which he intends to adopt on the common market'. While this principle does not deprive economic operators of the right to adapt themselves intelligently to the anticipated conduct of their competitors, it 'strictly precludes any (direct or indirect) contact between such operators, by which an undertaking may influence the market conduct of its competitors or disclose to them its intentions concerning its own market conduct, where the object or effect of such contact is to create conditions of competition which do not correspond to the normal conditions of the market in question'.[131]

In the light of these considerations, the Court then specified the criteria for the establishment of an *anti-competitive object* in information exchange cases. In *T-Mobile,* the Court stated that 'an exchange of information between competitors is tainted with an anti-competitive object if the exchange is capable of removing uncertainties concerning the *intended* conduct of the participating undertakings'. More specifically, 'an exchange of information which is capable of removing uncertainties between participants as regards the *timing, extent and details of the modifications to*

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[130] *T-Mobile* (n 24), para 35, citing Case C-7/95 P *John Deere Ltd v Commission* [1998] ECR I-3111, para 90; C-194/99 P *Thyssen Stahl AG v Commission* [2003] ECR I-10821, para 81.

[131] *T-Mobile,* ibid paras 32-33 citing Joined cases 40 to 48, 50, 54 to 56, 111, 113 and 114-73 *Coöperatieve Vereniging "Suiker Unie" UA and others v Commission* [1975] ECR 1663, para 174; Case 172/80 *Gerhard Züchner v Bayerische Vereinsbank AG* [1981] ECR 2021, para 14; *John Deere Ltd* (n 130) para 87.

be adopted by the undertaking concerned, must be regarded as pursuing an anti-competitive object'.[132]

With this statement the CJEU clearly demonstrates the influence of economic analysis on its current approach to object restrictions. In this case the involved undertakings had exchanged (and even discussed) information regarding the remuneration which they intended to pay in the future for the services supplied to them by dealers. Therefore, the information related not only to an essential factor in establishing prices, which is a key competition parameter, but also to planned future behaviour. By exchanging this type of information, the parties had knowledge of the market strategy of their competitors and could easily determine a collusive level of remuneration. This aspect was also highlighted by Advocate General Kokott in her opinion, in which she stated that the practice resulted in coordination of market conduct.[133] The assessment of information removing uncertainty about strategic intended conduct as restriction by object represents a suitable example to illustrate the consistency of this case and economics with each other.

2. The 'Potential Effects' Test

Another important aspect which has been also clarified in *T-Mobile* is that 'in order for a concerted practice to be regarded as having an anti-competitive *object*, "it is sufficient" that it has the potential to have a negative impact on competition. In other words, a concerted practice pursues an anti-competitive object (…) where it is *capable* in an individual case of resulting in the prevention, restriction or distortion of competition within the common market. This aspect should be assessed according to its content and objectives and having regard to its legal and economic context'.[134]

When considered in isolation, this statement may be somewhat confusing in that it seems to indicate that the mere potential of having negative effects constitutes the decisive condition ('it suffices') to qualify an exchange as restriction by object. Such a wide interpretation of object restrictions would, however, not be coherent with the general conception of the Courts (and the

[132] *T-Mobile* (n 24) para 41 and 43.
[133] See ibid, Opinion of Advocate General Kokott, point 36.
[134] *T-Mobile* (n 24) para 31.

Commission) of the object approach.[135] As the Court has held in a long line of cases including *T-Mobile*, 'the distinction between 'infringements by object' and 'infringements by effect' arises from the fact that certain forms of collusion between undertakings can be regarded, by their very nature, as being injurious to the proper functioning of normal competition'.[136] This implies that the object criterion is not designed to cover practices based *only* on their likelihood of negative effects; the magnitude of the impact is also a key factor in such assessment.[137] In addition, this aspect is also recognized by the European Courts when they state that the object analysis should 'reveal the effect on competition to be sufficiently deleterious'.[138]

Rather than adopting a broad perception of the 'object category' for information exchanges, the CJEU appears to advocate a sort of capability test.[139] In effect, the Court maintains that a concerted practice should be *capable in an individual case* of resulting in the restriction of competition. In order to interpret this statement correctly, it is necessary to emphasise the particular nature of information exchanges. As explained earlier, the anticompetitive character of information sharing resides in the *reduction of strategic uncertainty*. When undertakings exchange information regarding essential competition parameters on intended future conduct privately, they automatically eliminate – or at least considerably diminish – a key type of uncertainty, that is, uncertainty concerning *intended* conduct. Accordingly, it is reasonable to affirm that such information exchange (*i.e.*, private information concerning future prices and quantities) has the inherent capacity of reducing uncertainty,[140] and thus, it must be considered

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[135] See also Bernd Meyring, 'T-Mobile: Further confusion on information exchanges between competitors, Case C-8/08 *T-Mobile Netherlands and others* [2009] ECR 0000' (2010) 1(1) Journal of European Competition Law & Practice 30, 31. According to Meyring such interpretation 'would do away with restrictions by effect altogether because practices that are not even capable of having anticompetitive effects will not produce such effects in any event—and all other restrictions would be restrictions by object'.

[136] *T-Mobile* (n 24), para 28.

[137] See also *supra* section 2.

[138] *T-Mobile* (n 24) para 28, citing *Competition Authority v Beef Industry Development Society* (n 28), para 15.

[139] See Aleksandra Ossowska, 'Chapter on information exchange in the EC guidelines on horizontal agreements & How the policy fits with European case law' (Conference organized by the University College of London and IMEDIPA in Cyprus, May 2010) <http://www.ucl.ac.uk/laws/cyprus/docs/Ossowska_Cyprus2.pdf> accessed 12 December 2012.

[140] The reference to 'an individual case' is, in this sense, closely connected to the relevance of 'the legal and economic context'. Just like the most straightforward categories of agreements are considered as such designed to restrict competition (and the relevance of the

anticompetitive by its very nature.[141] This does not detract from the fact that other (less evident) types of information may also be capable of having such effect.

It is interesting to comment that, in practice, these kinds of exchanges can be seen as 'underdeveloped' illegal cartels. The substantive analysis of cartels is practically uncontroversial: they are considered the object restrictions *par excellence*. The main difference between cartel agreements and information exchanges facilitating collusion is that in cartels undertakings frequently negotiate the terms of their market behaviour with the purpose of reaching a collusive consensus and maintaining their coordinated conduct. In contrast, simple exchanges of information do not necessarily amount to explicit discussions intended to reach an agreement, but they can obviously be conducted with the same (collusive) purpose.[142] Although it is true that it may turn out more complex for firms to coordinate their conduct only by sharing information, nonetheless, if they are successful, these exchanges have the same detrimental impact as hardcore cartels.

It is well accepted that cases of explicit coordination, resulting from (naked) cartel agreements to fix prices or to share markets, are prohibited (almost) under any circumstances. In such cases, it is completely irrelevant whether the agreement succeeded in raising prices and/or restricted competition. Moreover, the role of the economic context is similarly significantly limited.[143] It thus seems reasonable to wonder whether in cases of information sharing regarding future prices or quantities, any consideration of the 'economic context' amounts only to a 'quick look' analysis – like in the case of the most serious infringements – or, conversely, whether a more

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economic context will be rather limited), when a certain category of information reduces uncertainty by its very nature, such category will be considered *as a whole* capable of reducing uncertainty in (all) individual cases. On the relevance of the legal and economic context in information exchange cases see the next subsection.

[141] See also Anna Gerbrandy, 'C-8/08, *T-Mobile Netherlands BV, KPN Mobile NV, Orange Nederland NV, Vodafone Libertel NV v. Raad van bestuur van de Nederlandse Mededingingsautoriteit*, Judgment of the Court of Justice of 4 June 2009' (2010) 47(4) Common Market Law Review 1199, 1206 *ff* (note).

[142] See also, OECD, Unilateral disclosure of information with anticompetitive effects (n 92), Background Paper by the Secretariat 3.

[143] See above Section 2.4. See also Meyring (n 135) 31, 'it is indeed common sense that [practices are hardcore cartels] are prohibited, whether or not they actually turn out to be effective in the individual case'.

careful examination of that economic context is required to correctly appraise information exchanges.

3. The Role of the Economic Context

Finding that a certain practice constitutes a restriction by object under article 101(1) TFEU generally requires an assessment of the economic context. This requirement was also stressed by the CJEU in *T-Mobile* where it held that, to establish that a practice has an anticompetitive object, it must be capable of restricting competition having regard to its legal and economic context.[144] This statement suggests that when an agreement is designed to restrict competition, but certain economic or regulatory circumstances make this impossible, the conduct in question should, conversely, not be qualified as an object restriction.[145]

While the need to consider the regulated nature of a given market appears to be less controversial, and the State action defence is commonly considered being a valid argument (even in the context of the most serious infringements), the precise role and relevance of the economic context in the area of information sharing remains somewhat blurred.[146] One of the most contentious issues is whether an information exchange may be deemed anti-competitive (by object) in a non-oligopolistic and non-concentrated market. This matter seems particularly acute when the concept of object restriction is understood as a presumption of anticompetitive effects: can such an assumption be correctly established in a market which is unfavourable to collusion? The answer to this question may have a profound impact on the method to assess object restrictions. If establishing a restriction by object requires a confirmation of the oligopolistic and concentrated nature of the market, this would imply that the qualification of information exchanges as object restrictions could only be made on a case-by-case basis, after a careful examination of the market structure. Hence, a general classification of information exchange based on the type and nature of the information as object infringements would not be correct.

The relevance of market concentration in the general assessment of (anti)competitiveness under article 101(1) TFEU has been illustrated by the

[144] *T-Mobile* (n 24) para 31.
[145] See also Meyring (n 135) 31.
[146] ibid.

economic analysis and the European case-law. First of all, economic theory suggests that highly concentrated markets are more likely to lead to collusive conduct. In fact, predictions based on game economic theory take as their starting point the existence of oligopolistic markets. In addition, this same consideration was brought to attention by the CJEU in *T-Mobile* where the Court held that 'on a *highly concentrated oligopolistic market*, (such as the market in the main proceedings), the exchange of information was such as to enable traders to know the market positions and strategies of their competitors and thus to impair appreciably the competition which exists between traders'.[147,148]

Some have argued that the Court's reference to the concentrated and oligopolistic nature of the market is the 'turning point' in the analysis of *T-Mobile*, based upon which it developed its legal reasoning to assess information exchanges.[149] Accordingly, the standard set out in the operative part of the judgement should only be applied, when the economic context of the exchange is a highly concentrated oligopolistic market.[150] This view should, however, be questioned. Although the Court does refer to the highly concentrated oligopolistic nature of the market, that reference is actually intended to elucidate the general context in which the competitive assessment of information exchange is conducted under article 101(1) TFEU, and does not specifically refer to the assessment of object restrictions. In effect, after referring to the highly concentrated nature of markets, the Court states that 'it follows that the exchange of information

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[147] *T-Mobile* (n 24), para 34 citing *John Deere Ltd* (n 130), para 88 *ff*. In *John Deere* (the landmark ruling regarding the structure of the market when analyzing information exchange), the CJEU firmly stated that while in truly competitive markets, transparency between agents 'may enhance and intensify competition, if other suppliers and of consumers may also benefit from such transparency. Conversely, 'on a highly concentrated oligopolistic market, the sharing of information concerning the operation of the market has the effect of revealing to all the competitors the market positions and strategies of the various individual competitors' (*John Deere Ltd*, ibid para 51).

[148] In effect, in the *T-Mobile* case the market was oligopolistic and highly concentrated. The market share held by the five operators amounted, respectively, to 10.6%, 42.1%, 9.7%, 26.1% and 11.4%. In addition, the market could be considered closed because no further licences had been issued. *T-Mobile* (n 24) para 10.

[149] Peter Camesasca, Anna Schmidt and Michael Clancy, 'The EC Commission's Draft Horizontal Guidelines: Presumed Guilty when Having a Chat' (2010) 1(5) Journal of European Competition Law & Practice 405, 414.

[150] ibid. These authors argue 'more precisely that 'the Court provides the general standard applicable to the exchange of information, whereby it is necessary to consider the 'nature of the products or services offered, the size and number of the undertakings involved and the volume of that market'.

between competitors is liable to be *incompatible with the competition rules* if it reduces or removes the degree of uncertainty'.[151] The criterion of the reduction of uncertainty remains thus the crucial element to examine the (anti)competitiveness of information exchange under the general framework of article 101(1) TFEU and, henceforth, it is not meant to establish by definition a restriction by object. It can be inferred that certain types of information exchange may have the object of reducing uncertainty, while other exchanges may (only) have this effect. After discussing this explanatory background about the anticompetitive concerns of information exchange, the Court specifies the precise circumstances under which information sharing can constitute *object* restrictions, namely 'when the information is capable of removing uncertainties concerning the *intended* conduct'.[152]

The distinction between the 'object' and the 'effects-based' approach becomes evident in the following context. Whereas the assessment of object restrictions is principally based on the fact that certain exchanges aim at reducing uncertainty, with respect to the effects-based analysis, the frequent emphasis placed on the market structure insinuates that the oligopolistic character of any market generally plays a significant role in the evaluation of information sharing. European practice, however, seems to indicate that this consideration (albeit generally significant) is not always indispensable to examine the effects of an agreement. For instance, in the *UK Agricultural Tractor Registration Exchange* decision, the European Commission did not exclude the possibility that collusive outcomes resulting from communication may materialize even in non-oligopolistic/fragmented markets.[153] Furthermore, in *Thyssen*, the CJEU confirmed that, even if in an oligopolistic market information exchange increases transparency and removes hidden competition, 'an information exchange may constitute a breach of competition rules even where the relevant market is not a highly concentrated oligopolistic market'.[154] This statement suggests that while a

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[151] *T-Mobile* (n 24), para 35 (emphasis added).
[152] ibid, para 43.
[153] *UK Agricultural Tractor Registration Exchange* (IV/31.370 and 31.446) Commission Decision 92/157/EEC [1992] OJ L 68/19.
[154] *Thyssen Stahl* (n 130), paras 86-88. 'It is true that, in its judgment in *John Deere*, cited above, which was upheld in this regard by the Court's judgment in John Deere, the Court of First Instance concluded that the tractors market was such a market. However, those judgments take into consideration a number of criteria in that regard, the only general principle applied in relation to the market structure being that supply must not be atomized.

highly concentrated oligopolistic market is not a necessary condition,[155] a *certain level of concentration* is required within the effects-based analysis.

This reasoning appears to have been embraced by the Commission who, in order to determine the level of concentration of the market, not only considers whether there is a low number of companies active in the market, but also takes into account whether a majority of the active firms are participating in the coordination scheme and their cumulative market shares.[156] In addition, this 'aggravating' but non-indispensable nature of the *highly concentrated* markets to judge the restrictive effects of agreements can be justified given the imperfect evidentiary value of the market structure.[157] While in certain cases markets characterized by high concentration can be very competitive, the practice of the Commission illustrates that, given the extreme efforts made by companies to surmount the obstacles deriving from the nature of the market cartels can turn out to be stable agreements in markets which are not strictly oligopolistic and with differentiated products.[158]

The previous reflections concerning the higher likelihood of collusion in highly concentrated markets can shed some light on the predictable anticompetitive *effects* resulting from an agreement. In this sense, it is reasonable to accept that, depending on the market structure, a given exchange may or may not lead to a reduction of uncertainty. However, turning back to the method to establish *object restrictions*, it should be borne in mind that, even if this approach does not disregard the likely

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(…) It follows that, in choosing the oligopolistic structure of the relevant market as one of the criteria of assessment, without seeking to establish whether the market was highly concentrated, the Court of First Instance did not infringe Article 65(1) of the ECSC Treaty as it must be interpreted in the light of the Court's case-law relating to exchanges of information'.

[155] High concentration should thus rather be seen as an aggravating factor. See Wagner-von Papp, 'Information Exchange Agreements' (n 1) 20.

[156] See also OECD, Policy Round Tables: Information Exchanges Between Competitors under Competition Law (n 2) Submission by France, 185. For instance, in the *Wirtschaftsvereinigung Stahl* case the assessment of the level of concentration of the market to into account that 16 of the 20 undertakings active on the market were taking part in the exchange, and the market shares of the four largest companies amounted to half of the production in the market (*Wirtschaftsvereinigung Stahl* (IV/36.069) Commission Decision 98/4/ECSC [1998] OJ L 1/10). Similarly, in *Thyssen Stahl* (n 130), 12 of the 19 market operators participated in information exchanges.

[157] See also OECD, Policy Round Tables: Information Exchanges Between Competitors under Competition Law (n 2) Background Paper, 47.

[158] ibid.

effects of agreements, in contrast to the effects-based method, it does not require an examination of their actual impact or of the market structure. When assessing whether an information exchange has an 'anti-competitive aim' or is 'designed' to reduce uncertainty, we are, in effect, confronted with a different query: whether the non-oligopolistic/concentrated character of the market actually obstructs the reduction of uncertainty to the extent of taking away the 'by object' qualification of the exchange. Once again, the answer to this question is rather apparent with respect to information exchanges relating to individual future prices and quantities. The mere fact that companies exchange this type of information, which undertakings should keep confidential in order to preserve their independent economic behaviour, is clearly sufficient to reveal the planned market strategy and, consequently, to show that the practice pursues an anti-competitive object. Whether the market in question was of an oligopolistic nature or not, seems to be rather irrelevant in this context.[159]

This interpretation is coherent with the European jurisprudence. For instance, in *Rhône-Poulenc*,[160] the claimant had been accused of taking part in meetings where competitors exchanged information concerning, *inter alia*, the prices which they intended to charge. In its judgment, the General Court held that 'an undertaking, by its participation in a meeting with an anti-competitive purpose, not only pursued the aim of eliminating in advance uncertainty about the future conduct of its competitors but could not fail to take into account, directly or indirectly, the information obtained in the course of those meetings in order to determine the policy which it intended to pursue on the market'.[161] Comparably, in *Tate & Lyle*, the Court declared that 'one reason for participating in meetings, during which an important competitor reveals its future price intentions, was always to eliminate in advance the uncertainty concerning the future conduct of competitors. Moreover, by merely participating in the meetings, each participant could not fail to take account, directly or indirectly, of the

[159] Nevertheless, it is noteworthy that even if an analysis of the concentration in the market may not be decisive to establish the aim of the most straightforward types of information exchanges, the Commission's practice does generally take into account whether the companies taking part in such information exchanges collectively hold a substantial share of the market.
[160] Case T-1/89 *Rhône-Poulenc SA v Commission* [1991] ECR II-867
[161] ibid paras 122-123.

information obtained during those meetings in order to determine the market policy which it intended to pursue'.[162]

In the analysis of certain types of information exchanges, the more or less concentrated nature of the market is simply incapable of altering the conclusion that some exchanges are clearly 'designed' to reduce uncertainty. If such a purpose can be established, further considerations will be trivial and the agreement will be presumed illegal under article 101(1) TFEU. In line with the case-law, information exchanges which *directly* reveal future pricing intentions or quantities pursue this objective independently of the concentrated nature of the market and, accordingly, they should primarily qualify for a *classification* as object restrictions.

4. Summary of Conclusions

The assessment of information exchanges by the European Courts is based on two crucial principles: the principle of economic independence and the criterion of reduction of strategic uncertainty. If an undertaking exchanges information which is *capable* of removing uncertainties concerning the *intended* conduct of the participating entities, there is a presumption that such information will be taken into account and will influence the conduct of any market competitors. As a consequence, the exchange of information will prevent them from determining the business policy in an independent manner. Although this approach differs from the economic analysis, it is clear that the European jurisprudence has been influenced by this economic thinking, an influence which makes these two visions consistent. Information capable of revealing intended future behaviour is the category of information which is most valuable to reach an equilibrium. Therefore, from an economic point of view, it entails the highest likelihood of significant negative effects. It is then reasonable to accept that this type of information restricts competition by its very nature; that is, by 'object' in competition legal terms.

A key issue is whether the economic context and, more precisely, the level of concentration of the market, allows disregarding the reality that certain categories of information have the inherent effect of reducing uncertainty as regards intended strategies. With respect to information regarding future

[162] Joined cases T-202/98, T-204/98 and T-207/98 *Tate & Lyle plc, British Sugar plc and Napier Brown & Co. Ltd v Commission* [2001] ECR II-2035, para 67.

prices or quantities – which reduce such uncertainty by their very nature – the relevance of the concentration factor is rather limited. This approach, albeit somewhat controversial from the economic angle, perfectly reflects the essence and function of 'object restrictions': when an agreement pursues an anticompetitive object, there is no need to demonstrate its effects. It is, however, equally important to stress that the position of the European Courts is not such, as to only include information exchange regarding future prices and quantities under the object heading. As the Court itself stated, the crucial element of the object assessment is whether the information is capable of reducing uncertainty regarding intended strategic conduct. If other types of information satisfy this condition, they should be also considered as object restrictions. Given the decisive influence of the particular circumstances of the case on this question, this less straightforward assessment should be conducted by reference to the precise 'legal and economic context' of the agreement.

V. Is the Approach Adopted by the Commission in its Guidelines Consistent With Economic Theory and the EU Case-Law?

Without further clarification, the above analysed case-law does not seem to provide straightforward guidance as to the present standard of assessment of information exchange under EU competition law. Given the absence of a clear approach and the great demand from stakeholders, on 14 January 2011 the Commission published its *Guidelines on the applicability of Article 101 TFEU to horizontal co-operation agreements* in which, for the first time, it also included a separate chapter on information exchange.[163] This new section can be seen as an attempt to codify and further clarify the general principles of case-law on the assessment of information exchange as well as the Commission's decisional practice.

The adoption of these Guidelines has been generally seen as a welcome initiative to provide further clarity, with regard to horizontal cooperation in general and information exchange in particular. However, the Commission's explicit view that certain types of exchanges fall within the object category

[163] These guidelines replace the previous Commission guidelines on the applicability of Article 81 of the EC Treaty to horizontal co-operation agreements [2001] OJ C 3/2. Besides information sharing agreements, the Guidelines also cover other common types of horizontal co-operation agreements: i.e. research and development agreements, production agreements including subcontracting and specialisation agreements, purchasing agreements, commercialisation agreements and standardisation agreements including standard contracts.

has not been applauded by all. What has been specifically pointed out is that this Commission's position goes much further than what can be deduced from the European Courts' case-law and economic theory.[164] This last section deals with this issue. After summarizing the position of the Commission as expressed in its 2011 Guidelines, it will attempt to answer the question whether this approach is in effect consistent with economic analysis and the relevant principles of the EU case-law.

On the up-side, the Commission recognizes that exchanging information can produce numerous benefits for both companies (for example, by reducing their inventories, firms can diminish costs) and consumers (for instance, by improving choice and reducing search costs).[165] However, it also stresses that, when it enables companies to be aware of their competitors' strategies, information exchanges can have a negative impact on competition. In particular, the Commission firmly states that communication of information among competitors may constitute an agreement with the *object* of restricting competition on the market.[166] In its view, this will be the case when the information exchange, by its very nature, leads to a restriction of competition. According to the Commission, such exchanges include information sharing between competitors of *individualised data regarding intended future prices or quantities.*[167]

In order to justify the classification of such types of information as object restrictions, the Guidelines only mention that exchanging information on companies' individualised intentions concerning future conduct with regard to prices or quantities is particularly likely to lead to a collusive outcome. Informing each other about such intentions may allow competitors to arrive at a common higher price level without incurring the risk of losing market

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[164] See e.g. Camesasca, Schmidt and Clancy (n 149) 405. For a more general critical assessment of the Guidelines see e.g. ECLF Working Group on Horizontal Agreements, 'Comments on the Draft Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements' (2010) European Competition Journal 507, 509; Thomas Rosch, 'Antitrust issues related to benchmarking and other information exchanges' (Remarks before the ABA Section of Antitrust Law, May 2011) <http://www.ftc.gov/speeches/rosch/110503roschbenchmarking.pdf > accessed 12 December 2012. See also more generally Padilla (n 3). See also *supra* notes 10 and 11.
[165] Cooperation Guidelines, para 57.
[166] ibid para 58.
[167] ibid para 74.

share; or without triggering a price war during the period of adjustment to the new prices.[168]

Although in the introductory paragraphs the Guidelines set out that the competitive outcome of information exchange depends on the characteristics of the market (such as concentration, transparency, stability, complexity etc.) as well as on the type of information that is exchanged (which may modify the market environment towards one liable to coordination),[169] such market features, essential as they are under the effects-based analysis, do not seem to be relevant in the context of object restrictions. This view is consistent with the well-established case-law according to which, once the anti-competitive object of an agreement has been established, there is no need to look at the actual effects it produces on the market.

Still, it could be argued, as the Commission itself acknowledges in the Guidelines, that particular attention should be paid to the *legal and economic context* in which the information exchange takes place to find whether it pursues a restrictive object.[170] In this context, it is suitable to briefly recall that, in order to establish a restriction of competition by object, two different paths can be followed. On the one hand, there is a path for the most serious and obvious violations. Following this path implies that a certain agreement can be classified based on its predicted (harming) effects. The role of the economic context is then very limited. On the other hand, a more elaborated analysis can be conducted for those agreements whose effects are more ambiguous. Such assessment can only be carried out considering the economic context.

Although the Commission does not delve into the relevance of the economic context for the object analysis in the Guidelines, it does seem to fully embrace the first mentioned 'abridged' path for specific types of information exchange. Particularly, in the Guidelines, the exchange of information on future prices and quantities is considered to be a serious and obvious infringement of the competition rules and, accordingly, it can be directly classified as object restriction without need to conduct a thorough analysis of the economic context. This standpoint is further confirmed by

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[168] ibid para 73. This paragraph also adds that 'it is less likely that information exchanges concerning future intentions are made for pro-competitive reasons than exchanges of actual data'.
[169] ibid para 58.
[170] ibid para 72

the Commission in the Guidelines, when it states that 'private exchanges between competitors of their individualised intentions regarding future prices or quantities (…) have the object of fixing prices or quantities'.[171]

Even if this construction has been criticized by a number of commentators[172] – frequently on the side of companies, choosing the 'abridged approach' certainly seems suitable given the nature of the Guidelines. When the Commission publishes Guidelines, its main objective is simply to bring together the established and at times complex case-law and its own practice, and translate their principles into relatively workable rules for businesses. In short: the purpose of the Guidelines is generally to offer companies the demanded legal certainty. Rather than including more ambiguous types of information which may also reveal future intentions, such as current pricing and quantities, by specifying which types of information exchange will be (almost) always, and independently of their economic context, classified as object restrictions, the Commission's Guidelines are not only consistent with the general concept of object restriction as confirmed by the European case-law. In addition, they are intended to provide useful clarification regarding the types of information sharing which should, almost invariably, fall under the object categorization, in both the Commission's and the Courts' vision.

In view of the legal consequences of the object assessment, the *classification* of information on future prices and quantities as practices with an anticompetitive object cannot be carried out without taking into account its economic perspective. The influence of economic analysis is clearly reflected in the Guidelines, in which the Commission itself highlights that exchanges of strategic information artificially increase transparency in the market and thereby facilitate coordination of companies' competitive behaviour and result in restrictive effects on competition.[173] 'By exchanging information companies can create mutually consistent expectations regarding the uncertainties present in the market and, by this means, reach a common understanding on the terms of coordination of their competitive behaviour. Exchange of information about intentions concerning future conduct, in contrast to past and present information, constitutes the most

[171] ibid para 74.
[172] See *supra* note 164.
[173] ibid para 65.

likely means to enable companies to reach such a common understanding'.[174]

Given the general consistency of the Commission's Guidelines with the concept and function of 'object restrictions' and the economic theory, the only question left is whether the main principles stemming from EU jurisprudence as regards information exchange and object restrictions are also respected by the Commission's guiding principles.

In the CJEU's view, the crux in finding that information sharing has an anticompetitive object is its *capability of removing uncertainties* concerning the intended conduct of the participating undertakings. If such capability can be established in an individual case (*i.e.*, the agreement tests positive on the capacity examination in the concrete case), the activity will be presumed illegal under article 101(1) TFEU. If there is one category of information about which such statement can be made without any need to make further reflections on the economic context, this is undoubtedly information about intended future conduct on essential competition parameters, such as prices and quantities. Such exchanges restrict competition by their very nature since, by having access to the mutually immediate and relevant data, undertakings directly eliminate uncertainty about future conduct. Other considerations are, however, more superfluous.

Despite the consistency of the Commission's position in its Guidelines with economic theory and the principles of case-law, it cannot but be emphasized that while such information exchanges can, and should indeed, be considered *object* restrictions, the double conception of the object analysis, suggests that the door of the object assessment is still open for other types of exchanges, provided that in individual cases they are capable of removing uncertainty concerning the planned future conduct. For instance, if information sharing in relation to present pricing or quantity data is capable of revealing intentions on future pricing or output behaviour; or in cases where the combination of different types of data enables the direct deduction of intended future strategic behaviour.[175] Although this observation is not explicitly stated in the Guidelines, this perception would

[174] ibid para 66.

[175] This vision was indeed originally expressed in the Commission's draft Horizontal Guidelines. See Commission, 'Draft Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements Brussels' (Communication) SEC(2010) 528/2, para 68.

still be consistent both with economics, which indicate that information that is used to reach an equilibrium should be prohibited, and with the European jurisprudence. Yet, for these more ambiguous and complex cases, a more conscious examination of the economic context should be undertaken.

VI. Final Conclusions

Almost fifteen years ago, the Commission initiated a long series of reforms with the objective of modernising the application and interpretation of the EU competition rules. One central goal of the multiple initiatives was to ensure that the competitiveness assessment of agreements under article 101 TFEU was grounded on solid economic analysis. It is unquestionable that during this period the application of article 101 TFEU has gradually changed, making this provision to evolve into a more economic-based rule. Despite the clear impact of the initiatives, it has been commented that the reformed system did not modernize the application of one of the basic elements of article 101(1) TFEU, namely the concept of object restrictions[176]. The legal treatment of agreements containing restrictions by object is considered rather formalistic and is even seen as an exception to the increasing economic influence.[177] This general reluctance of economists to scrutinize agreements on the basis of the object approach becomes most evident in the area of information sharing agreements, which very frequently lead to varying effects.

This article examined the concept of object restriction and relied on that examination to assess whether this approach can constitute an appropriate standard of analysis for information exchange agreements. It was showed that the European Courts (and the Commission) have two different readings of this substantive element. The most straightforward and serious types of agreements can be directly classified as object restrictions, while an 'in context' examination should be conducted when the anticompetitive nature of a certain practice is less obvious. This double-sided approach can be considered adequate from an economic perspective; first, because it allows competition authorities to suppress any potentially harming agreements at low cost; and second, because the possibility to appraise an agreement in its

[176] See *e.g.* Alison Jones, 'The Journey Towards an Effect Based Approach Under Article 101 TFEU – The Case Of Hardcore Restrains' (2010) 55(4) The Antitrust Bulletin 783, 792.
[177] See RBB Economics Brief (n 10) 4.

legal and economic context, on the one hand, and the legal defence under article 101(3) TFEU on the other, are also suitable means of minimizing false positives.

Consequently, the question emerged whether there is a category of information exchange that can be *directly classified* as object restrictions from an economic perspective. Building upon the economic predictions on the likelihood of collusion, there is a concrete type of exchange which must be automatically categorised as object restriction, that is to say, exchanges among competitors regarding future conduct on prices and quantities. The presumption of anti-competitiveness should be restricted to this type of exchange because, solely based on the features of the information, it is not possible to identify other exchange categories that are very likely to have an anti-competitive effect (in the sense of reaching a collusive equilibrium), and are very unlikely to have an efficiency justification. Whether other exchanges can be also used to identify future conduct with the aim of reaching an equilibrium, can only be assessed within the earlier described object assessment on a case-by-case basis by analysing the exchange in its respective economic context.

Thereafter, the article examined the latest developments in EU jurisprudence as regards the assessment of information exchange (considered as restrictions by object), and tested the compatibility of economics and the existing case law. The European Courts' focus on the *capacity to remove uncertainty concerning intended conduct* on the market, as the key principle to establish the anticompetitive object of information sharing agreements, illustrates that by now the case-law is clearly affected by economic theory on collusion. It was also argued that this criterion perfectly guarantees consistency with the (double) legal appraisal of object restrictions. Exchanging information concerning precise future market conduct is clearly sufficient to reveal the planned strategy and, consequently, to show that the practice pursues an anti-competitive object. Considerations regarding the economic context, including the oligopolistic nature of the market, do not seem to have a decisive relevance.

Relying on the previous examinations, it is concluded that the legal conception of object restrictions and the economic theoretic approach, albeit different, are not as inconsistent with each other as they may appear at first sight. As both the Commission's Guidelines and, in a more general manner,

the recent judgment of the CJEU in *T-Mobile* demonstrate, the *apparent* conflict can be most definitely resolved.

Restrictive Practices in Pharmaceutical Industry: Reverse Payment Agreements *Seeking for a Balance between Intellectual Property and Competition Law*

OLGA GURGULA*

Reverse payment agreements have attracted the close attention of competition authorities as they are suspected to be the fundamental reason for encumbering competition in the pharmaceutical sector. For more than a decade the U.S. competition and judicial authorities have been scrutinising them, developing specific approaches suitable for their assessment. However, once the practice was deemed to be settled, the Third Circuit questioned this practice employing the new test. In the EU this type of agreement was not in focus until recently, therefore no relevant case law has developed whatsoever. Such uncertainty regarding the possible further developments in the assessment of reverse payment agreements is detrimental to the pharmaceutical industry, as it hinders companies' ability to adopt their business strategies without the fear of triggering antitrust liability. This article will examine the current status of the reverse payment agreements in both jurisdictions, analyse the application of article 101 TFEU and Section 1 of the Sherman Act along with other relevant legislative provisions, the applied tests and approaches, and specific examples of the agreements decided by the U.S. courts. Such a discussion pursues the practical goal of expanding understanding of what constitutes permitted behaviour for pharmaceutical companies when concluding this type of agreement with a view to avoiding antitrust liability.

I. Introduction

Intellectual property is no longer the arcane domain of intellectual property lawyers.[1] It is the most valuable corporate asset which a company may

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possess, and a powerful weapon against its competitors. Increased understanding of the importance of intellectual property rights has advanced their protection and exploitation to a new level. As businesses have developed a greater understanding of the value of their intangible assets, they have not only pursued more rigorous enforcement policies; they have also invented more imaginative commercial strategies to gain and retain market share using their intellectual property.[2]

As long as such practices facilitate robust competition, they are welcomed and encouraged. However, some strategies have triggered the concern of competition authorities. Where intellectual property rights are used to restrict competition significantly and impose barriers to market entry, intervention of competition law is likely.

As one of the sectors most important to public health, the pharmaceutical industry has always warranted the close attention of competition authorities. Pharmaceutical companies rely heavily on intellectual property to protect their inventions and recoup their investment. It is also seen as the necessary incentive to advance innovation. Pharmaceutical companies therefore make great efforts to protect intellectual property rights, their main tool to ensure a large market share and to exclude competitors from the market for as long as their intellectual property allows them.

Recently, the pharmaceutical industry has undergone significant changes: various "blockbuster" medicines, which account for a substantial part of the sales and profits of large pharmaceutical companies, have lost patent protection, with more to follow in the coming years.[3] This shift has forced pharmaceutical companies to develop new and reinforce current business practices using their intellectual property rights to retain their market shares.

However, not every practice is welcomed by the competition authorities. A number of new commercial practices used by pharmaceutical companies have been prohibited as exclusionary or exploitive abuses under the

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[1] Carlos M Correa, Abdulqawi A. Yusuf, *Intellectual Property and International Trade: The TRIPS Agreement* (Kluwer Law International, The Netherlands 2008) 150.

[2] Steven Anderman and Ariel Ezrachi, *Intellectual Property and Competition Law: New Frontiers* (Oxford University Press 2011) 6.

[3] European Commission, 'Executive Summary of the Pharmaceutical Sector Inquiry Report' (8 July 2009) <http://ec.europa.eu/competition/sectors/pharmaceuticals/inquiry-/communication_en.pdf> accessed 6 August 2012 (Executive Summary).

competition rules. The *AstraZeneca* case,[4] for instance, raises the question of when a misuse of the patent process violates Article 102 TFEU.[5]

Other practices have attracted the attention of competition authorities for being the suspected reason for the delay or blocking of generic drug competition.[6] Such practices include patent settlement agreements concluded between originator companies and generic companies in the context of patent disputes and opposition procedures or litigation where no final adjudication has been handed down.[7]

Certainly, not all patent settlement agreements are deemed illegal. Some are recognised as perfectly legal and even pro-competitive.[8] Nevertheless, some of these agreements have triggered a flame debate as to their conformity within antitrust law. A main concern among competition authorities are so-called reverse payment agreements, in which the originator company pays the generic company for staying off the market. Despite mutual concerns that this type of agreement may raise competition problems, there is no agreement about which of them should be considered illegal and violative of the competition law and which may be allowed. In addition, there is no agreement as to which evaluative approach to take when considering such disputes.

This article will review the patent settlement agreements under different regimes, including those of the EU and the U.S. This review starts by considering the general background of patent settlement agreements and their types. Then, turning to the U.S. and the EU legal frameworks regarding marketing authorisation underpinning the incentive for pharmaceutical companies to conclude this type of agreement, as well as the competition law provisions of article 101 TFEU and Section 1 of the

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[4] Case T-321/05 *AstraZeneca v Commission* [2010] ECR II-02805.

[5] Anderman (n 2) 8.

[6] Among such practices, the European Commission defines patent filing strategies, patent-related exchanges and litigation, oppositions and appeals, life cycle strategies for second generation products. See Executive Summary (n 3) 3.

[7] European Commission, '3rd Report on the Monitoring of Patent Settlements (period: January-December 2011)' (25 July 2012) <http://ec.europa.eu/competition/sectors-/pharmaceuticals/inquiry/patent_settlements_report3_en.pdf> accessed 6August 2012 (3rd Monitoring Report).

[8] European Commission, 'Pharmaceutical Sector Inquiry Final Report' (8 July 2009) <http://ec.europa.eu/competition/sectors/pharmaceuticals/inquiry/staff_working_paper_part 1.pdf> accessed 5 August 2012 (Pharmaceutical Sector Inquiry) 255.

Sherman Act, it further examines the respective positions of the FTC and the EU Commission regarding the patent settlement agreements.

It will further detail the U.S. courts' specific approaches to evaluating this type of agreement. On the basis of relevant U.S. case law, this article will extract general rules applied by the courts in their judgements. Finally, it will consider specific examples of both lawful and unlawful reverse payment agreements as decided by the courts and will explore whether the differences between the tests applied by the U.S. courts lead to different outcomes for these agreements. It will also examine the most recent decision of the US Court of Appeal for the Third Circuit and the impact it has on the previous case law regarding the reverse payment agreements. It will further discuss the possibility to apply the US tests for the evaluation of the reverse payment agreements to the EU realia considering some differences in the legal framework of these two regimes and will suggest the possible way the reverse payment agreements evaluation under the EU legislation and applying the EU competition law doctrines.

Having discussed and analysed the legislative frameworks, competition authorities' and courts' respective positions toward the patent settlement agreements, and having examined examples of the patent settlement agreements, this article will finish with recommendations regarding the development of a coherent approach to the reverse payment agreements and possible submission of this type of disputes to the jurisdiction of the European Patent Court (EPC). This article also advices which provisions to avoid while negotiating patent settlement agreements in order not to trigger competition concerns. It is hoped that such analysis can offer a practical approach toward understanding what comprises permitted behaviour for pharmaceutical companies when concluding this type of agreement, to avoid antitrust liability.

II. Patent Settlement Agreements and Types of Reverse Payment Agreements

1. Patent Settlement Agreements: General Considerations

Parties may opt to settle a dispute in or out of court to save time and money rather than pursuing the disagreement until the final court decision, which will likely prove unsatisfactory to at least one of the parties. Patent disputes settlements are no exception, as patent litigation is typically lengthy and

extremely costly.[9] The pharmaceutical industry in particular has recently favoured this type of agreement, where the patent is considered a primary corporate asset which the patent holder vigourously protects and which competitors target.

When a patent litigation between brand-name[10] and generic pharmaceutical companies occurs, it typically involves determining whether the relevant patents are valid and have been infringed. For the brand-name drug company to prevail, it must successfully defend the validity of its patents and show that the generic's product would infringe those patents.[11] For the generic company to succeed, it must prove that the patent is invalid or unenforceable and/or that its generic drug does not infringe the patent.[12] Such disputes are extremely complex and demand enormous effort from both parties. Therefore, given the high costs of patent litigation and the potential uncertainty of the case outcome, brand-name and generic companies may wish to settle a dispute before a court decides on the merits. This trend is evidenced by the rapidly growing number of patent settlements during the last few years.[13]

Such settlements do not necessarily raise competition law concerns. The parties may agree that the generic company may start marketing at some point before the patent expires, but not as soon as it expects through the litigation.[14] This agreement will most likely reflect the parties' beliefs on the

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[9] Pharmaceutical Sector Inquiry (n 8) (originator companies paid, on average, € 230,000 in legal fees per case in a single Member State. The highest amount of legal fees is paid in the UK, with an average of € 993,000 per litigation, followed by the Netherlands and France, approximately half that in the UK, and the lowest in Germany and Austria (€ 76,000 and € 46,000) para 659.

[10] According to the Federal Food, Drug, and Cosmetic Act the term 'brand name drug company' means the party which holds the approved application (…) for a brand name drug which is a listed drug in an ANDA, or a party which owns a patent for which information is submitted for such drug (..) (Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (n 41) Sec. 1111). The EU equivalent of this term is 'Originator company'.

[11] Federal Trade Commission Staff Study, 'Pay-for-Delay: How Drug Company Pay-Offs Cost Consumers Billions' (January 2010) <http://www.ftc.gov/os/2010/01/100112 payfordelayrpt.pdf> accessed 6 August 2012, 3 (FTC Pay-for-Delay Study).

[12] ibid.

[13] 3rd Monitoring Report (n 7) 6 (from 12 patent settlement agreements in 2000 to 120 in 2011).

[14] FTC Pay-for-Delay Study (n 11) 3.

likelihood of success of their legal positions in a dispute.[15] Settlements which contain no other specific provisions normally do not raise competition concerns.

However, particular types of patent settlement agreements have attracted scrutiny from competition authorities. The so-called 'reverse payment', 'pay-for-delay' or 'exclusionary payments' settlement, wherein some kind of consideration flows from the originator company to the generic company in exchange for the promise by the latter to refrain from entering the market, has sparked doubts about its conformity with competition law principles. The FTC launched a campaign against this type of agreements a decade ago, and the EU Commission and some other national competition authorities have made them a recent focus.

The authorities' main concern is that the pharmaceutical brand name company uses its monopoly profits to pay the generic company to stay out of the market, thus eliminating its direct competitor. This behaviour leads to decreased competition in the pharmaceutical sector and so harms consumers, who do not receive cheaper generic version of the drug as soon as they could have done with the generic company's entry on the market. On the other hand, the proponents of the reverse payment agreements argue that these settlement agreements benefit the public in ending the costly litigation.[16] As a result, pharmaceutical companies may invest the saved resources into further research for new drugs, and save time and effort on the part of the courts, patent offices and competition authorities to decide the matter, which also has positive public interests.[17]

2. Specific Patent Settlement Agreements: Reverse Payment Agreements and Their Types

Although some differences exist between the types of reverse payment agreements in the U.S. and the EU, one can highlight certain common provisions used by pharmaceutical companies when settling their disputes,

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[15] Federal Trade Commission Report, 'Authorized Generic Drugs: Short-Term Effects and Long-Term Impact' (August 2011) < http://www.ftc.gov/os/2011/08/2011-genericdrugreport.pdf > accessed 6 August 2012, 140 (FTC Authorized Generic Drugs Report).
[16] Pharmaceutical Sector Inquiry (n 8) 255.
[17] 3rd Monitoring Report (n 7) 2.

based on FTC and EU Commission findings.[18] The main provisions which raise competition concerns in this type of agreement are whether an agreement contains (i) limitation/restriction on market entry by the generic company and (ii) value transfer from the originator to the generic company.[19]

The value transfer from the originator company to the generic company may take different forms, including:

- a plain monetary transfer from originator to generic company;
- non-monetary benefits from originator to generic company, which may include, inter alia:
  - the originator company's granting a licence to the generic company to manufacture branded product;[20]
  - entering into the supply/distribution agreement with the generic company;[21]
  - entering into co-marketing and co-promotion agreements;
  - a promise by the originator not to compete with the generic using its authorised generic (AGs). [22]

The generic company's restrictions on market entry also vary. The parties may agree that the generic company will enter the market before, upon or after the patent expires.

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[18] See Pharmaceutical Sector Inquiry (n 8), 3rd Monitoring Report (n 7), FTC Pay-for-Delay Study (n 11), FTC Authorized Generic Drugs Report (n 15).

[19] Pharmaceutical Sector Inquiry (n 8).270.

[20] 3rd Monitoring Report (n 7) 3. 'A licence granted by the originator company allowing market presence of the generic company is also categorised as limiting generic entry, because the generic company cannot enter the market with its own product or it cannot set the conditions for the commercialisation of its product freely.' (internal references are omitted) ibid.

[21] ibid. 'The same logic applies to patent settlement agreements in which the parties agree that the generic company will be a distributor of the originator product concerned or if the generic company will source its supplies of the active pharmaceutical ingredient (API) from the originator company.' ibid.

[22] FTC Authorized Generic Drugs Report (n 15). 'The AGs are pharmaceutical products that are approved as brand-name drugs but marketed as generic drugs. AGs do not bear the brand-name or trademark of the brand-name drug or manufacturer, but the brand-name and AG products are manufactured to the brand's specifications.' ibid. This form of compensation occurs when the brand-name company agrees not to launch its AG during the first-filer's 180-day exclusivity period, in exchange for the first-filer's agreement to delay its market entry.

Despite these provisions in reverse payment agreements have raised competition concerns it will be seen in section 4 of this article that not all of these agreements have been held as unlawful.

III. Legal Framework

1. Legal Framework Regarding Marketing Authorisation in the U.S. and the EU

When discussing reverse payment agreements, one must understand the legal basis which creates incentives for generic companies to challenge a patent and for originators to protect it with a claim of patent infringement. Another important factor which requires understanding of the legal framework is that, whilst significant similarities exist between settlement agreements in the EU and the U.S., there are also some differences which result partly from the different regulatory frameworks.[23]

1.1. U.S. legislation

To start marketing a drug in the U.S., a pharmaceutical company must first apply for approval to the Food and Drug Administration (FDA) under the Federal Food Drug and Cosmetic Act.[24] A brand-name company obtains FDA approval for the new drug through a New Drug Application (NDA) and must prove that its product is safe and effective.[25]

(a) Hatch-Waxman Act

The Hatch-Waxman Act,[26] enacted in 1984, and amended in 2003,[27] provides alternative ways for generic companies to obtain FDA approval for

[23] Pharmaceutical Sector Inquiry (n 8) 290. '(…) [i]n the USA, the first generic company to file a paragraph-IV certification is explicitly rewarded by the legislator, whilst in the EU the first to market enjoys no statutory period during which he is protected against market entry of a second, third or subsequent generic company.' ibid. This difference has created a specific type of value transfer – authorised generics as a bargaining asset to induce a generic company to refrain from entering the market. See FTC Authorized Generic Drugs Report (n 15) n 21. This value transfer is typical for the U.S. market, but not the EU, as the lack of exclusivity period for the first filer offers no bargaining power to the originator company.
[24] 21 U.S.C. § 301, 21 U.S.C. § 355(b).
[25] 21 U.S.C. § 355(b),(c).
[26] Codified as amended at 21 U.S.C. § 355 and 35 U.S.C. §§ 156 and 271, 282.
[27] Amended as part of the Medicare Prescription Drug, Improvement, and Modernisation Act of 2003.

their products. The main purpose for introducing the Hatch-Waxman Amendments was to encourage generic companies to enter the market at an earlier stage, and thus facilitate competition with a brand-name drug[28] which would 'make available more low cost generic drugs'[29] for consumers. The Act provides an accelerated process for submitting an 'Abbreviated New Drug Application' (ANDA) to the FDA to gain approval for a drug which is shown to be a bioequivalent to a new drug previously approved by the FDA.[30] Thus, in order to prove the safety and efficacy of the generic medicine a generic company now may to rely on the clinical data first submitted by the brand-name pharmaceutical company.[31]

If the generic company wants to enter the market before the patent expiration for the brand-name drug, it may apply for 'Paragraph IV' ANDA certifying that the 'patent is invalid or will not be infringed by the manufacture, use, or sale of the new drug for which the application is submitted.'[32] The company must also include in the application a statement that it will give notice of its certification to each owner of the patent which is the subject of certification, including a detailed statement of the factual and legal basis of the applicant's opinion that the patent is invalid or will not be infringed.[33]

Paragraph IV certification constitutes a technical act of infringement.[34] It empowers the patent holder brand-name drug company to bring an action for a patent infringement within 45 days of the received notice.[35] The approval will be given immediately upon the expiration of 45 days if no such patent infringement action is brought within that period.[36] However, if the brand-name company does file a patent infringement suit within the stated period, the approval shall be made effective upon the expiration of the

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[28] FTC Pay-for-Delay Study (n 11) 3, See also Joseph J. Jacobi, 'Reconsidering the Antitrust Implications of Settlement in ANDA Litigation' [2010] SRR Journal <http://www.srr.com/article/reconsidering-antitrust-implications-settlement-anda-litigation> accessed 6 August 2012.
[29] H.R. REP. NO. 98-857, at 14 (1984), *as reprinted in* 1984 U.S.C.C.A.N. 2647. (H.R. REP. NO. 98-857).
[30] 21 U.S.C. § 355(j). See FTC Authorized Generic Drugs Report (n 15) 3.
[31] FTC Authorized Generic Drugs Report (n 15) 3.
[32] 21 U.S.C. § 355(j)(2)(A)(vii)(IV).
[33] 21 U.S.C. § 355(j)(2)(B).
[34] 35 U.S.C. § 271(e)(2)(A).
[35] 21 U.S.C. § 355(j)(5)(B)(iii).
[36] ibid.

30-month period beginning on the date of the receipt of the notice or upon a favourable decision of the court – whichever comes earlier.[37]

Once the earliest event occurs, the FDA may authorise the marketing of the generic drug, and the first applicant of Paragraph IV ANDA becomes entitled to 180-day exclusivity period.[38] This exclusivity period means that subsequent ANDA applications will become effective only upon the expiration of this period,[39] which effectively protects the first to file generic company from generic competition during this period. It thereby provides an incentive to challenge patents of brand-name pharmaceutical companies seeking to enter the market prior to patent expiration.[40]

(b) Medicare Prescription Drug, Improvement, and Modernization Act of 2003

Following FTC recommendations,[41] Congress passed the Medicare Prescription Drug, Improvement, and Modernization Act of 2003[42] to address irregularities created by the Hatch-Waxman Amendments.[43] The Act includes only one 30-month stay per ANDA,[44] forfeiture of the 180-day exclusivity period under certain circumstances[45] and, most important, the stipulation that agreements between ANDA applicants or between ANDA applicants and NDA holders must be filed with the Department of Justice and the FTC within 10 days of execution.[46]

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[37] ibid.
[38] 21 U.S.C. § 355(j)(5)(B)(iv)(I)–(II).
[39] ibid.
[40] FTC Authorized Generic Drugs Report (n 15) 3.
[41] Federal Trade Commission, 'Generic Drug Entry Prior to Patent Expiration: An FTC Study' (July 2002) < http://www.ftc.gov/os/2002/07/genericdrugstudy.pdf> accessed 6 August 2012.
[42] Medicare Prescription Drug, Improvement, and Modernization Act of 2003, Pub. L. No. 108-173, 117 Stat. 2066 (codified as amended in scattered sections of 21 U.S.C. and 42 U.S.C.) (Medicare Act).
[43] Anne-Marie C. Yvon, 'Settlements Between Brand and Generic Pharmaceutical Companies: A Reasonable Antitrust Analysis of Reverse Payments' (2006) 75 Fordham Law Review 1883, 1896.
[44] Medicare Act (n 42) Sec.1101.
[45] ibid. Sec.1102
[46] ibid. Sec. 1112,1113. See also Yvon (n 43) 1897.

1.2. EU Legislation

In the EU, as in the U.S., a pharmaceutical company must obtain marketing authorisation (MA) for a drug to be placed on the market.[47] Two types of authorisation exist: national authorisation, which is issued by the competent authorities of the EU Member States and is effective on its territory,[48] and community authorisation, which is issued by the European Commission on the basis of the centralised procedure and covers the territory of the EU.[49] Regulation (EC) No 726/2004[50] governs the centralised procedure, which offers a single application, a single evaluation, a single authorisation and the right to market medicinal product in all EU Member States.[51]

The generic company may receive marketing authorisation without providing its own pre-clinical tests and clinical trials if it can show that its medicine is a generic version of a previously approved drug.[52] The authority relies on the tests and trials for the already approved drug, submitted by originator company, but only after the expiration of the data exclusivity period which protects the data relating to the approved drug.[53]

Before 2004, the EU did not regulate product development by the generic company whilst the originator's patent was still alive; each country decided this issue at the national level.[54] The legal uncertainty about whether the research for the marketing authorisation before the patent's expiration amounted to patent infringement forced generic companies to wait for

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[47] Pharmaceutical Sector Inquiry (n 8) 115.
[48] ibid.
[49] ibid.
[50] Regulation (EC) No 726/2004 of the European Parliament and of the Council of 31 March 2004 laying down Community procedures for the authorisation and supervision of medicinal products for human and veterinary use and establishing a European Medicines Agency, OJ L 136, 30.4.2004, p 1 (Regulation (EC) No 726/2004); see also Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community Code relating to medicinal products for human use, OJ L 311, 28.11.2001, p 67. (Directive 2001/83/EC).
[51] Pharmaceutical Sector Inquiry (n 8) 118.
[52] Directive 2001/83/EC (n 50) Art. 10.
53 ibid. See also Pharmaceutical Sector Inquiry (n 8) 119.
54 Pharmaceutical Sector Inquiry (n 8) 122. See also Kristof Roox, 'The Bolar provision: a safe harbour in Europe for biosimilars', (2006) 172 EURAlex < http://www.crowell.com/documents/DOCASSOCFKTYPE_ARTICLES_614.pdf> accessed 6 August 2012.

patent expiration to carry out their product development and related testing in countries where the basic patent had already expired or where such protection did not exist.[55]

The Directive 2004/27/EC was introduced to eliminate this uncertainly.[56] The so-called '*Bolar'* provision was designed to give generic companies an exemption for pre-marketing testing, to bring EU legislation closer to the U.S.[57] This provision creates a safe harbour for certain tests and studies whilst the reference product is still patent-protected in the EU so as to enable the generic producer to apply for marketing authorisation once the period of data exclusivity granted to the holder of the original MA has elapsed.[58] After the implementation of this Directive, therefore, a generic company can obtain market authorisation for a bioequivalent drug before the patent has expired, which allows the company to start marketing its drug immediately after the patent expires.[59]

2. Differences between the U.S. and EU Legal Frameworks

Despite general similarities between the U.S. and EU legal frameworks regarding drug-marketing authorisations, certain differences have led to the evolution of specific provisions of the reverse payment agreements pertaining to the particularities of the legal provisions in the respective jurisdictions.

Although, the implementation of *Bolar* provisions brought EU regulation closer to the U.S, the latter legislation has also expanded the possibilities of market entry by generic companies by introducing the so-called 'Paragraph IV' certification. This legislation enables generic companies to enter the market before a patent expires, an early entry encouraged by the 180-day

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[55] Pharmaceutical Sector Inquiry (n 8) 123. See Roox (n 54). 'In the US, for example, the US Court of Appeals initially ruled in the case of *Roche v. Bolar* that the experimental use of a drug for the purposes of obtaining regulatory approval for a generic version of a patented pharmaceutical product constituted a patent infringement. Following this case, US patent law was amended to include an exemption to permit such activities'. See also Aria Joze Zomorodian, 'Settlement Agreements in Patent Litigation; American lessons for a European context' (Master thesis, Lund University 2012) 23.

[56] Directive 2004/27/EC the European Parliament and of the Council of 31 March 2004 amending Directive 2001/83/EC on the Community code relating to medicinal products for human use OJ L 136, 30.4.2004, p 34. (Directive 2004/27/EC).

[57] Roox (n 54) 19.

[58] Pharmaceutical Sector Inquiry (n 8) 123-124.

[59] Zomorodian (n 55) 23.

exclusivity period granted to the first-to-file generic company. These provisions have no equivalent in EU law. Such provisions in U.S. legislation have triggered new kinds of reverse payment agreements which are not specific to EU law. [60] This is the case of brand-name drug companies, instead of paying the generic companies for their promise not to enter the market, agree not to launch their authorised generics in competition with the approved generic drug during the 180-day exclusivity period.[61]

3. U.S. and EU competition rules applicable to the reverse payment agreements

3.1. U.S. antitrust rules

Section 1 of the Sherman Act prohibits '[e]very contract, combination (…) or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations'.[62]

3.2. EU competition rules

Historically, EU competition law treated patent settlement agreements like any other agreement.[63] As defined by the Court of Justice of the European Union (CJEU) in the context of 'no-challenge' clauses:

> In its prohibition of certain 'agreements' between undertakings, Article [101 (1) TFEU] [64] makes no distinction between agreements whose purpose is to put an end to litigation and those concluded with other aims in mind.[65]

The Commission scrutinises this kind of agreement under article 101 of the Treaty on the Functioning of the European Union (TFEU), which prohibits agreements and concerted practices which may affect trade and prevent or restrict competition.

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[60] Pharmaceutical Sector Inquiry (n 8) 291.
[61] FTC Authorized Generic Drugs Report (n 15) 141.
[62] 15 U.S.C. §1.
[63] Sean-Paul Brankin, Patent settlements and competition law: where is the European Commission going?' (2009) 5(1) Journal of Intellectual Property Law & Practice 23, 23.
[64] Article 101 (1) of the Treaty on the Functioning of the European Union (TFEU).
[65] Case 65/86 *Bayer AG v Maschinenmfabrik Hennecke GmbH & Heinz Sullhoftr* [1988] ECR-5249, para 15.

Unlike U.S. legislation, Section 1 of the Sherman Act, article 101 TFEU contains paragraph 3, which provides for individual exemptions to the main prohibitions set in paragraph 1, subject to specified criteria. Thus, an agreement may be exempted provided that it:

> contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:
> (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
> (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.[66]

In addition, several block exemption regulations give guidance to undertakings on which agreements will be exempted.[67] Of particular interest to this article is the Technology Transfer Block Exemption Regulation (TTBER), which addresses competition concerns arising, *inter alia*, due to patent licensing agreements.[68] The TTBER recognises that technology transfer agreements usually improve economic efficiency, are pro-competitive and give rise to competition concerns only when the undertakings have a high level of market power and agree to incorporate particularly damaging restrictions within the agreement.[69]

In its Guidelines to the TTBER,[70] the European Commission acknowledges that the licence agreements 'in the context of settlement agreements and non-assertion agreements is not as such restrictive of competition since it allows the parties to exploit their technologies post agreement.'[71] The Commission indicates, however, that 'the individual terms and conditions of such agreements may be caught by Article [101](1) [TFEU].'[72] The Commission defines that '[w]here the parties have a significant degree of

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[66] Article 101 (3) TFEU.
[67] Catherine Colston, Jonathan Galloway, *Modern Intellectual Property Law* (3rd edn, Routledge 2009) 25.
[68] Commission Regulation (EC) No 772/2004 of 27 April 2004 on the application of Article 81(3) of the Treaty to categories of technology transfer agreements, OJ L 123, 27.4.2004, 11 (TTBER), see also Colston (n 67) 26.
[69] TTBER (n 68) recitals para 5, see also Colston (n 67) 26.
[70] Commission Notice, 'Guidelines on the application of Article 81 of the EC Treaty [now Art. 101 TFEU) to technology transfer agreements' OJ [2004] C 101/02 (Technology Transfer Guidelines).
[71] ibid, para 204.
[72] ibid.

market power and the agreement imposes restrictions that clearly go beyond what is required in order to unblock, the agreement is likely to be caught by Article [101].'[73] The Commission does not explain what is meant by 'beyond the unblocking', but one may argue that, for instance, the restrictions relating to other intellectual property rights which are not in dispute may well be deemed as going beyond that needed to unblock.[74]

IV. Competition Authorities' Positions on Reverse Payment Agreements

1. FTC Position

For more than a decade, the FTC has been straggling with certain types of patent settlement agreements where the brand-name companies pay generics to delay entry.[75] The FTC contends that, although branded pharmaceutical manufacturers and their generic competitors tend to view reverse payment settlements favourably, consumers may suffer as 'they miss out on generic prices that can be as much as 90 per cent less than brand prices.'[76] According to FTC staff analysis published in January 2010, exclusion payment settlements cost consumers $3.5 billion per year.[77]

The FTC's main concern regarding reverse payments is that the patent holder is using part of the profits from its patent monopoly to buy off the entry of its competitor.[78] Thus, the FTC sees such agreements as a violation of antitrust law, namely Section 1 of the Sherman Act. The FTC argues that such settlements may raise serious competition concerns when they involve compensation from the brand-name company to the generic company to delay generic entry beyond the time of a simple compromise date.[79] According to the FTC position, such settlements 'thwart the goal of the Hatch-Waxman Amendments to encourage generic companies to challenge questionable patents and promptly 'make available more low cost generic

[73] ibid, para 207.
[74] Anderman (n 2) 283.
[75] FTC Authorized Generic Drugs Report (n 15) i.
[76] FTC Pay-for-Delay Study (n 11) 1.
[77] FTC Pay-for-Delay Study (n 11) 2.
[78] Brankin (n 63) 24.
[79] FTC Authorized Generic Drugs Report (n 15) 140. The *simple compromise date* according to the FTC is when 'the brand and generic settle the litigation simply by agreeing on a time for generic entry that is prior to patent expiration but later than immediate entry without any compensation.' ibid.

drugs', while simultaneously protecting legitimate patent claims covering innovator drugs.'[80] The FTC has challenged a number of these agreements, and is lobbying for them to be recognised as illegal at the legislative level.[81]

2. European Commission Position

Unlike the U.S., in Europe patent settlement agreements have neither raised significant interest by the European Commission previously[82] nor have they been the subject of consideration before the CJEU.

However, inspired by its U.S. counterpart and following the *AstraZeneca* case,[83] the EU Commission has launched intensive monitoring of competition in the pharmaceutical sector. [84] Its Executive Summary of the Pharmaceutical Inquiry Report emphasises '[t]he importance of a well-functioning pharmaceutical sector and the presence of certain indications that competition in the pharmaceutical market in the European Union might not be working well.' [85] The inquiry aimed '[t]o examine the reasons for observed delays in the entry of generic medicines to the market and the apparent decline in innovation as measured by the number of new medicines coming to the market.'[86] The inquiry sought inter alia to examine practices which '[c]ompanies may use to block or delay generic competition.'[87]

The inquiry identifies patent settlement agreements among such practices which delay or block generic entry.[88] The European Commission sees agreements which limit market entry of the generic and include a value

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[80] FTC Authorized Generic Drugs Report (n 15) 141 citing H.R. REP. NO. 98-857 (n 29).
[81] Federal Trade Commission, 'Statement by FTC Chairman Jon Leibowitz Regarding Senate Judiciary Committee Mark-up of Legislation Stopping Illegal Pay-for-Delay Drug Settlements' (07/21/2011) < http://www.ftc.gov/opa/2011/07/pdfmarkup-.shtm> accessed 6 December 2012;
[82] Brankin (n 63) 23.
[83] AstraZeneca (n 4), the EU General Court agreed with the Commission's findings of the AstraZeneca's abuse of a dominant market position in the pharmaceutical sector via misusing the regulatory framework to delay the market entry of competing generic products.
[84] Commission Decision of 15 January 2008 initiating an enquiry into the pharmaceutical sector pursuant to Article 17 of Council Regulation (EC) No 1/2003 (Case No COMP/D2/39.514).
[85] Executive Summary (n 3).
[86] ibid.
[87] ibid. 'The scope of the inquiry included companies with 80% of the relevant turnover in the EU, 43 originator and 27 generic companies, limiting products to medicines for human use within the 27 member states and the time limitation was from 2000 to 2007.' ibid.
[88] ibid.

transfer from the originator company to a generic company as potentially anticompetitive.[89] The Commission also deems potentially problematic those agreements which include restrictions beyond the exclusionary zone of the patent, meaning that they reach beyond its geographic scope, its period of protection or its exclusionary scope.[90] The Commission explains that the reason for this concern regarding this type of agreements is that such agreements do not relate directly to the IP rights granted by the patents in question.[91] The Commission also indicates as problematic those agreements which include settlement agreements on a patent which the patent holder knows that it does not meet the patentability criteria.[92] For instance, a patent may be granted following the provision of incorrect, misleading or incomplete information.[93] Therefore, the European Commission decided to monitor further the settlements 'with a potential to adversely affect European consumers.'[94] Currently, three Reports in the Monitoring of Patent Settlements were concluded. [95]

Following its inquiry into the pharmaceutical sector and monitoring exercises, the Commission has opened formal antitrust investigations against originator and generic companies suspected of engaging in anti-competitive practices and it has examined their patent settlement agreements. The two major cases concern the brand-name companies *Lundbeck* and *Les Laboratoires Servier*.

According to the Commission press release, the Danish company *Lundbeck* and its four generic competitors were informed of the Commission's objections regarding their settlement agreements concerning *Citalopram*, an antidepressant.[96] The Commission has expressed its preliminary view that

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[89] ibid.
[90] 3rd Monitoring Report (n 7).
[91] ibid.
[92] ibid.
[93] ibid.
[94] Executive Summary (n 3) 20.
[95] European Commission, '1st Report on the Monitoring of Patent Settlements (period: mid 2008-end 2009)' (5 July 2010) <http://ec.europa.eu/competition/sectors/-pharmaceuticals/inquiry/patent_settlements_report1.pdf> accessed 6 August 2012; European Commission, '2nd Report on the Monitoring of Patent Settlements (period: January-December 2010)' (6 July 2011) <http://ec.europa.eu/competition/sectors/-pharmaceuticals/inquiry/patent_settlements_report2.pdf> accessed 6 August 2012; 3rd Monitoring Report (n 7).
[96] European Commission Press Release, 'Antitrust: Commission sends Statement of Objections to Lundbeck and others for preventing market entry of generic antidepressant

these agreements aimed to prevent the market entry of cheaper generic medicines in violation of Article 101 TFEU.[97]

According to the Commission, these agreements were concluded when the generic entry became possible after certain *Lundbeck's* patents had expired.[98] The agreements contain substantial value transfers from *Lundbeck* to the generic companies, and resulted in the subsequent refrain by the latter from entering the market.[99] The value transfers occurred via direct payments from *Lundbeck* to the generic companies and via the purchase of generic Citalopram stock for destruction or guaranteed profits in a distribution agreement.[100] The Commission considers that these agreements may have caused substantial consumer harm, as they may have delayed the entry of generic medicine for up to two years.[101] The price of Citalopram remained high as a result.[102]

Another major investigation was launched against the French pharmaceutical company *Les Laboratoires Servier*.[103] In its press release on 30 July 2012,[104] the Commission stated that *Servier* and its several generic competitors were informed of the Commission's objections against their patent settlement agreements and *Servier's* acquisition of key competing technologies, which may have delayed the generic entry of the cardio-vascular medicine Perindopril. The Commission alleges that *Servier* unduly protected its market exclusivity by inducing its generic challengers to conclude patent settlements, which the Commission considers a violation of EU competition rules prohibiting restrictive business practices and the abuse of a dominant market position (respectively articles 101 and 102

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medicine' IP/12/834 (25 July 2012) <http://europa.eu/rapid/pressReleasesAction-.do?reference=IP/12/834&format=HTML&aged=0&language=EN&guiLanguage=en> accessed 6 August 2012.

[97] ibid.

[98] ibid.

[99] ibid.

[100] ibid.

[101] ibid.

[102] ibid.

[103] European Commission, Memo 'Antitrust: Commission opens formal proceedings against Les Laboratoires Servier and a number of generic pharmaceutical companies' (July 2009) MEMO/09/322 <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO-/09/322&format=HTML&aged=0&language> accessed 6 July 2012.

[104] European Commission Press Release, 'Antitrust: Commission sends Statement of Objections on perindopril to Servier and others' IP/12/835 (30 July 2012) <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/12/835&format=HTML&aged=0&language=EN&guiLanguage=en> accessed 6 July 2012.

TFEU).[105]Additional pending investigations concern *Cephalon* and *Teva*[106] and *Johnson & Johnson* and *Novartis*[107] for potential violations of the EU competition rules.

V. U.S. Courts' Developments: Approaches, General Rules and Specific Examples of Reverse Payments Agreements

1. U.S. Courts' Approaches to Reverse Payment Agreements

Contrary to the firm position of the FTC regarding the anticompetitive nature of reverse payment agreements, U.S. courts are currently divided as to how to scrutinise such agreements. They were the subject of considerations in several appellate circuits, which have taken different approaches to their evaluations and have arrived at different conclusions. By examining the applied tests developed by the courts, the particular terms of the agreements and the outcome of the cases, we will determine which reverse payment agreements were deemed lawful and which were deemed anticompetitive.

1.1. 'Per Se Illegality' Approach

This approach was taken by the U.S. Court of Appeal for the Sixth Circuit in the case of 'first impression'. The case involved payment from a brand-name company to a generic company in exchange for the promise by the latter to refrain from entering the market even after the FDA's approval.[108] The Court explained that most restraints are evaluated using a '*rule of reason'*, other restrains, however, 'are deemed unlawful *per se*'[109] because they 'have such predictable and pernicious anticompetitive effect, and such

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[105] ibid.

[106] European Commission Press Release, 'Antitrust: Commission opens investigation against pharmaceutical companies Cephalon and Teva' IP/11/511 (28 April 2011) <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/511&format=HTML&aged=1&language=EN&guiLanguage=en> accessed 6 July 2012.

[107] European Commission Press Release, 'Antitrust: Commission opens proceedings against Johnson & Johnson and Novartis' IP/11/1228 (21 October 2011) <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/1228&format=HTML&aged=1&language=EN&guiLanguage=en> accessed 6 July 2012.

[108] *In re Cardizem CD Antitrust Litigation*, 332 F.3d 896 (6th Cir. 2003), *cert denied*, 125 S.Ct. 307 (2004) (*Cardizem* 6th Cir. 2003).

[109] ibid 906.

limited potential for pro-competitive benefit.'[110] It referred to the Supreme Court, which 'has identified certain types of restraints as subject to the *per se* rule. The classic examples are naked, horizontal restraints pertaining to prices or territories.'[111]

The Court reiterated that '(...) the virtue/vice of the *per se* rule is that it allows courts to presume that certain behaviours as a class are anticompetitive without expending judicial resources to evaluate the actual anticompetitive effects or pro-competitive justifications in a particular case.'[112] Thus, applying this test, the Court rejected any arguments regarding the pro-competitive nature of the agreement and held that the agreement was 'at its core, a horizontal agreement to eliminate competition (…)' and 'a classic example of a per se illegal restraint of trade.'[113]

1.2. 'Rule of Reason' Approach

The U.S. Court of Appeal for the Second Circuit used a different approach.[114] In deciding on the lawfulness of the agreement, the Court applied the *'rule of reason'* analysis, which involves a three-step process.[115] 'First, the plaintiff bears the initial burden of showing that the defendant's conduct 'had an *actual* adverse effect on competition as a whole in the relevant market'. If the plaintiff satisfies this burden, the burden then shifts to the defendant to offer evidence that its conduct had pro-competitive effects. If the defendant is able to offer such proof, the burden shifts back to the plaintiff who must prove that any legitimate competitive effects could have been achieved through a less restrictive alternative.'[116]

The Federal Circuit, agreeing with the Second Circuit regarding the application of this test, explained that the starting point is to define the

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[110] ibid 906 citing *Northern Pacific Ry. Co. v. United States*, 356 U.S. 1, 5, 78 S.Ct. 514, 2 L.Ed.2d 545 (1958).
[111] ibid 907.
[112] ibid 909.
[113] ibid.
[114] *Ark. Carpenters Health & Welfare Fund v. Bayer AG* (*In re Ciprofloxacin Hydrochloride Antitrust Litig*.) 604 F.3d 98 (2d Cir. 2010), cert.denied, 131 S.Ct. 1606 (2011) (*Cipro* 2d Cir. 2010).
[115] ibid,104.
[116] *Cipro* 2d Cir. 2010 (n 114) 104 citing *Capital Imaging Assocs., P.C. v. Mohawk Valley Med. Assocs., Inc*., 996 F.2d 537 (2d Cir. 1993).

relevant market and to determine whether the defendants possess market power therein.[117]

To analyse further whether there was 'actual adverse effect on competition', the first step of the 'rule of reason' test, the Second Circuit raised the question of whether reverse payments agreements 'fall within the scope of the patent holder's property rights, or whether such settlements are properly characterized as illegal marketing-sharing agreements.'[118] Approaching this question, the Court referred to the Court's previous decision in another case,[119] stating that the right to enter into such an agreement falls within 'the terms of the exclusionary grant conferred by the branded manufacture's patent'.[120] It added that, unless the patent was obtained by fraud patent or an enforcement suit is objectively baseless, 'there is no injury to the market cognizable under existing antitrust law, as long as competition is restrained only within the scope of the patent.'[121]

The Federal Circuit, applying the same '*rule of reason*' test, stated that there was no evidence that the settlement agreements created a bottleneck on challenges to the patent or otherwise restrained competition outside the 'exclusionary zone' of the patent.[122] Therefore, 'the plaintiffs had failed to demonstrate that the Agreements had an anti-competitive effect on the market for [the drug] beyond that permitted by the patent.'[123] Since the plaintiffs had not provided the facts needed under the first step of this analysis, the Court found it unnecessary to consider the second or third step.[124]

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[117] Ark. Carpenters Health & Welfare Fund v. Bayer AG (*In re Ciprofloxacin Hydrochloride Antitrust Litig*.), 544 F.3d 1323 (Fed. Cir. 2008), cert. denied, 129 S.Ct. 2828 (2009) (*Cipro* Fed. Cir. 2008) 1332 citing *Geneva Pharms. Tech. Corp. v. Barr Labs., Inc.*, 386 F.3d 485, 495-96 (2d Cir. 2004), and *United States v. Visa U.S.A., Inc.*, 344 F.3d 229, 238 (2d Cir. 2003).

[118] *Cipro* 2d Cir. 2010 (n 114) 104.

[119] *Joblove v. Barr Labs., Inc*. (*In re Tamoxifen Citrate Antitrust Litig*.), 429 F.3d 370 (2d Cir. 2005), amended by, 466 F.3d 187 (2d Cir. 2006) (*Tamoxifen* 2d Cir. 2006).

[120] *Cipro* 2d Cir. 2010 (n 114) 105.

[121] Ibid 106 citing *Tamoxifen* 2d Cir. 2006.

[122] *Cipro* Fed. Cir. 2008 (n 117) 1332 citing *In re Ciprofloxacin Hydrochloride Antitrust Litigation*, 363 F. Supp. 2d 514 (E.D.N.Y. 2005) 540.

[123] ibid.

[124] ibid.

1.3. 'Scope of the Patent' Test

In deciding on the lawfulness of reverse payment agreements, the Eleventh Circuit preferred a more traditional analysis. It focused on the permissible exclusionary scope under the patent as compared to the exclusions and anticompetitive effects arising out of the agreement.[125] The court explained that 'neither the rule of reason nor the per se analysis is appropriate in this context,'[126] as these tests aim to determine whether the agreement had an anticompetitive effect on the market.[127] However, the Court indicated that 'by its nature patents create an environment of exclusion, and consequently, cripple competition. The anticompetitive effect is already present.'[128]

The Court added, that 'the proper analysis of antitrust liability requires an examination of: (1) the scope of the exclusionary potential of the patent; (2) the extent to which the agreements exceed that scope; and (3) the resulting anticompetitive effects.'[129] When discussing the first step of the test, the court held that an agreement cannot exclude more competition than the patent has the potential to exclude.[130] Otherwise, the patent holder 'has used the settlement to buy exclusionary rights that are not contained in the patent grant, and those additional rights are vulnerable to antitrust attack.'[131] Thus, if the anticompetitive effects fall within the scope of the exclusionary potential of the patent, the parties are immune from antitrust liability.[132] The Court stated that, under the patent, the originator company had the right to exclude the generic companies from the market[133] and to grant licenses.[134] Such rights existed until the patent expired, or until the generic manufacturers proved either that the patent was invalid or that their products did not infringe upon the originator's patent.[135]

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[125] Jacobi (n 28).
[126] *Schering Plough Corp. v.FTC*, 402 F.3d 1056, 1065 (11th Cir. 2005) (*Schering Plough* 11th Cir. 2005).
[127] ibid.
[128] ibid.
[129] ibid 1066.
[130] *FTC v. Watson Pharms, Inc.*, 677 F.3d 1298, 1308 (11th Cir. 2012) (*Watson Pharms*, 11th Cir. 2012).
[131] ibid.
[132] ibid 1309 citing *Valley Drug Co. v. Geneva Pharmaceuticals*, Inc., 344 F.3d 1294 (11th Cir. 2003), cert. denied, 543 U.S. 939 (2004) 1311 (*Valley Drug* 11th Cir. 2003).
[133] *Schering Plough* 11th Cir. 2005 (n 126) 1066.
[134] ibid 1067.
[135] ibid 1066–67.

Under the second step of the test, the court analysed whether the settlement extended the originator's exclusionary rights beyond that scope. The court held that, as the settlements permitted generic companies to market their generic drugs several years before the patent's expiration, the competition was excluded for a shorter period than the patent allowed.[136] As a result, the Court determined that 'the reverse payment settlements did not impermissibly extend the originator's patent monopoly.'[137]

The third step of this analysis requires findings about whether the reverse payment agreements were indeed an 'unfair method of competition.'[138] It referred to the Supreme Court, which requires that the effects be actually anticompetitive.[139] The Court defined that the patent claims covered the restraints at hand and defined this clause as an 'ancillary restraint.'[140] The Court decreed that, for a condition to be defined as an ancillary, 'an agreement limiting competition must be secondary and collateral to an independent and legitimate transaction.'[141]

The court stated that, under the agreement, the scope of the products subject to the specific entry date demonstrates an efficient narrowness and no other products were delayed by these ancillary restraints.[142] Moreover, the agreement covered the identical reach of the patent.[143] Therefore, emphasising that the 'general policy of the law is to favour the settlement litigation',[144] the court concluded that the settlements 'fell well within the protection of the patent and were therefore not illegal'.[145]

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[136] ibid 1068.
[137] *Watson Pharms,* 11th Cir. 2012 (n 130) 1310.
[138] *Schering Plough* 11th Cir. 2005 (n 126) 1072.
[139] ibid citing *California Dental Association v. FTC*, 128 F.3d 720, (9th Cir. 1997) 775 n.12.
[140] ibid 1072.
[141] ibid 1073 citing *Rothery Storage & Van Co. v. Atlas Van Lines*, Inc., 792 F.2d 210 (D.C. Cir. 1986) 224.
[142] ibid.
[143] ibid.
[144] ibid 1073 citing *Aro Corp. v. Allied Witan Co.*, 531 F.2d 1368, (6th Cir. 1976) 1372.
[145] ibid 1076.

1.4. A Quick Look 'Rule of Reason' Analysis

The Third Circuit used this approach in its most recent decision regarding reverse payment agreements.[146] Notably, the agreements under review in this Court were already under consideration in the Eleventh Circuit.[147] Applying the scope of the patent test, the latter declared these agreements lawful and not violative of antitrust law as they did not exceed the scope of the patent.

The Third Circuit, considering the same agreements, disagreed with the Eleventh Circuit. The Court rejected the scope of the patent test and instead applied a quick look rule of reason analysis.[148] This analysis is based on the economic realities of the agreement in question.[149] Thus, the Court explained that the very existence of any payment from a brand-name company to a generic patent challenger who agrees to delay its market entry stands as *prima facie* evidence of an unreasonable restraint of trade.[150] One may rebut this presumption by showing that the payment (1) was for a purpose other than delayed entry or (2) offers some pro-competitive benefit.[151]

1.5. Brief Conclusions on the U.S. Courts' Tests

Despite the courts' different approaches, namely the *per se* test, rule of reason and scope of the patent test, they ultimately arrived at the same conclusion: as long as the scope of the patent covers the agreement and this patent was not procured by fraud or the litigation is not baseless, the agreement is lawful and does not violate antitrust law.

One may well argue that this practice was almost settled until recently. However, the Third Circuit undermined the practice with its decision[152] which refused to consider the reverse payment agreements from the patent/antirust point of view and instead concentrated on the existence of the reverse payment. As a result, there currently exist two Appellate Court

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[146] *In re K-Dur Antitrust Litig.*, 2012 WL 2877662 (3d Cir. July 16, 2012) (*In re K-Dur* 3d Cir. 2012).
[147] *Schering Plough* 11th Cir. 2005 (n 126).
[148] ibid 32.
[149] ibid.
[150] ibid 33.
[151] ibid.
[152] *In re K-Dur* 3d Cir. 2012 (n 146).

decisions – by the Third and the Eleventh Circuits – which, through different approaches, arrived at opposite conclusions regarding the same agreements.[153]

Notably, the decision of the Eleventh Circuit is often cited for triggering the increased number of reverse payment agreements.[154] The Third Circuit's decision regarding the same agreements may well lead to a prohibition of, or limitations imposed on, reverse payment agreements. In any case the Third Circuit's decision may mark the reason for the Supreme Court to decide this issue and finally define the coherent evaluative approach.

2. General Rules Inferred From the U.S. Case Law

As was noted above, disputes regarding reverse payment agreements are comparatively a new type of disputes in the U.S., and some circuits still need to consider them at a 'first impression'. Analysing the U.S. case law reveals a divergence in the evaluation techniques applied to these agreements, and legal society thus advocates for the harmonising the case law by implementing a coherent approach for treating and deciding on such disputes,[155] as some fear that these divergences may lead to opposite decisions regarding the same kind of agreements.[156] There are indications, however, that despite the above factors courts in general consistently segregate the specific types of reverse payment agreements. This practice derives from common rules from the previous antitrust and patent case law, and from new rules emerging from the recent case law on pay-for-delay agreements.[157]

Analysing the courts' decisions infers the following general rules, which the courts explicitly or implicitly accept and which relate to the disputes regarding reverse payment agreements.

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[153] *In re K-Dur* 3d Cir. 2012 (n 146) and *Schering Plough* 11th Cir. 2005 (n 146).

[154] Jon Leibowitz, Comm'r, FTC, 'Exclusion Payments to Settle Pharmaceutical Patent Cases: They're B-a-a-a-ck!, Address at the Second Annual In-House Counsel's Forum on Pharmaceutical Antitrust 8 (April 24, 2006) 3 <http://www.ftc.gov/speeches/leibowitz/060424PharmaSpeechACI.pdf.> accessed 7 August 2012; see also FTC Pay-for-Delay Study (n 11) 1.

[155] Yvon (n 43)1908, 1912.

[156] This was already proved by the recent decision of the Third Circuit. See *In re K-Dur* 3d Cir. 2012 (n 146).

[157] The exception to this generalisation is the Third Circuit's recent decision. See *In re K-Dur* 3d Cir. 2012 (n 146).

2.1. Presumption of Patent Validity

Some argue that reverse payment settlements fall within the exclusionary scope of the patents in question, provided those patents are valid.[158] Thus, in considering this type of disputes, the courts generally refer to the presumption of patent validity established in the law.[159] Based on this presumption, courts consider the issue of the reverse payment agreements' compatibility with the competition rules without prior revision of patent validity.

However, some authors question this legal presumption.[160] What if the patent is weak or obviously invalid? The proper challenge would result in the revocation or invalidity of the patent.[161] Concluding the settlement in such a case could prevent such outcomes and thus unduly extend the period of protection enjoyed by the patent holder.[162] As the Second Circuit acknowledged:

> If courts do not discount the exclusionary power of the patent by the probability of the patent's being held invalid, then the patents most likely to be the subject of exclusion payments would be precisely those patents that have the most questionable validity.[163]

Some argue that, if any of the presumptions regarding the patent validity fall, the agreement undoubtedly marks an unlawful restraint of trade.[164] Therefore, the question is whether the courts should consider patent validity as part of their analyses of these disputes.[165] Answering this question, the Federal Circuit agreeing with the Second and Eleventh Circuits stated that,

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[158] Jacobi (n 28) 4.
[159] 35 U.S.C. § 282
[160] Markus Schmid, 'Pharmaceutical reverse payment settlements – a European perspective in the wake of the sector inquiry' [2012] E.C.L.R. 367, 373; Gregory Dolin, 'Reverse Settlements as Patent Invalidity Signals' (2011) 24 Harvard Journal of Law & Technology 281, 318; see also Anderman (n 2) 172, Jacobi (n 28) 4.
[161] Anderman (n 2) 272.
[162] ibid.
[163] Joblove v. Barr Labs., Inc. (*In re Tamoxifen Citrate Antitrust Litig.),* 429 F.3d 370 (2d Cir. 2005), amended by, 466 F.3d 187 (2d Cir. 2006) (*Tamoxifen* 2d Cir. 2005) 211 citing In re Ciprofloxacin Hydrochloride Antitrust Litig., 363 F. Supp. 2d 514 (E.D.N.Y. 2005) 534.
[164] Markus (n 160) 373, Jacobi (n 28) 4.
[165] Jacobi (n 28) 4.

if there is no evidence that a patent was procured by fraud or that litigation is sham, there is no need to consider patent validity in this type of dispute.[166]

Although this presumption of patent validity is generally considered irrefutable, the Third Circuit questioned it in its recent decision. The Court stated that, rather than adopting such a presumption, it should be taken into account that 'a patent, in the last analysis, simply represents a legal conclusion reached by the Patent Office.'[167] The Court concluded that 'the public interest supports judicial testing and elimination of weak patents.'[168]

The Court determined that, with respect to reverse payments agreements, such logic is persuasive: as they 'permit the sharing of monopoly rents between would-be competitors without any assurance that the underlying patent is valid'.[169] The Court explained that the goal of Hatch-Waxman Act is 'to increase the availability of low cost drugs'.[170] Thus, in aiming to achieve this goal, it allows for the generic companies to challenge the brand-name companies' weak or narrow patents.[171]

2.2. The Scope of the Patent

Most of the courts have accepted that, as long as agreement falls within the scope of patent protection, it should be deemed lawful and consistent with the competition law.[172] Analysing the reverse payment settlement agreement, the Second Circuit admitted that the agreement in question was doubtless anticompetitive,[173] as it limited competition between a branded product and its generic version.[174] However, since it did not exceed the scope of the patent, it was not an unlawful anticompetitive agreement.[175]

In this respect, it is important to define the scope of the patent, which is seen to include the claims covered by the patent, term of protection and

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[166] *Cipro* Fed. Cir. 2008 (n 122) 1336.
[167] *In re K-Dur* 3d Cir. 2012 (n 146) 27 citing *Lear, Inc. v. Adkins*, 395 U.S. 653 (1969) 670.
[168] ibid 29.
[169] ibid 30.
[170] ibid 31 citing H.R. REP. NO. 98-857 (n 29).
[171] ibid 31.
[172] The Third Circuit in its recent decision has rejected this approach. ibid 32.
[173] *Tamoxifen* 2d Cir. 2006 (n 119) 218.
[174] ibid.
[175] ibid.

geographical area.[176] The patent confers the right to exclude others from profiting from the patented invention.[177] Patents do not, however, extend the patentee's monopoly beyond its statutory right to exclude.[178] The Second Circuit held that the settlement agreement did not exceed the scope of the patent where: (1) there was no restriction on marketing non-infringing products; (2) a generic version of the branded drug would necessarily infringe the branded firm's patent; (3) the agreement did not bar other generic manufacturers from challenging the patent.[179]

One example of exceeding the scope of the patent is when a generic company agrees to refrain from ever marketing a generic version of a patented drug.[180] This means that settlement agreement will block generic competition after the patent expiration, and thus will exclude competition beyond the scope of exclusion granted by the patent. [181] Another example is when a settlement agreement allows a generic company to retain its 180-day exclusivity period even though it has no intention to market its generic drug.[182] This stipulation means that the exclusivity period, which begins after the date of first commercial marketing, would never be triggered.[183] As a result, 'the exclusivity period would have acted like a cork in a bottle, blocking other generic competition from pouring into the market.'[184] Thus the agreement creates anticompetitive effects beyond the scope of the patent.[185]

However, the Third Circuit did not find the scope of the patent approach persuasive.[186] Declining to follow it, the Court explained that it 'improperly restricts the application of antitrust law and is contrary to the policies

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[176] 3rd Monitoring Report (n 7).
[177] *Dawson Chem. Co. v. Rohm & Haas Co*., 448 U.S. 176, 215 (1980).
[178] *Mallinckrodt, Inc. v. Medipart, Inc*. 976 F.2d 700, 708 (Fed. Cir. 1992).
[179] *Cipro* 2d Cir. 2010 (n 114) 106 citing *Tamoxifen* 2d Cir. 2005 (n 119) 213-15.
[180] *Andrx Pharmaceuticals, Inc. v. Elan Corp*., 421 F.3d 1227, 1235 (11th Cir. 2005) (*Andrx Pharmaceuticals* 11th Cir. 2005).
[181] *Watson Pharms*, 11th Cir. 2012 (n 130) 1311 citing *Andrx Pharmaceuticals* 11th Cir. 2005, 1231 (internal citation omitted).
[182] ibid citing *Andrx Pharmaceuticals* 11th Cir. 2005, 1231 (internal citation omitted).
[183] ibid citing *Andrx Pharmaceuticals* 11th Cir. 2005, 1231 (internal citation omitted).
[184] ibid.
[185] ibid citing *Andrx Pharmaceuticals* 11th Cir. 2005, 1235 (internal citation omitted).
[186] *In re K-Dur* 3d Cir. 2012 (n 146) 22.

underlying the Hatch-Waxman Act and a long line of Supreme Court precedent on patent litigation and competition.'[187]

2.3. Sham Litigation or Fraud in Obtaining a Patent

The Federal Circuit stated that 'an antitrust violation could be found in the extreme situation where there was evidence of fraud on the PTO or sham litigation.'[188] Facing antitrust liability, a defendant may invoke the immunity under the Noerr-Pennington doctrine, which 'allows private citizens to exercise their First Amendment rights to petition the government without fear of antitrust liability.'[189] However, 'sham' conduct falls within exceptions to the doctrine.[190] As the Second Circuit stated, 'the doctrine does not extend protection to the defendants 'where the alleged conspiracy is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor'.[191]

The situations in which the sham exception applies are defined as follows: first, where the lawsuit is objectively baseless and the defendant's motive in bringing it was unlawful; second, where the conduct involves a series of lawsuits brought pursuant to a policy of starting legal proceedings without regard to the merits and for an unlawful purpose; third, if the allegedly unlawful conduct consists of making intentional misrepresentations to the court, litigation can be deemed a sham if a party's knowing fraud upon, or its intentional misrepresentations to, the court deprives the litigation of its legitimacy.[192] The third situation may be directed to not only a court but also the federal Patent and Trademark Office.[193] The patent obtained by fraud grants unlawful monopoly to the patent holder and thereby violates antitrust law.

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[187] ibid 27.
[188] *Cipro* Fed. Cir. 2008 (n 117) 1335 citing *Valley Drug* 11th Cir. 2003 (n 132) 1309.
[189] *Kaiser Foundation Health Plan, Inc. v. Abbott Laboratories, Inc*, 552 F.3d 1033 (9th Cir. 2009), 1044 (*Terazozin* 9th Cir. 2009) citing *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) and *United Mine Workers of Am. v. Pennington*, 381 U.S. 657 (1965).
[190] ibid 1045.
[191] *Tamoxifen* 2d Cir. 2006 (n 119) 217 citing *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 511, 92 S. Ct. 609, 30 L. Ed. 2d 642 (1972) (quoting Noerr, 365 U.S. at 144).
[192] *Terazozin* 9th Cir. 2009 (n 189) 1045 citing *City of Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365, 380 (1991).
[193] *Terazozin* 9th Cir. 2009 (n 189) 1045 citing *Sosa v. DIRECTV, Inc.*, 437 F.3d 923, 938 (9th Cir. 2006).

2.4. The Agreement Must Settle the Dispute Finally

The settlement must fully resolve litigation between the generic company and the originator company to enable the other generic manufacturers to enter the market. Interim settlements which aim to withdraw generic entry whilst the litigation is pending are viewed as unlawful.[194] The Second Circuit stated that 'rather than resolve the litigation, the settlements in those cases prolonged it by providing incentives to the defendant generic manufacturers not to pursue the litigation avidly.'[195] The alleged purpose of this kind of agreement is to create a bottleneck: delaying the triggering of the 180-day exclusivity period in turn delays the entry of both the first filer and any other potential generic company.[196]

2.5. Likelihood to Prevail in the Dispute

Although courts have rejected the '*likelihood to prevail in the dispute'* approach, it is one worth noting as the FTC firmly stands by this position. In one case involving the invalidation of the patent after the settlement agreement, the Eleventh Circuit held that in case the decision about the patent invalidity was held after the settlement agreement this decision should not be taken into account.[197] All that matters is the patent's 'potential exclusionary power as it appeared at the time of settlement.'[198]

The FTC has developed a 'not likely to prevail' test, arguing that 'a patent has no exclusionary potential if its holder was not likely to win the underlying infringement suit.'[199] It also argues that 'if the patent has no exclusionary potential then any reverse payment settlement that excludes any competition from the market necessarily exceeds the potential exclusionary scope of the patent and must be seen as the patent holder's illegal 'buying off' of a serious threat to competition.'[200] The FTC advocates adopting a rule according to which 'an exclusion payment is unlawful if, viewing the situation objectively as of the time of the

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[194] *Andrx Pharmaceuticals, Inc. v. Biovail Corp. International, 256 F.3d 799 (D.C. Cir. 2001), cert. denied, 535 U.S. 931* (2002) (*Andrx* D.C. Cir. 2001).
[195] *Tamoxifen* 2d Cir. 2006 (n 119) 215.
[196] *In re K-Dur* 3d Cir. 2012 (n 146) 20 citing *Andrx* D.C. Cir. 2001, 804.
[197] *Watson Pharms,* 11th Cir. 2012 (n 130) 1308.
[198] ibid citing *Valley Drug* 11th Cir. 2003 (n 132) 1311.
[199] ibid, 1312.
[200] ibid.

settlement, it is more likely than not that the patent would not have blocked generic entry earlier than the agreed-upon entry date.'[201]

The Eleventh Circuit rejected this proposed test firmly, holding that:

> Rational parties settle to cap the cost of litigation and to avoid the chance of losing. Those motives exist not only for the side that is likely to lose but also for the side that is likely, but only likely, to win. A party likely to win might not want to play the odds for the same reason that one likely to survive a game of Russian roulette might not want to take a turn. With four chambers of a seven-chamber revolver unloaded, a party pulling the trigger is likely (57% to 43%) to survive, but the undertaking is still one that can lead to undertaking.[202]

3. Examples of Reverse Payment Agreements as Decided by U.S. Courts

The following are examples of terms and conditions of the reverse payment agreements which violate antitrust law, as decided by U.S. courts:

3.1. Examples of Unlawful Reverse Payment Agreements

(a) Agreement Recognised As Per Se Illegal

Agreement contained payments from the originator company to the generic company beginning on the date of FDA approval obtained by the generic company and ending on the date when the generic company started selling its generic version of the patented drug or when the court considering the patent infringement dispute recognised the infringement. In return, the generic company promised not to market its generic version of a patented drug even after the FDA approval. The agreement included generics which did not infringe the patent and promise by the generic company not to relinquish the 180-day period of market exclusivity.[203]

The Sixth Circuit held that such restrictions on market entry coupled with payments, non-infringing product and abuse of the 180-day market exclusivity precluding subsequent generic companies from entering the

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[201] ibid.
[202] ibid 1313.
[203] *Cardizem* 6th Cir. 2003 (n 108).

market are per se unlawful and violate antitrust law. Therefore, the court recognised this agreement 'at its core, a horizontal agreement to eliminate competition in the market for a [patented drug] (...) a classic example of a per se illegal restraint of trade.'[204]

(b) Agreement Recognised As Illegal under the 'Scope of the Patent' Test

Agreement contained recognition of the patent infringement by the generic company and promise to refrain from ever entering the market with its generic version of the drug in exchange for a license from brand-name company to manufacture a generic controlled version of the drug.[205]

The Eleventh Circuit held that the promise to refrain from ever marketing a generic version of patented drug would block generic competition after the patent expired, and thus excluded competition beyond the scope of exclusion granted by the relevant patent.[206] The agreement also allowed the generic company to retain its 180-day exclusivity period even though that company had no intention to market its generic drug.[207] This agreement would have acted 'like a cork in a bottle, blocking other generic competition'. Therefore, the Court determined that the settlement yielded anticompetitive effects beyond the scope of the patent and was unlawful.[208]

(c) Common Features of Agreements Which Were Held Unlawful

When evaluating the provisions of the above reverse payment agreements, the courts used different tests for their evaluations, yet the outcome was the same: these agreements were held unlawful. Comparing the provisions of these two agreements indicates that they have a common feature: their provisions, such as non-infringing product, refraining from ever marketing generic version and abuse of market exclusivity, go beyond the scope of the patent protection. Therefore, despite applying different tests, the courts reached the same conclusion that these agreements violate antitrust law.

3.2. Examples of Lawful Reverse Payment Agreements

The following reverse payment agreements were found lawful:

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[204] ibid 908.
[205] *Andrx Pharmaceuticals* 11th Cir. 2005 (n 180).
[206] *Watson Pharms,* 11th Cir. 2012 (n 130) 1311.
[207] ibid citing *Andrx Pharmaceuticals* 11th Cir. 2005 (n 180) 1231.
[208] ibid 1311.

(a) Agreement Held Lawful Under the 'Rule of Reason' Approach

According to the agreement, the originator company agreed to pay a lump sum immediately and make quarterly payments for the duration of the patent, except for the last six months before the patent's expiration. The originator also agreed to provide the generic manufacturers a guaranteed licence to sell brand-name drug at a reduced rate for the six months before the patent's expiration. In exchange, generic company recognised the patent validity and agreed not to market its generic version of a drug before the patent's expiration.[209]

The Second Circuit found that the agreement is lawful as it falls within the scope of the patent.[210]

(b) Agreement Held As Lawful under the 'Scope of the Patent' Test

Generic companies agreed not to market generic versions of a drug until five years before patent expiration unless another manufacturer launched its generic drug beforehand. They also agreed to promote branded drug to doctors and to serve as a backup manufacturer for branded drug. Originator company, in return, agreed to make yearly payments and additional annual payments for the backup manufacturing assistance.[211]

The court agreed with the district court that the agreement did not exceed the scope of the patent.[212]

(c) Common Features of the Agreements That Were Held Lawful

Notably, these agreements contain restrictions on both generic market entry and value transfer from the originator company to the generic company. They also were evaluated under different approaches. Nevertheless, courts declared them lawful because they fell within the scope of the patent.

As stated by the Federal Circuit: 'wherein all anticompetitive effects of the settlement agreement are within the exclusionary power of the patent, the outcome is the same whether the court begins its analysis under antitrust law by applying a rule of reason approach to evaluate the anti-competitive

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[209] *Cipro* 2d Cir. 2010 (n 114).
[210] ibid, 103, 110.
[211] *Watson Pharms*, 11th Cir. 2012 (n 130).
[212] ibid, 1306, 1315.

effects, or under patent law by analysing the right to exclude afforded by the patent.'[213]

3.3. Conflicting Decisions of the Eleventh and the Third Circuits

Currently, there exist two conflicting decisions regarding the same agreement. The reverse payment agreements decided by both Circuits restricted the generic entry date to one earlier than patent expiration, the licence from the generic company to the originator company and payments from the originator company to the generic company which included legal fees and royalty for the licence.[214]

On 8 March 2005 the Eleventh Circuit considering the dispute held this agreement lawful as it fell within the scope of patent protection.[215] It took into account that the settlement excluded competition for a shorter period before the patent expiration.[216] It also held that payments from originator to generic company were a 'fair price' for the product under the licence granted by the generic company to originator, and therefore the aim of these payments was not to delay the market entry.[217] Therefore, the Court rejected 'a rule of law that would automatically invalidate any agreement where a patent-holding pharmaceutical manufacturer settles an infringements case by negotiating the generic's entry date, and, in an ancillary transaction, pays for other products licences by the generic'.[218]

On 16 July 2012, the Third Circuit considering the same agreements disagreed with the Eleventh Circuit and rejected the scope of the patent test. Instead, the court applied a quick look rule of reason analysis. It declared that any payment from patent holder to a generic company which promises to refrain from entering the market should be treated as *prima facie* evidence of unreasonable restraint of trade, unless it is proved that the payment did not seek to delay the generic market entry or offers a pro-competitive effect.[219]

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[213] *Cipro* Fed. Cir. 2008 (n 117) 1336.
[214] *Schering Plough* 11th Cir. 2005 (n 126), *In re K-Dur* 3d Cir. 2012 (n 146)
[215] ibid, 1076.
[216] ibid, 1068.
[217]ibid, 1071.
[218] ibid, 1076.
[219] *In re K-Dur* 3d Cir. 2012 (n 146), 33. See analysis to n 146-151.

As stated above, these two decisions sharply divided the circuits that prior to the latter decision despite the diverse approaches applied to the reverse payment agreements had ultimately arrived at a similar conclusions. Considering the importance of the issue, which concerns both public and private interests and which may distort the fragile balance between intellectual property protection and competition rules, this disagreement between circuits must be resolved. It is up to the Supreme Court or the legislative authorities to upend this discrepancy in the case law and to settle the coherent practice within the U.S. courts.

VI. EU Developments: Approaches and General Rules in Disputes Regarding Patent Settlement Agreements

Although the EU lacks relevant case law regarding reverse payment agreements, it may prove helpful to explore the evolving pattern in the U.S. jurisprudence and modify it for the EU, and to infer approaches and general principles from the previous EU case law which might apply to reverse payment agreements.

1. Incorporating the U.S. Approaches and Tests for Reverse Payment Agreements into the European Legal Framework

It is generally viewed that the EU competition authorities' position would likely follow the U.S. courts' approaches to assessing reverse payment agreements based on the exclusionary scope of a patent.[220] In this respect, and considering the lack of relevant case law in the EU, it is interesting to analyse whether European courts may use the US courts' current approaches and tests in disputes regarding reverse payment agreements. To understand whether the U.S. judicial approaches would suit the European competition environment, one must grasp the peculiarities of the European competition legal framework compared to that of the U.S. At the very basic level, the difference between these regimes is that the EU promotes a single market under the main principle of free movement of goods among its Member States, which does not occur in U.S. competition law.

Section 1 of the Sherman Act and its sister provision (albeit not identical) article 101 (1) TFEU aim to tackle practices which restrict competition in

[220] William H. Rooney and Elai Katz, 'Review of Reverse-Payment Agreements: The Agencies, the Courts, Congress, and the European Commission' (2009) 5 Competition Policy International 120, 136.

these two regimes.[221] However, as discussed above, article 101 goes further and offers in its paragraph 3 exceptions to the prohibitions set forth in paragraph 1. Therefore, the EU analysis of possible anticompetitive effect found within the scope of paragraph 1 will ultimately evaluate whether the agreement may be exempt under paragraph 3. These particularities cause certain difficulties in applying the U.S. tests and approaches to the EU realia.

Moreover, as there are no provisions in the EU equivalent to the Hatch-Waxman Act which provides an exclusivity period to the first to file generic company, a reverse payment in the EU would only delay entry of the generic company which is a party to the agreement and would not delay generic entry in the market to any other generic company.[222] Therefore, it may be argued, that the potential effects of a reverse payment are likely to be less restrictive of competition in the EU than in the U.S.

In further discussing possible applications of the U.S. approaches and tests analysed in section 4 of this article, the following will suggest relevant modifications subject to the EU law peculiarities in general, and to the specific nature of reverse payments agreements in particular.

1.1. Modified *Per Se* Test

As shown above,[223] the U.S. case law addresses certain types of trade practices which are considered plainly anticompetitive.[224] These practices include agreements which fix purchase or selling prices, share markets or limit production.[225] It was recognised that, where the agreement is plainly anticompetitive, the *per se* approach will be used. It was explained that the chances that these practices will not prove anti-competitive are so limited that, for reasons of judicial economy and certainty of law, they should be

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[221] Pietro Manzini, 'The European rule of reason-crossing the sea of doubt' (2002) 23(8) European Competition Law Review 392, 384.
[222] Gavin Robert and Fabio Falconi, 'Patent litigation settlement agreements in the pharmaceutical industry: marrying the innovation bride and competition groom' (2006) 27(9) European Competition Law Review 524, 532.
[223] See section 4.
[224] See text to n 108-113.
[225] *Cardizem* 6th Cir. 2003 (n108) 907 citing *National College Athletic Ass'n v. Board of Regents*, 468 U.S. 85, 100 (1984), Manzini (n 221) 394.

considered prohibited *ex ante*, without having to evaluate their actual competitive value.[226]

The General Court[227] acknowledged such an approach in the *European Night Services & Co. v. Commission*, which stated that:

> in assessing an agreement under Article [101] (1) of the Treaty, account should be taken of the actual conditions in which it functions (…) unless it is an agreement containing obvious restrictions of competition such as price-fixing, market-sharing or the control of outlets.[228]

However, article 101 TFEU excludes the possibility of such *ex ante* analysis.[229] Paragraph 3 states that 'any' practice restricting competition and prohibited under paragraph 1 may be exempt from the prohibition if it satisfies all conditions set forth in paragraph 3.[230]

In the *Matra Hachette v. Commission* the General Court stated that:

> in principle, no anti-competitive practice can exist which, whatever the extent of its effects on a given market, cannot be exempted, provided that all the conditions laid down in Article [101](3) of the Treaty are satisfied.[231]

Thus, contrary to the U.S. legal doctrine, the EU legal framework requests an evaluation of the pro and anti-competitive effects of practices, not immediately under article 101 (1) TFEU, but further under article 101 (3) TFEU.[232]

1.2. Modified 'Rule of Reason' Test

The rule of reason doctrine has evolved in the U.S. jurisprudence and evaluates the pro- and anti-competitive aspects of a given agreement.[233] As

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[226] *Cardizem* 6th Cir. 2003 (n 108) 907, Manzini (n 221) 392.
[227] The then Court of First Instance.
[228] Cases T-374/94, T-375/94, T-384/94 and T-388/94, *ENS & Co v. Commission*, [1998] E.C.R. II-3141, para 136.
[229] Manzini (n 221) 398.
[230] Manzini (n 221) 398.
[231] Case T-17/93, *Matra Hachette v. Commission* [1994] E.C.R. II-595, para. 85.
[232] Manzini (n 221) 398.
[233] ibid 393.

the Supreme Court has stated, there are certain types of 'agreements whose anti-competitive effect can only be evaluated by analysing the facts peculiar to the business, the history of the restraint and the reason why it was imposed'.[234] Before 2001, there was no defined position of whether the rule of reason exists in the EU competition law.[235] Some suggestions for implementing this test date back to the late-1960s.[236] However, despite this doctrinal support, the CJEU was not convinced of the possibility to apply the rule of reason under article 101 (1) TFEU.[237]

The *Métropole Télévision* decision resolved all doubts regarding the rule of reason test.[238] In this case, the applicants argued that the Commission should have applied the then equivalent of article 101 (1) TFEU in light of a rule of reason, under which an anti-competitive practice falls outside the scope of its prohibition if it has more positive than negative effect on competition in a given market.[239] However, the General Court held that such an interpretation of article 101 (1) TFEU was difficult to reconcile with the rules prescribed by that provision.[240] Firmly rejecting this suggestion, the Court held that article [101 (3) TFEU] expressly allows for the possibility of exempting agreements which restrict competition if they fulfil the conditions prescribed by this paragraph.[241] The Court emphasised that, only within this provision, one could apply the pro- and anti-competitive analysis of a restriction. It added that:

> Article [101 (3) TFEU] would lose much of its effectiveness if such an examination had to be carried out already under article [101 (1) TFEU].[242]

Thus, this decision implies that one cannot incorporate the rule of reason in its initial form from the U.S. case law into article 101 (1) TFEU. Rather, the

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[234] *National Society of Professional Engineers v. U.S.* 435 U.S. 679 (1978).
[235] Manzini (n 221) 396.
[236] ibid 394, referencing to René Joliet, *The Rule of Reason in Antitrust Law, American, German and Common Market Law in Comparative Perspective,* (1967) Le Haye.
[237] Manzini (n 221) 395, Cases C-56 and 58/64 *Consten-Grundig v. Commission* [1966] E.C.R. 341; [1966] Common Market Law Review 48.
[238] Manzini (n 221) 398. Case T-112/99 *Métropole Télévision (M6) & Co v. Commission* [2001] E.C.R. 2001.
[239] *Métropole Télévision* (n 238), para 68.
[240] ibid, para 73.
[241] ibid, para 74.
[242] ibid.

balance of pro- and anti-competitive effects must be drawn on the basis of Article 101(1) in conjunction with article 101(3) TFEU.[243]

1.3. Ancillary Restraints Doctrine in European Case Law

Ancillary restraints are restraints which are needed to conclude a lawful contract, and their importance is subordinate to the latter.[244] The CJEU stipulated that the ancillary restraints to competition which are necessary to conduct a lawful practice do not fall within the scope of Article 101(1) TFEU.[245] Thus, in the *Remia v. Commission* case, the Court recognised that such restraints were necessary for the non-competition agreements included in sale of business contracts which 'have the merit of ensuring that the transfer has the effect intended',[246] as long as their duration and scope are strictly limited to this purpose.[247]

In *Métropole Télévision*, the General Court had discussed the ancillary restraints doctrine when considering the applicant's claim that the exclusivity clause and the clause relating to the special-interest channels were ancillary to their joint venture. The applicant argued that, since the Commission had found that the joint venture did not infringe article 101(1) TFEU, the ancillary clauses should also have been cleared.[248]

In its findings, the General Court stated that 'the concept of an "ancillary restriction" covers any restriction which is directly related and necessary to the implementation of a main operation.'[249] The Court held that 'a restriction "directly related" to implementation of a main operation must be understood to be any restriction which is subordinate to the implementation of that operation and which has an evident link with it'. [250] The Court defined two conditions for satisfying the necessity test: it must establish,

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[243] Manzini (n 221) 398.
[244] ibid 399.
[245] Case C-42/84, *Remia v. Commission* [1985] E.C.R. 2545; [1987] 1 Common Market Law Review 1; Case C-161/84, *Pronuptia de Paris* [1986] E.C.R. 353 [1986] 1 Common Market Law Review 414; Case C-250/92, *Goettrup-Klim & Co.* [1994] E.C.R. I-5641 [1996] 4 Common Market Law Review 191, see also Manzini (n 221) 397.
[246] *Remia v. Commission* (n 245), para. 19.
[247] ibid, para. 20
[248] *Métropole Télévision* (n 238), para 80-91, See also Alison Jones and Brenda Sufrin, *EU Competition Law; Text, Cases and Materials (4th edn, Oxford University Press 2011)* 231.
[249] *Métropole Télévision* (n 238), para 104.
[250] ibid, para 105.

first, whether the restriction is objectively necessary to implement the main operation and, second, whether the restriction is proportional to it.[251]

For the finding of the objective necessity, the court determined that '[i]f, without the restriction, the main operation is difficult or even impossible to implement, the restriction may be regarded as objectively necessary for its implementation.'[252] The Court referred to the Commission's findings that a number of restrictions were objectively needed to implement certain operations if, failing such restrictions, the operation in question 'could not be implemented or could only be implemented under more uncertain conditions, at substantially higher cost, over an appreciably longer period or with considerably less probability of success'.[253] When the restriction was found objectively necessary to implement a main operation, 'it is still necessary to verify whether its duration and its material and geographic scope do not exceed what is necessary to implement that operation.'[254] The Court explained that '[i]f the duration or the scope of the restriction exceed what is necessary in order to implement the operation, it must be assessed separately under article [101(3) TFEU].'[255]

If the direct relation and the necessity conditions to achieve a main operation are established, one may examine the compatibility of that restriction with the competition rules together with that of the main operation.[256] Therefore, if the main operation is found not to infringe article 101(1) TFEU, the same result must be found for the restrictions directly related to and necessary for that operation. [257] Alternately, if the main operation found to infringe article 101 (1) TFEU may be exempted under article 101(3) TFEU as it satisfies its conditions, the exemption also extends to the ancillary restrictions.[258]

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[251] ibid, para 106.
[252] ibid, para 109.
[253] ibid, para 111.
[254] ibid, para 113.
[255] ibid.
[256] ibid, para 115.
[257] ibid, para 116.
[258] ibid .

1.4. Possible Way to Assess the Reverse Payment Agreements under EU Competition Law

Applying the aforementioned approaches of the EU case law, one may suggest the following assessment of reverse payments agreements. Article 101(1) TFEU defines that an agreement falls within its prohibition when it has as its object or effect the prevention, restriction or distortion of competition. One may argue that the main purpose of the reverse payment agreements is to settle a patent dispute, thus ending the high-cost litigation which would last a considerable period. Settling the dispute therefore marks a main operation. The European Commission in its Guidelines has acknowledged in terms of the 'non-challenge clauses' that 'the very purpose of the agreement is to settle existing disputes and/or to avoid future disputes'.[259] Therefore, it is possible to conclude that such an agreement falls outside the scope of article 101 (1) TFEU.

The provisions of the settlement agreement which limit generic competition (such as licence agreement) and contain the value transfer from the originator company to the generic company may be deemed ancillary restraints to the main operation. To conclude that limitation on generic competition and reverse payment are ancillary restraints, parties must prove that such restraints are directly related and necessary to implementing the main agreement, namely settling the dispute.

The restraints relate directly to the main transaction if they are subordinate to the implementation of that transaction.[260] As defined above, the settlement of the patent dispute is the main transaction. Thus, all provisions in the settlement which aim to resolve the dispute among the parties may be deemed subordinate, and thereby directly related, to implementing the transaction. Such settlement may include restrictions on the generic competition and certain value transfer from one party to another.

The necessity test is satisfied if it establishes the following two conditions: (a) it is objectively necessary for the implementing the main operation; (b) it is proportional to the main operation.[261]

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[259] Technology Transfer Guidelines (n 70), para 209.
[260] European Commission, 'Communication from the Commission Notice Guidelines on the application of the Article 81 (3) of the Treaty' OJ [2004] 101/08, para 29.
[261] *Métropole Télévision* (n 238) para 106.

Regarding the objective necessity, one may argue that, failing such restrictions, the parties would not agree to settle the dispute. For settlements to succeed, the generic company must acknowledge patent validity and promise not to infringe it in the future, that is not to enter the market whilst it is pending. Likewise, signing the licencing agreement could prove objectively necessary, as continuing litigation would lead to uncertain outcome 'at substantially higher cost, over an appreciably longer period or with considerably less probability of success.'[262] Regarding proportionality, here one may incorporate the theory of the scope of the patent. If such limitations fall within the scope of the patent (ie concern the product covered by the patent, within its term of protection and geographical area), the restrictions may be considered proportionate.

Thus, when such limitations on generic competition and reverse payment are found to be ancillary restraints, they must be further evaluated together with the main agreement. Therefore, as the settlement agreements fall outside Article 101 (1) TFEU so do the said ancillary restraints.

2. General Rules Inferred from the EU Case Law

Deciding on the patent settlement agreements, specifically in the form of licence agreements, the CJEU adhered to the following principles.

2.1. The Scope of Intellectual Property Rights

In its 3rd Report on the Monitoring of Patent Settlements, the Commission defined as potentially troublesome patent settlement agreements those with restrictions beyond the exclusionary zone of the patent, as they would not appear directly related to the intellectual property rights granted by the patents in question.[263] According to the Commission, this position means that they would reach beyond its geographic scope, its period of protection or its exclusionary scope.[264]

The CJEU jurisprudence may support such a position. In one of its decisions relating to the licence agreement, the CJEU stated that the clauses contained in the licencing agreements, in so far as they relate to parts of the invention not covered by the patent, may find no justification on grounds of protecting

[262] ibid, para 111.
[263] 3rd Monitoring Report (n 7) 2.
[264] ibid.

an industrial property right.[265] Deciding further on the compatibility of the above clause, the Court concluded that it cannot accept that the obligation of the licencee only to sell the patented product in conjunction with a product outside the scope of the patent is indispensable to exploiting the patent.[266]

The Court took the same position regarding the provisions which try to gain the protection granted by the patent in a country which lacks patent protection.[267] The Court stated that it 'limited freedom of competition by means of a clause which had nothing to do with the patent.'[268] Moreover, in one of its decisions, the CJEU declared that the other party's abandoning of its right to advertise its product in the settlement agreement 'does not bear even the semblance of a connection with the question of the use of the [right concerned]'.[269]

Applying this case law to the reverse payment agreements, one may conclude that, in cases where the agreements contain provisions which include products not covered by the patent, extend to the territory beyond that defined in the patent or contain obligations of the party which have no connection to the patent, such agreement will go beyond the scope of the patent and thus will likely trigger competition concerns.

2.2. 'No-Challenge' Clause

In its Technology Transfer Guidelines, the European Commission acknowledges the 'no-challenge' clause in the settlement agreement. It states that:

> It is inherent in such agreements that the parties agree not to challenge *ex post* the intellectual property rights covered by the agreement. Indeed, the very purpose of the agreement is to settle existing disputes and/or to avoid future disputes.[270]

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[265] Case 193/83 *Windsurfing International Inc v Commission* [1986] ECR 611, para 36.
[266] ibid para 57.
[267] ibid, para 85.
[268] ibid.
[269] Case 35/83 *BAT Cigaretten-Fabriken GmbH v Commission* [1985] ECR 363, para 34.
[270] Technology Transfer Guidelines (n 70), para 209.

Thus, the Guidelines generally consider non-challenge clauses to fall outside Article 101 (1) TFEU.[271]

However, this position of the European Commission does not align with the previous CJEU case law.[272] The Court considers such clauses to fall outside 'the specific subject matter of the patent, which cannot be interpreted as also affording protection against actions brought in order to challenge the patent's validity'.[273] The Court emphasised: 'it is in the public interest to eliminate any obstacle to economic activity which may arise where a patent was granted in error'.[274] Thus, such provisions were held as 'an unlawful restriction on competition'.[275]

2.3. 'Sham' Conduct

As stated above, licence agreements which settle a dispute are generally accepted.[276] However, this tendency may be true only in case of a genuine dispute about a valid right.[277] When 'the dispute is sham, or if the right is itself invalid any "settlement" agreement involving restrictions of competition'[278] will fall under Article 101 (1) TFEU. [279]

In *BAT Cigaretten-Fabriken GmbH v Commission*, the CJEU considered the compatibility of a settlement agreement known as 'delimitation agreement' with the competition law.[280] The agreement concerned the settlement of a trademark dispute related to one party's application for trademark registration and the other party's opposition, though the trademark proved to be dormant.

The Court stated that the opposition by 'the proprietor of an unused, dormant, trade mark which is liable to be removed from the register upon application by any interested party (...) as part of its efforts to control the distribution of the [other party's] products, constitute an abuse of the rights

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[271] ibid, para 209.
[272] Anderman (n 2) 283.
[273] *Windsurfing* (n 265) para 92.
[274] ibid.
[275] ibid, para 93.
[276] Technology Transfer Guidelines (n 70) para 204.
[277] Anderman (n 2) 282.
[278] ibid.
[279] ibid.
[280] *BAT Cigaretten* (n 269).

conferred upon it by its trade mark ownership.'[281] Thus, the Court found that this agreement fell within the prohibition of Article 101 (1) TFEU.

Therefore, in applying the CJEU's conclusions to reverse payment agreements, one may contend that settling a patent dispute is lawful unless the originator's enforcement of a patent is a sham due to patent invalidity. These actions will likely qualify as abuse of the rights conferred upon by the patent and will fall within the prohibition laid down by Article 101 (1) TFEU.

VII. Conclusions

A classic tension between the intellectual property legal system and competition law recently has gained a sharp and tangible essence in moving from academic discussion to our everyday life. It has transformed into a fierce battle between competition authorities and pharmaceutical companies. The aim of the former is to protect competition to benefit consumers, using every possible tool (administrative, judicial, and political). The latter, meanwhile, claims the right to settle disputes with their competitors to protect their main corporate asset, by which they retain market share and secure their profits.

Both the FTC and the European Commission have defined a separate group of patent settlement agreements which combine certain provisions, such as restrictions on generic market entry and value transfer from a brand-name company to a generic company as a cause of their main concern treating such agreements as a violation of article 101 TFEU and Section 1 of the Sherman Act. Such concern was fuelled by certain indications that generic competition in the pharmaceutical industry is not working well. The competition authorities defined reverse payment agreements as one of the reasons for the delay of generic drugs' entry. Armed with provisions prohibiting restrictions on competition, the competition authorities have launched a campaign against these agreements. They claim violation of antitrust law if they find evidence of restriction on generic market entry along with value transfer from a brand-name to a generic company.

The U.S. courts facing this new type of patent-antitrust disputes have proven more cautious in their judgments. They carefully separate from the bundle

[281] ibid, para 35.

of reverse payment agreements only truly anticompetitive agreements as per their view, based on the already settled patent and antitrust case law and new rules and approaches. However, the Third Court's maverick decision[282] on 16 July 2012 undermined the comparatively settled case law since 2005, which relies mainly on the scope of patent doctrine. Firmly rejected previous practice, the Court declared all settlement agreements containing reverse payments to be presumably unlawful. This stance has led to two conflicting decisions by the two different circuits concerning the same agreements. Before the Third Circuit decision, the Supreme Court had never agreed to consider the matter. Thus, one may assume that this tension will probably serve as a sound ground for the Supreme Court to address this tension and construe the guidance to the courts as to how approach such agreements.

As the Court of Justice of the European Union has never considered this type of dispute, a U.S. Supreme Court decision on this matter may play a crucial role in establishing the relevant EU case law. As discussed above, however, the EU case law contains certain tests and approaches which may apply to the context of reverse payment agreements disputes.

These judicial, administrative and political developments in the U.S. and the EU regarding the assessment of reverse payment agreements matter as the agreements are comparatively new: the overwhelming majority of jurisdictions have never considered them. As soon as the practice settles in these jurisdictions, competition authorities in other jurisdictions are likely to follow that approach.

This article aimed to analyse current developments in these two jurisdictions and to define the current status of reverse payment agreements. It also aimed to extract provisions which most likely will raise the interest of competition authorities and which may lead to the recognition of an agreement as illegal and violative of antitrust law. Since pharmaceutical companies may risk being the target of competition authorities' investigations and subsequently litigation, such analysis pursued the practical goal of deepening understanding of what constitutes permitted behaviour for pharmaceutical companies when concluding this type of agreement to avoid antitrust liability.

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[282] *In re K-Dur* 3d Cir. 2012 (n 146).

Therefore, despite some difficulties in deducing the coherent line regarding reverse payment agreements after the Third Circuit's recent decision the following precautions would still seem sensible for those involved in negotiating settlements of patent disputes between pharmaceutical companies.[283] First, it is advisable to avoid settlements which restrict generic entry in relation to products, periods or geographical areas outside the scope of the patents in question. [284] It is likewise reasonable to avoid settlements which include direct payments from originator to generic company or agreements such as royalty-free licences, as they might be seen as equivalent to a direct payment.[285]

As a general recommendation, I would suggest the following. It could be cumbersome and complicated to produce one set of rules for such a complex issue, as each agreement may contain various provisions which distinguish it from a seemingly similar one. This variety forces competition authorities and courts to evaluate each agreement on a case-by-case basis. However, it may be useful to develop a specific set of guidelines based on the general principles which already exist in the U.S. case law, as well as in the EU. This consistency will help orientate the pharmaceutical industry and help both competition authorities and pharmaceutical companies conserve resources.

Another proposal relates to the recent decision to establish European Patent Court. As future patent settlement agreements will undoubtedly concern the European patents and disputes held by the EPC, to avoid the divergent approaches observed in the U.S. courts it may be reasonable to submit these disputes to the EPC jurisdiction. It would be worth considering the possibility of evaluation by the EPC of the patent validity on a *prima facia* basis. In refusing to decide this issue whilst reviewing the conformity of the reverse payment agreements, the U.S. courts appeal partially to the presumption of patent validity and partially to the lack of the necessary knowledge in reviewing it.[286] As the EPC is a specialised patent court, it has the ability to decide on patent validity on a *prima facie* basis. This approach would eliminate all doubts as to the strength of the patent and would

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[283] Brankin (n 63) 28.
[284] ibid.
[285] ibid.
[286] *Watson Pharms*, 11th Cir. 2012 (n 130) 1315.

exclude all allegations of undeserved monopoly gained by the weak or invalid patent.

To conclude, though it may sound striking, however, in order to reconcile two legal systems (competition and patent) the result will be unavoidable: whilst patent is pending, the patent holder may exclude its competitors and settle the dispute, however anticompetitive it would not seem, unless this settlement exceeds the scope of the patent. Otherwise, the fragile balance could be injured, pushing the measures in one or another direction may damage or even destroy one of the systems. Overly strong patent protection will distort competition and ultimately harm consumers, who will suffer from the patent monopoly. The opposing situation, favouring competition over patent protection and expanding the boundaries of antitrust liability, will hamper industry innovation, also to the detriment of consumers.

Buyer Power in the Context of Private Label in the EU: *Accompanied with a Special Reference to the UK's Approach*

SERA ERZENE*

In the last few decades the retail sector in the European Union has become highly concentrated, with large retailers having significant market power that gives them an advantageous position against suppliers. These retailers have recently started to offer their own label products. As a result, the introduction of those private labels has added a horizontal dimension to the relationship between retailers and branded-product suppliers which traditionally had only a vertical character. This two-dimensional relationship makes it difficult to adopt a competition law approach to the exercise of buyer power by retailers, which can lead to positive effects, but can, at the same time, create serious competition concerns as well. This article seeks to explore to what extent those competition concerns associated with buyer power and private label can be addressed under articles 101 and 102 TFEU in the EU. In that regard, it particularly discusses barriers to the effective application of those rules at EU level. Furthermore, given the high private label penetration in the UK and the broad awareness of its anticompetitive outcomes, the UK competition law tools are specially presented as an example of efforts at the national level to address anticompetitive effects resulting from buyer power in the private label context.

I. Introduction

Retail competition has lately received considerable attention from competition authorities as well as commentators. Given the concentrated nature of the retail sector across the European Union (EU), large retailers dominating the sector hold significant buyer power that gives them a great advantage in bargaining with their suppliers. The introduction of private label products has brought along a new dimension to the relationship

between retailers and branded product suppliers. The European Commission and national competition authorities (NCAs) in various member states have started to focus on how to handle the balance between positive and negative outcomes resulting from these developments at both retail and supply level. The United Kingdom (UK) stands out from other member states due to its extensive experience and concrete efforts in that respect. Therefore, this article seeks to analyse the competition tools used in the EU and the UK to address anticompetitive concerns stemming from buyer power particularly in the context of private label. It should be noted that, besides competition rules, there may also be other possible tools and solutions provided under other legal rules regulating unfair practices, intellectual property rights and misleading advertising, which are directed at overcoming those concerns associated to buyer power and private labels. However, this article aims to analyse the relevant issues only from a competition law perspective and thus, it does not touch on those tools and solutions discussed in the context of other areas of law.

This article consists of three substantive parts. To set the scene for the discussion, the first part explains fundamental concepts including the economic nature of the retail sector, buyer power and private label. The second part assesses how articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) address competition problems associated with buyer power in the context of private label. Since this article focuses on the applicable *ex post* tools, the assessment of mergers between retailers is mentioned only to the extent that it relates to the applicability of articles 101 and 102 TFEU. Finally, the last part describes the path followed by the UK competition authorities to eliminate competition concerns arising from the abuse of buyer power in relation to private labels.

II. Retailing Sector and Private Labels

1. Grocery Retailing

Retailing constitutes the final link between the manufacturing of a product and the end-consumer.[1] Retailers serve a significant function for end-

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consumers in many aspects. These generally include the selection, collection, and storage of goods on behalf of the consumer.[2] Retailers also assist end-consumers in making their choices through the provision of product information and after-sales services.[3] Given its intermediary nature, retailing has a key role both in the formation of the product prices in a supply chain and for the supplier's access to the end-consumer.[4] In addition to its intermediary function in supply chains, retailing has a vital role in the general economy as well.[5] The retail sector is one of the three largest service sectors in Europe both in terms of value-added and employment.[6] According to the Commission's data, retail services accounted for 4.2 % of the total gross value added in the EU and for 8.4% of the total EU employment in 2007, a fact which indicates the crucial role of this sector for the EU economy.[7]

Among different categories of retailing, grocery retailing has a prevailing position.[8] Grocery sales represent around 50% of the EU's total retailing.[9] The grocery sector has actually experienced a world-wide structural change within the last couple of decades. Large retailers offering a selection of fast moving consumer goods have increased their market shares, whereas traditional and small retailers have begun to shrink.[10] Research conducted by *Euromonitor International* shows that in 2007, in 15 EU member states,

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[1] London Economics, 'Competition in Retailing', OFT Research Paper 13 (1997) <http://oft.gov.uk/shared_oft/reports/comp_policy/oft195.pdf> accessed 31 December 2012 (Competition in Retailing Research Paper), summary sec 2.1.

[2] ibid sec 1.

[3] European Commission, 'Staff Working Document on Retail Services in the Internal Market Accompanying document to the Report on Retail Market Monitoring: Towards more efficient and fairer retail services in the Internal Market for 2020' COM (2010) 355 final <http://ec.europa.eu/internal_market/retail/docs/working_document_en.pdf > accessed 31 December 2012 (Commission Staff Working Document) 6.

[4] Paul W Dobson, 'Exploiting Buyer Power: Lessons from the British Grocery Trade' (2005) 2 Antitrust Law Journal 529, 537.

[5] European Commission, 'Retail Market Monitoring Report - Towards more efficient and fairer retail services in the internal market for 2020', COM (2010) 355 final, <http://ec.europa.eu/internal_market/retail/docs/monitoring_report_en.pdf > accessed 31 December 2012, 2.

[6] Commission Staff Working Document (n 3) 7.

[7] ibid.

[8] Paul Dobson, Roger Clarke, Stephen Davies and Michael Waterson, 'Buyer Power and its Impact on Competition in the Food Retail Distribution Sector of the European Union' (2000) <http://idei.fr/doc/conf/fpi/papers_2000/dobson.pdf> accessed 31 December 2012, 1.

[9] Commission Staff Working Document (n 3) 8.

[10] ibid 10.

the eight biggest companies controlled between 50% and 80% of the national grocery retail market.[11]

This situation can be explained by various factors. First of all, compared to traditional retailers, large retailers have a greater ability to offer a variety of goods in a wide range of prices. Furthermore, the emergence of new store formats and significant investments in new technology and improved logistics have contributed to the strengthening of the large retailers' position in the sector.[12] Consumers are therefore attracted by the variety of choices and prices, the convenience of one-stop-shopping and the high quality of services.[13]

Besides these, the ability of large retailers to exercise buyer power over suppliers and the lack of such power on the side of small and traditional retailers is an important factor that puts the former ones in a better position than the latter as far as competing in the sector is concerned. This buyer power particularly enables large retailers to purchase products at lower prices than small retailers.[14] To that end, the Commission emphasises the impact of the cost advantage of a centralised purchasing system enjoyed by large retailers over small retailers as follows:

> The decline of the share of more traditional, small and independent retailers is nevertheless a common phenomenon across the EU and across all sectors of retailing. (…) A combination of factors can explain this trend, but a main explanation is that small independent non-specialised retailers that cannot benefit from the cost advantage of a centralised purchasing system will typically be driven out of the market by their larger more price competitive rivals that can do so.[15]

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[11] ibid 9.
[12] Dobson and others (n 8) 1.
[13] Dobson Consulting, 'Buyer Power and its Impact on Competition in the Food Retail Distribution Sector of the European Union', (1999) <http://ec.europa.eu/-competition/publications/1999_study_buyer_power_en.pdf> accessed 31 December 2012.
[14] Dobson (n 4) 556.
[15] Commission Staff Working Document (n 3) 10.

2. The Concept of Buyer Power

Buyer power essentially refers to the ability of downstream firms to affect the terms of trade with upstream suppliers.[16] Depending on its source and the effect of its exercise, buyer power may take two different forms which are closely linked to each other.[17] The first form is monopsony power which arises where a firm's share of purchases in an upstream input (procurement) market is large enough to decrease the market price by purchasing less or increase it by purchasing more.[18] Therefore, monopsony power is generally considered as the mirror image of 'monopoly' or 'dominant position' as called in the EU.[19] The second form of buyer power, however, is bargaining power which refers to the bargaining strength of a firm with respect to its suppliers.[20] A firm is more likely to possess bargaining power if it has a significant market share in a concentrated procurement market. However, having monopsony power is not a prerequisite for the existence of bargaining power. In other words, a firm may have substantial bargaining power, even if it is not dominant in the relevant procurement market.[21]

The retail sector is generally characterised by the buyer power of large retailers which mostly appears in the form of bargaining power. Indeed, with the increasing concentration, buyer power has started to play a central

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[16] OECD, 'Monopsony and Buyer Power' DAF/COMP (2008) 38 <http://www.oecd.-org/daf/competition/44445750.pdf> accessed 31 December 2012, 9.
[17] ibid. See also Zhiqi Chen, 'Defining Buyer Power' (2008) 53 Antitrust Bulletin 241.
[18] OECD (n 16) 9.
[19] Roger N Doll, '"Buyer Power" and Economic Policy' (2005) 72 Antitrust Law Journal 589, 589; Chen (n 17) 243.
[20] OECD (n 16) 9. The Commission's definition of buyer power seems to stress on the bargaining aspect of buyer power. It defines buyer power as 'the ability of one or more buyers, based on their economic importance on the market in question, to obtain favourable purchasing terms from their suppliers.' European Commission, 'Glossary of Terms Used in EU Competition Policy Antitrust and Control of Concentrations', Directorate-General for Competition (2002) <http://ec.europa.eu/competition/publications/glossary_en.pdf> accessed 31 December 2012.
[21] For more information about the relation between monopsony and bargaining power and buyer power in general, see John B Kirkwood, 'Buyer Power and Exclusionary Conduct: Should Brooke Group Set the Standards for Buyer-Induced Price Discrimination and Predatory Bidding?' (2005) 72 Antitrust Law Journal 625; OECD (n 16); Chen (n 17); Howard Smith and John Thanassoulis 'Bargaining Between Retailers and Their Suppliers' in Ariel Ezrachi and Ulf Bernitz (eds), *Private Labels, Brands and Competition Policy: The Changing Landscape of Retail Competition* (Oxford University Press 2009), 45, Maurice E Stucke, 'Looking at the Monopsony in the Mirror' (2012) University of Tennessee, College of Law, Legal Studies Research Paper Series 191 <http://papers.ssrn.com/sol3/papers-.cfm?abstract_id=2094553> accessed 31 December 2012.

role in this sector. Large retailers escalate the amount and frequency of orders from suppliers as their selling power at the retail level increases. This mainly enables them to successfully negotiate with suppliers for more favourable terms and conditions than it would be expected under normal competitive conditions.[22] Thus, buyer power provides large retailers with an advantage not only over traditional and small retailers at the retail level, but also over suppliers operating at the upstream level.[23]

The fact that retailers have significant buyer power, in many cases, results in pro-competitive effects. The exercise of this power may prevent powerful sellers from exploiting their position and may thereby force them to lower their prices.[24] This is regarded to lead to pro-competitive effects, only if lower prices are passed on to consumers.[25] However, whether the retailer will have the incentive to pass on such discounts to consumers by lowering its own prices depends on its position at the retail level and on other market characteristics.[26] In this context, the lower the market power the retailer enjoys in the downstream market, the more likely it will offer the products concerned on competitive prices that would benefit consumer.[27]

On the other hand though, buyer power can also lead to anti-competitive effects on retail and supply competition.[28] In a setting where the supplier is weak and the buyer is powerful, the lack of balance between the parties' powers may be abused by the buyer at the expense of the supplier. Such a situation, however, may in the end distort both supply and retail level competition. Terms imposed by powerful retailers in this context may take different forms, such as listing charges, slotting allowances, retroactive discounts on products already sold and unjustified high contributions to promotional expenses.[29] Retailers may also force their suppliers not to sell

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[22] Dobson (n 4) 532; European Commission, 'The Impact of Private Labels on the Competitiveness of the European Food Supply Chain' (2011) <http://ec.europa.eu/-enterprise/sectors/food/files/study_privlab04042011_en.pdf> accessed 31 December 2012 (Study on the Impact of Private Labels) 18.
[23] Robert L Steiner 'Market Power in Consumer Goods Industries' in Ariel Ezrachi and Ulf Bernitz (eds), *Private Labels, Brands and Competition Policy: The Changing Landscape of Retail Competition* (Oxford University Press 2009) 76.
[24] Dobson and others (n 8) 4. Stucke (n 21) 7.
[25] Dobson and others (n 8) 4.
[26] Dobson Consulting (n 13) 36.
[27] Dobson and others (n 8) 5.
[28] For the ability to exploit buyer power, see Competition in Retailing Research Paper (n 1) sec 5.1.2.4.
[29] Dobson and others (n 8) 3.

to other retailers at a lower price ('most favoured customer' condition) or not to supply any other retailer at all (exclusive supply condition).[30]

Although these terms may grant a retailer the ability to buy and sell the products at lower prices in the short run, they may have detrimental effects on competition in the long run.[31] For instance, they may diminish the incentive of brand suppliers to innovate and improve products.[32] Similar concerns are also acknowledged in relation to joint purchasing agreements in the Guidelines on Horizontal Cooperation Agreements.[33] Therein, the Commission provides that if the purchasing parties have significant buying power, 'they may force suppliers to reduce the range or quality of products they produce, which may bring about restrictive effects on competition such as quality reductions, lessening of innovation efforts, or ultimately sub-optimal supply'.[34] In the long run, the exercise of buyer power may even lead to the exit of some brand manufacturers, particularly secondary brand owners. Therefore, it may thereby make the sector dominated by 'a small number of fully integrated retailers, offering private-label' and a few primary brand manufacturers.[35] This may in turn result in reduced choice and, depending on the nature of competition between these vertically integrated retailers, in possibly higher prices.[36]

To conclude, any competition law approach adopted in relation to the exercise of buyer power in the retail sector should consider both its positive and negative effects. In this regard, a proper balance should be achieved between short-run benefits including lower prices and increased choice on the one hand, and long-term harms to manufacturer competition resulting

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[30] ibid.
[31] ibid 4.
[32] Stucke (n 21) 15.
[33] Commission Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2010] OJ C11/1.
[34] ibid para 202.
[35] Dobson and others (n 8) 4; Steiner (n 23) 93; Ariel Ezrachi, 'Unchallenged Market Power? The Tale of Supermarkets, Private Labels and Competition Law' (2010) 33 World Competition 257, 261-62. See also European Commission 'Green Paper on Vertical Restraints in EC Competition Policy' (1997) <http://europa.eu/documents/comm/green-_papers/pdf/com96_721_en.pdf > accessed 31 December 2012, para 234.
[36] Dobson and others (n 8) 5.

from prevailing own-label penetration and the distortion of retail competition in favour of large retailers, on the other hand.[37]

3. Private Label as a Competition Phenomenon

With the grocery retail market becoming increasingly saturated,[38] many retailers have realised the benefits of vertical integration and of diversifying from each other.[39] In this context, by using as an advantage their ability to instantly respond to consumers' changing demands, they have started developing their own brands.[40] Given their impact on the formation of retail and supply level prices, on the suppliers' incentive to innovate, and the viability of competing retailers,[41] these private labels have become an important phenomenon in the retail sector.

Although the launch of private labels dates back to 1970s, their importance has gradually increased in recent decades, and private labels currently represent one of the dominant features of the EU retail market.[42] In the EU, private labels have a share of around 25% of the grocery market with an average growth rate of 4% per year.[43] This growth of private labels can be attributed to various factors. First, due to their ability to cut down the costs associated with brand development, marketing and advertisement, the retailers' cost to produce and sell a private label product is often less than the cost for brand manufacturers.[44] Furthermore, by taking advantage of the growing size of their stores in order to stock more products than they previously did, retailers have become able to increase the number and range of private labels they offer to customers. Customers are therefore attracted by a variety of products at comparably cheaper prices. These advantages

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[37] ibid 4-5.
[38] See II/2 above. See also Commission Staff Working Document (n 3) 8-9.
[39] Commission Staff Working Document (n 3) 13; Richard Herbert 'Private Labels – What Drives Them Forward' in Ariel Ezrachi and Ulf Bernitz (eds), *Private Labels, Brands and Competition Policy: The Changing Landscape of Retail Competition* (Oxford University Press 2009) 4.
[40] Commission Staff Working Document (n 3) 12; AC Nielsen Global Services, 'The Power of Private Label 2005: A Review of Growth Trends Around the World' (2005) <http://at.nielsen.com/pubs/documents/PrivateLabel_RMS.pdf> accessed 31 December 2012 (Nielsen's Review of Growth Trends).
[41] Study on the Impact of Private Labels (n 22) 44.
[42] Commission Staff Working Document (n 3) 11.
[43] Study on the Impact of Private Labels, (n 22) 11.
[44] ibid 44. Research conducted by Nielsen shows that private label products are third times lower than manufacturer brands. Nielsen's Review of Growth Trends (n 40).

have made private labels super-profitable to retailers. To this end, the increasing number of discount retail stores focusing on private labels has also contributed to the growth of private labels in the retail sector.

Moreover, private labels have been further developed in line with consumer demands to cover a range of innovation-oriented and differentiated products.[45] While previously being generic items, private labels have lately become more sophisticated.[46] Currently, private labels are considered to be significant brands themselves. As a result, retailers have moved from being merely intermediaries in distributing manufacturers' branded items to being a key player of the supply chain which controls product development and marketing process.[47] In this regard, retailers, which were previously only a customer to brand manufacturers, have now transformed into powerful competitors. This development has brought up many discussions about the competitive impact of private labels on supply and retail competition.

3.1. Possible Positive Effects

The development of private labels generates various advantages for consumers. As argued by *Dobson and Chakraborty*, by offering an increased variety of goods at substantially cheaper prices compared to branded products, private labels can bring about significant benefits to consumers.[48] Cost advantages enjoyed in relation to private label products grant retailers the ability to canalize more resources to research and innovation.[49] In addition, based on their ability to monitor consumer preferences, most retailers now develop specific product lines focusing on different aspects including health, environment and social values, to instantly respond to the needs of consumers.[50] In this respect, private labels appear to have a role in countervailing the strong position of branded

[45] Commission Staff Working Document (n 3) 11.
[46] Paul W Dobson and Ratula Chakraborty 'Private Labels and Branded Goods: Consumers' "Horrors" and "Heroes"' in Ariel Ezrachi and Ulf Bernitz (eds), *Private Labels, Brands and Competition Policy: The Changing Landscape of Retail Competition* (Oxford University Press 2009) 109.
[47] ibid 110.
[48] ibid 112-16.
[49] ibid 112-16; Study on the Impact of Private Labels (n 22) 37-45.
[50] Dobson and Chakraborty (n 6046) 109.

products by providing cheaper alternatives for consumers as well as by creating an opportunity to open up new product areas.[51]

3.2. Possible Negative Effects

Nonetheless, private labels can also lead to certain anti-competitive effects, where retailers abuse their double-agent position and free ride on the efforts of branded manufacturers.[52] Free riding on the brand manufacturer's marketing, formulation or packaging may mislead the consumer and it ultimately prevents this manufacturer from recouping its investment and from generating the expected profit. This may also damage the product image that the brand manufacturer has built up through careful and continuing investment.[53] In turn, this situation may decrease the branded manufacturer's incentive to invest in innovation and in improving product quality. Although free riding and copycatting significantly affect the competitive structure of the retail and procurement markets, this issue mostly remains to be solved within the scope of intellectual property law.[54]

However, there are other possible negative scenarios associated with private labels, which may require the application of the competition rules. Such scenarios mainly result from the new two-dimensional relationship which provides the retailer with the capability to 'exploit its role of double agent'.[55] By the nature of their function, retailers set the prices of all products offered in the store.[56] On the basis of this power, retailers may have an incentive to promote their private labels at the expense of branded products by limiting choice and by changing category price structures in a way to benefit their private labels.[57] This can create significant barriers to

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[51] ibid 114-15.
[52] ibid 112. See also Pieter Kuipers 'Retailer and Private Labels: Asymmetry of Information, In-store Competition and the Control of Shelf Space' in Ariel Ezrachi and Ulf Bernitz (eds), *Private Labels, Brands and Competition Policy: The Changing Landscape of Retail Competition* (Oxford University Press 2009) 189.
[53] There even exist instances where retailers go beyond using similarities with the branded product and totally copycat the product itself. This behaviour does not only reduce incentive of the branded manufacturer to innovate, but also results in the loss of sales and the necessity to make expense for making changes on the packaging or appearance of the good to keep it different from the private label copycat. See Dobson and Chakraborty (n 46) 112-15.
[54] Study on the Impact of Private Labels (n 22) 124.
[55] ibid 40 and 47.
[56] Kuipers (n 52) 211.
[57] ibid; Study on the Impact of Private Labels (n 22) 44.

access to large retailers' shelf space, especially for secondary brands which do not enjoy a strong brand image and financial position to meet the conditions requested by retailers.[58]

Hence, retailers may seek to encourage consumers to switch to and keep buying its private label by undermining brands with poor shelf positioning, artificial price differentials, deliberate stock-outs and value destroying promotions.[59] Restraints imposed on manufacturers by retailers for that purpose may include exclusive supply, refusal to stock or delisting, minimum supply levels, minimum advertising requirements and finally, sunk facility requirements.[60] The following sections of this article deal with the question how these restraints are addressed under EU and UK competition law.

III. Competition Assessment In Respect of Private Labels under Article 101 TFEU

Article 101(1) TFEU prohibits 'agreements between undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market'. Such restrictive agreements may, however, be exempted from this prohibition if they satisfy the four cumulative conditions set out in article 101(3) TFEU.[61]

With respect to the applicability of article 101 TFEU to the abuse of buyer power in the context of private labels, the main discussion point is whether the relevant competition concern results from an agreement in the meaning of article 101(1) or from unilateral conduct. Indeed, the existence of an agreement may be controversial in the case of application of unilateral

[58] Dobson and Chakraborty (n 46) 112-14; Dobson Consulting (n 13) 122.
[59] Dobson and Chakraborty (n 46) 114.
[60] Competition in Retailing Research Paper (n 1) Section 2.4.1.
[61] For more information on the application of Article 101 TFEU see Maher M. Dabbah, *EC and UK Competition Law: Commentary, Cases and Materials* (Cambridge University Press 2006) 55-128; Okeoghene Odudu, *The Boundaries of EC Competition Law: The Scope of Article 101* (Oxford University Press 2006); Jonathan Faull and Ali Nikpay, The EC Law of Competition (7th edn, Oxford University Press 2007) paras 3.01-3.460; Valentine Korah, *An Introductory Guide to EC Competition Law and Practice* (9th edn, Hart Publishing 2007) 43-100; Ivo Van Bael and Jean-Francois Bellis, *Competition Law of the European Community* (5th edn, Wolters Kluwer 2010) 15-98; Richard Whish and David Bailey *Competition Law* (7th edn, Oxford University Press 2012) 82-168.

measures. In *AEG-Telefunken v Commission*,[62] the Court of Justice of the European Union (CJEU) decided that AEG's refusal to supply to retail outlets outside its selective distribution system was an agreement between AEG and its distributors within the selective distribution system. In various other decisions, the EU courts confirmed this position.[63] In *ADALAT*,[64] however, the General Court of the European Union (General Court) and the CJEU appear to use a narrower definition for the term 'agreement' under article 101. The General Court therein makes a distinction between 'cases in which an undertaking has adopted a genuinely unilateral measure, and thus without the express or implied participation of another undertaking' and 'those in which the unilateral character of the measure is merely apparent'.[65] The General Court explains that the first case does not indicate a concurrence of wills between the parties and, therefore, does not form an agreement in the sense of article 101 because there is not an express or implied acquiescence by other parties. [66] The CJEU approved this approach of the General Court.[67]

Although in many cases the commercial relationship between the retailer and the supplier is based on an agreement, many competition concerns related to private label may escape the scope of article 101 TFEU, because the conduct of the retailer concerned constitutes a genuinely unilateral measure falling outside the definition of 'agreement'. In this respect, considering the current practices in relation to private labels that may amount to an agreement, the analysis under article 101 TFEU should particularly have as its subject the exchange of information, exclusive

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[62] Case 107/82 [1983] 3151.

[63] See e.g. Joined cases 32/78, 36/78 to 82/78 *BMW Belgium SA and others v Commission* [1979] ECR 2435 paras 29-30; Joined cases 25 and 26/84 *Ford - Werke AG and Ford of Europe Inc. v Commission* [1985] ECR 2725, para 21; Case 75/84 *Metro SB-Großmärkte GmbH & Co. KG v Commission* [1986] ECR 3021, paras 72-73.

[64] Case T-41/96 *Bayer AG v Commission* [2000] ECR II-3383; Cases C-2/01 and C-2/01 *Bundesverband der Arzneimittel-Importeure eV and Commission v Bayer AG* [2004] ECR I-23.

[65] *Bayer AG v Commission* (n 64) para 71.

[66] ibid, paras 66-72.

[67] For more information about the definition of agreement in the meaning of Article 101 TFEU, see Urs Wickihalder, 'The Distinction between an "Agreement" within the Meaning of Article 81(1) of the EC Treaty and Unilateral Conduct' (2006) 2 European Competition Journal 87; Whish and Bailey (n 61) 105-10.

supply conditions, upfront access payments and category management agreements.[68]

To start with, information exchange is a natural outcome of the relationship between the supplier and the retailer. Given the fact that the retailer purchases products from the supplier and sells them at the retail level, it should be accepted as normal that the retailer is aware of the prices of these products. Having said that, any information exchange between a product supplier and a retailer offering competing private labels bears the characteristics of 'exchange of information between competitors'.[69] Considering its ability to supply its private labels at a lower price due to the various economic advantages it enjoys,[70] the retailer may use information about price and output as a means to set/increase its competing private label's price. Although it was a merger case, in *Proctor&Gamble/Gillette*, the Commission explained that the retailer's knowledge of the prices could grant it the ability to fix the prices for its own private label products in reaction to the producers of branded products.[71] However, as exemplified above, because the exchange of information about the prices of brand products is an indispensable part of the vertical relationship between the retailer and the supplier, it is unlikely to be regarded as an infringement of article 101(1) TFEU.

In the context of the vertical relationship between the supplier and the retailer, usually information exchange also includes data regarding the marketing and quality of brand products. Indeed, it is common that retailers request from brand manufacturers details about the product, including formula specifications or marketing plans depending on the marketing strategy which is proposed to be pursued. This practice is claimed to be necessary for a better marketing of the product which will make it available to a larger scope of consumers.[72] Under the pressure of the retailer's power

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[68] It should be noted that buyer power may raise competition concerns in relation to other agreements including joint purchasing agreements. However, since these agreements are usually not related to the abuse of buyer power by retailers in the context of private labels, this article does not intend to analyse them. For more information about the assessment of joint purchasing agreements, see Guidelines on Horizontal Cooperation Agreements (n 33) sec 5.

[69] For more information about assessment of information exchange under article 101 see ibid, paras 55-110.

[70] See II above.

[71] *Procter & Gamble/Gillette* (Case COMP/M.3732) [2005] para 124.

[72] Kuipers (n 52) 193-95.

and with the desire to better position the product, the manufacturer is left with no choice but to be part of such a practice.

Although under this scenario the objective of the parties is not in principle to set the prices in a common manner, which is the main concern about exchange of information between competitors, such practice is still worth examining in terms of its effects on competition in innovation and product quality. In this regard, competition concerns centralise on the retailer's use of information handed for the purpose of marketing for developing its own competing labels. It is common that by using that kind of information, the retailer introduces its private label copycat not much later than the manufacturer introduces its new product.[73] This free riding by the retailer may prevent the manufacturer from achieving the targeted sales and from recouping its investment. The ultimate impact is likely to reduce the incentive of the brand manufacturer to innovate and improve its existing products. Nevertheless, it would be problematic to argue that this information sharing infringes article 101 TFEU, because it is, at the same time, necessary for the better marketing of the products and it can thus be considered to lead to efficiencies as well.[74]

Another type of practices which may fall under article 101 TFEU is exclusive supply obligations.[75] Here the supplier is forced not to provide the products concerned to any other retailer. Accordingly, the retailer becomes the only point where consumer can purchase the product. This obligation mainly affects retail level competition to the extent that other retailers may be foreclosed, if they fail to offer substitutes to those products. However, the possible impact on the manufacturer should not be underestimated either. Within this context, an anticompetitive scenario may arise where, having prevented the manufacturer from reaching the consumer via other retail channels, the retailer ends its relationship with that manufacturer. Under such circumstances, particularly small manufacturers may be forced to exit the market or become a sub-contractor manufacturer of its private labels.

[73] Dobson and Chakraborty (n 46) 113.

[74] The Guidelines on Horizontal Cooperation Agreements recognise that information exchange is not always considered to restrict competition since they may lead to significant efficiencies. See (n 33) sec II. Such information sharing about prices and other competitive parameters related to the products in question between the retailer and the supplier is most likely to be treated in this context.

[75] If this obligation is imposed by an undertaking enjoying dominance, it is likely to constitute an abuse of dominant position under Article 102 TFEU. For further information see IV below.

The Block Exemption Regulation on Vertical Restraints sets a safe harbour for agreements where the buyer holds a market share of less than 30% in the downstream sales market and in the upstream purchase market.[76] The current concentration levels in grocery retail and procurement markets indicate that in most cases, such restraints will fall within those safe harbours.

Upfront access payments, which are defined as fixed fees that suppliers pay to retailers for accessing its distribution network, constitute another practice that may fall within the scope of article 101 TFEU.[77] In the Guidelines on Vertical Restraints, the Commission provides that, exceptionally, the widespread use of these payments may increase barriers to entry for small suppliers and they may thus be treated as analogous to single branding obligations.[78] In light of this, practices, such as slotting allowances and pay-to-stay fees which may be used by the retailer to eliminate the competitors of its own labels, may be caught by article 101 TFEU. However, considering the dictum of *ADALAT* and the Commission's approach to analyse them by analogy to single brand obligations, the applicability of article 101 TFEU to those concerns associated with private label may be the case, only if there is an express or implied acquiescence to these practices by suppliers which are not party to the agreement in question. Therefore, where the retailer follows this practice only in order to favour its private labels, the practice is unlikely to amount to an agreement in the meaning of article 101 TFEU. In any case, the Block Exemption Regulation on Vertical Restraints exempts these payments, if both the supplier's and buyer's market share does not exceed 30%.[79]

Finally, it should be discussed whether competition concerns related to private labels may be addressed in the context of category management agreements under article 101 TFEU. Category management agreements refer to those by which, within a distribution agreement, the distributor entrusts a supplier called the 'category captain' with the marketing of a category of products including in general not only the supplier's products,

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[76] Commission Regulation No 330/2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices [2010] OJ L 102/1, art 3(1).
[77] Commission Guidelines on Vertical Restraints [2010] OJ C130/1, para 203.
[78] ibid para 205.
[79] ibid para 203. The Commission posits that upfront access payments in many cases lead to procompetitive effects. ibid paras 207-08.

but also the products of its competitors.[80] These agreements may raise competition concerns, if the category captain supplier is able to limit or disadvantage the distribution of products of competing suppliers.[81] The Commission explains that although the distributor may not usually have an interest in limiting its choice of products, the fact that the distributor also sells competing products under its private labels may increase its incentive to exclude certain suppliers, in particular of intermediate range products.[82] On the other hand, in many cases the retailer unilaterally limits or disadvantages the products of certain suppliers without appointing a category captain under a category management agreement. These situations also seem to fall outside article 101 TFEU.[83]

To sum up, article 101 TFEU does not appear to be an efficient way to address anti-competitive retailer behaviours associated with buyer power and private label. The main reason is that, although some practices, such as information exchange, exclusive supply obligations, upfront access payments and category management agreements may be based on an agreement in the sense of article 101(1), in most cases the behaviour concerned constitutes a unilateral conduct that falls outside the scope of the provision. In this regard, article 101 does not seem, in principle, to catch the majority of anticompetitive concerns, such as delisting and the disadvantageous positioning of products, resulting from the use of buyer power by retailers in their relationship with suppliers.

IV. Assessment under Article 102 TFEU

Article 102 TFEU prohibits abuse of a dominant position that may affect trade between Member States. For article 102 TFEU to be infringed, an abuse must be committed by a firm enjoying a dominant position in a given market.[84] In this context, this section firstly analyses the existence of a dominant position in relation to the retail sector and then discusses certain

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[80] ibid para 209.
[81] ibid para 210.
[82] ibid.
[83] Similar to upfront access payments, category management agreements fall within the safe harbour under Vertical Restraints Block Exemption Regulation if both the supplier's and buyer's market shares do not exceed 30%. ibid para 209.
[84] For more information on the application of Article 102 TFEU, see Robert O'Donoghue, A Jorge Padilla, '*The Law and Economics of Article 82 EC*' (Hart Publishing 2006); Alison Jones and Brenda Sufrin, *EU Competition Law Texts, Cases and Materials*' (4th edn, Oxford University Press 2011)283-560; Whish and Bailey (n 61) 173-214.

conducts of retailers that may form an abuse in the meaning of article 102 TFEU.

1. Dominant Position

Under EU competition law, the concept of dominance has been defined as a position of economic strength that grant an undertaking the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of consumers.[85] Dominance is therefore concerned with market power. For the assessment of market power, however, the first step is to determine the relevant market.[86] The relevant market has two dimensions: the relevant product market and the relevant geographic market.

The relevant product market comprises products that are deemed as interchangeable or substitutable from both supply and demand side.[87] The *Kesko/Tuko* decision concerning the acquisition of *Tuko Oy* by *Kesko Oy*, both active in the Finnish retail sector, gives guidance on how the Commission may define the relevant product market with respect to the retail sector.[88] Therein, the Commission provided that the relevant product markets could be defined as 'the retail market for daily consumer goods' and 'the markets for procurement of daily consumer goods'.[89] As regards the retail market for daily consumer goods, the Commission made a distinction between supermarkets and other stores, such as specialised stores and petrol stations. This classification was based on the retailers' ability to offer a wide selection of products, to provide consumers with the opportunity to purchase most of household necessities in a 'one-stop shop`, and to have the facilities making the shopping experience convenient. Therefore, the Commission found that the relevant product market consisted

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[85] Case 27/76 *United Brands Company and United Brands Continentaal BV v Commission* [1978] ECR 207, para 65. See also Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings [2009] OJ C45/7, para 10.

[86] Case 6-72 *Europemballage Corporation and Continental Can Company Inc. v Commission* [1973] para 34.

[87] Commission Notice on the definition of relevant market for the purposes of Community competition law [1997] OJ C372/5, para 7.

[88] Case IV/M.784 Commission Decision 97/277/EC [1997] OJ L 110/53.

[89] ibid paras 18-20 and 33. The other product market defined in the relevant decision was the market for cash-and-carry sales of daily consumer goods. However, since most of the retailers are not active in the cash-carry, it is preferred to emphasis on those two product markets mentioned above.

of the provision of a basket of fresh and dry food-stuffs and non-food household consumables sold in a supermarket environment.[90]

Coming now to the possible geographic market, although the Commission considered it as being an area where the supermarket could be reached in no more than 20 minutes driving time, a final decision about the exact scope of the relevant geographic market was not necessary to be made.[91] According to the Commission, the market for procurement of daily consumer goods involves the purchase of daily consumer goods by customers, such as wholesalers, retailers, and other enterprises. However, as long as they are not substitutable with each other, each product purchased by the retailer constitutes an individual product market within the procurement market framework.[92] With respect to this market, the relevant geographic market seems to be identified with particular reference to the ability of suppliers to switch their means of channelling goods to final consumers.[93]

The abuse of buyer power by retailers against brand product manufacturers normally takes place in the market for the procurement of daily consumer goods. Therefore, it should be firstly analysed whether the retailer concerned has dominance with respect to this procurement market. However, it should be noted that the dominance and the abusive behaviour should not necessarily exist in same market.[94] If an undertaking enjoying dominance in one market engages in an abusive behaviour in another market, particularly a market neighbouring or downstream or upstream to the one where its dominance exists, such behaviour would also fall within the scope of prohibition of article 102 TFEU.[95] In this context, it may be necessary to assess whether the retailer enjoys a dominant position in respect of the retail market for daily consumer goods.[96]

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[90] ibid paras 18-20.
[91] ibid paras 21-23.
[92] Having said that, the Commission concluded that because in Finland the pattern of demand for each of the product groups was generally similar and concentrated, there was no need to make an assessment about the impact of the merger on each individual product or group of products. ibid para 34.
[93] ibid para 37.
[94] Whish and Bailey (n 61) 205-08.
[95] Case C-310/93P *British Gypsum v Commission* ECR I-865; Case C-333/94P *Tetra Pak II* [1996] ECR I-5951, para 27; Case C 52-/09 *Konkurrensverket v TeliaSonera Sverige AB* ECR I-000, paras 84-89.
[96] 'In the retail trade there is a close interdependence between the distribution market and the procurement market. Retailers' shares of the distribution market determine their

In general, market shares are the first indicator for the existence of dominance. The *AKZO* decision envisages that a market share of 50% would lead to a presumption of substantial market power and thereby, a presumption of dominance.[97] Moreover, the Guidance on the application of article 102 TFEU sets out a safe harbour for undertakings having a market share below 40%.[98] In addition to the market share of the undertaking concerned, there are other indicators of dominance as well, such as superior technology,[99] investment and financial resources,[100] ownership of intellectual property rights,[101] brand image and advertising campaigns,[102] economies of scale,[103] vertical integration and distribution systems[104] and the market position of competitors,[105] and entry barriers and countervailing buyer power.[106]

The analysis of dominant position does not show any difference in respect to the retail market. Hence, based on the factors mentioned above, it is examined whether the undertaking concerned has the capability to profitably increase prices above the competitive level for a significant period of time without facing sufficiently effective competitive constraints.[107] Nevertheless, the assessment of dominance in relation to procurement markets may differ from this analysis, given the fact that it concerns the buyer power of the retailer, which corresponds to monopsony power as explained above.[108] As regards this market, it is rather asked whether the

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procurement volume: the bigger the retailer's share of the distribution market, the larger the procurement volume.' *Rewe/Meinl* (Case IV/M.1221) [1999] para 72.

[97] Case C-62/86 *Akzo Chemie BV v Commission* [1991] ECR I-3359, para 60. See also See also Case T-102/96 *Gencor v Commission* [1999] ECR II-753, para 205; Case T-221/95 *Endemol v Commission* [1999] ECR II-1299, para 134; Case T-210/01 *General Electric v Commission* [2005] ECR II-5575, para 115; Case T-177/04 *easyJet v Commission* [2006] ECR II-1931, para 174.

[98] Guidance on the Application of Article 102 (n 85) para 14.

[99] *United Brands* (n 85) paras 82-84.

[100] ibid paras 122-124.

[101] Case C-53/92 P. *Hilti AG v Commission* [1994] ECR 1-00667 para 93, Joined cases C-241/91P and C-242-91P *Radio Telefis Eireann and Independent Television Publications Ltd v Commission* [1995] ECR 1-734, paras 46-47.

[102] *United Brands* (n 85), paras 91-94

[103] Case T- 65/89 *BPB Industries Plc and British Gypsum Ltd v Commission* [1993] ECR II-389 para 116.

[104] *United Brands* (n 85), paras 69-81 and 85-90.

[105] Case 85/76 *Hoffman-La Roche & Co AG v. Commission* [1979] ECR 461, paras 36 and 48.

[106] See Guidance on the application of Article 102 (n 85) paras 13-18.

[107] ibid para 11.

[108] See II/2 above.

retailer has the ability to decrease or increase supply prices for a sufficiently long period by adjusting its purchases accordingly. Furthermore, the calculation of market shares is based on purchases rather than sales, and the power of suppliers is incorporated into the analysis as countervailing power.[109] It should be reminded that retailers may enjoy buyer power in the form of bargaining power, even if they do not have large market shares in the procurement market. However, such bargaining power on its own does not amount to a dominant position in the meaning of article 102 TFEU.[110]

There are not many article 102 decisions that include an assessment of dominance in the retail sector. On the other hand, merger cases in which the Commission analysed whether the merger would lead to a dominant position in the retail sector may provide guidance as to the assessment of dominance under article 102 TFEU.

In *Kesko/Tuko*, for example, the Commission decided that the merger, resulting in a combined market share of 55%, would lead to a presumption of dominance on the Finnish market for retail of daily consumer goods. Besides this high combined market share, the parties' control over the premises suited for retail outlets, the customer loyalty schemes, the private label products[111] and the distribution systems was considered as a factor that contributed to such presumption of dominance.[112] More importantly, the parties' increased buyer power was emphasised because of its significant contribution to barriers to entry to the relevant market of daily consumer goods retailing. In light of this, it would enable the merged entity to act, to a significant extent, independently of its competitors on the retail market.[113]

In *Rewe/Meinl*,[114] the proposed merger was concluded to lead to a dominant position in the markets of food-retailing and procurement in Austria. The high post-merger market share of the merged entity in the retail market was

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[109] Guidelines on Horizontal Cooperation Agreements (n 33) 208-12.
[110] See Alberto Pera and Valentina Bonfitto 'Buyer Power in Anti-Trust Investigations: a Review' (2011) 32 European Competition Law Review 414, 423-24.
[111] The producers of brand products claimed that the private label products of Kesko and Tuko were used as a tool in their negotiation with suppliers. *Kesko/Tuko* (n 88) para 129.
[112] ibid paras 106.
[113] ibid paras 133-135
[114] *Rewe/Meinl* (n 96). A similar approach was adopted by Bundeskartellamt in EDEKA/Tengelmann. See <http://www.bundeskartellamt.de/wEnglisch/News/Archiv/ArchivNews2008/2008_07_01.php> accessed 31 December 2012.

regarded to indicate a possible dominance in the market for food retailing.[115] Considering the strong interdependence between the retail and procurement markets, the Commission came to the conclusion that the merger would lead to dominance in the procurement market as well.[116] This conclusion was further supported by the fact that producers would be more dependent on the merged entity, given the latter's ability to secure further improvements in its buying conditions.[117] Moreover, in relation to its private labels, it was observed that, prior to the merger, the parties used to delist secondary brands, which supported its assumed independence from suppliers. This merger, resulting in a risk of dominance in the relevant markets, was therefore cleared subject to remedies ensuring the reduction of the undertaking's buyer power.[118]

The *Rewe/Meinl* decision also sheds some light on the concept of dependence between the retailer and the supplier. According to the research conducted in the scope of the evaluation, a supplier may undergo heavy financial losses to replace any customer from which it generates more than 22% of its turnover.[119] In this regard, when a major customer is lost, suppliers may not have many alternatives since way outs, such as switching to other sales channels or to exports, were generally not feasible in the short term. This meant that if a retailer ceased to make purchases, the supplier was likely to be severely affected and, ultimately, to exit the market.[120] This economic dependence of the supplier on the retailer indicates the bargaining power of the latter. Notwithstanding that such bargaining power may also enable the retailer to enjoy some degree of economic independence, as described above, it is not sufficient to establish dominance under article 102 TFEU. Therefore, such power can only be considered as one of the factors that contribute to the existence of dominance.

Although appearing highly concentrated in most of the EU Member States[121], due to the fierce competition between supermarkets, retail markets

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[115] As a result of the operation, the combined market share of the parties would exceed 45% with respect to the region of Vienna. *Rewe/Meinl* (n 96) paras 31-36.
[116] ibid paras 71-115.
[117] ibid para 115.
[118] ibid paras 118-129.
[119] ibid para 101. In *Carrefour/Promodes*, the Commission refers to the same percentage and qualifies it as a threshold indicating the existence of economic dependence. *Carrefour/Promodes* (COMP/M.1684) [2000].
[120] *Rewe/Meinl* (n 96) para 102.
[121] Study on the Impact of Private Labels (n 22) 136.

are mostly characterised by 'a number of distribution channels offered by competing supermarkets, none of which occupy a dominant position'.[122] Therefore, in the vast majority of cases, the retailer abusing its buyer power in relation to its private labels does not form a dominant undertaking under article 102 TEFU. That being said, it should be noted that in the meaning of article 102 TFEU, dominant position can be held not only by one firm, but also collectively by several firms.[123] Thus, whether retailers can be considered to have a collective dominance position in the retail sector needs to be discussed.

For the existence of collective dominance, the nature of the market must allow firms to behave in a parallel manner, thereby appearing in the market as a collective entity.[124] This may be the case only if the market structure is oligopolistic, ie the market consists of 'few sellers, realising their interdependence in taking strategic decisions such as on price, output or quality'.[125] In *Airtours v Commission*, the General Court sets forth three cumulative conditions for the firms in question to be viewed as collectively dominant.[126] The first one is the presence of transparent market structure which enables firms to monitor any deviations from the terms of coordination. The second condition requires the presence of deterrent mechanisms in the event of any deviation. Finally, the third condition is that the reactions of outsiders should not jeopardise the success of the coordination.[127]

As explained above, a prevailing feature of retail markets across the EU is that they are controlled by few large retailers and are henceforth highly concentrated. This characteristic may be regarded as indicating the existence

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[122] Ezrachi (n 35) 268.
[123] Joined cases T-68, 77, 78/89 *Societa Italian Vetro SpA and others v Commission* [1992] ECR II-1403 para 360.
[124] Case C-395/96 *Compagnie Maritime Belge Transports v Commission* [2000] ECR I-1365 para 36.
[125] European Commission Glossary of Terms (n 20). In an oligopoly, each firm is aware that its market behaviour will affect the other sellers' market behaviour. As a result, each firm will take possible reactions from the other players into account.
[126] Case T-342/99 *Airtours plc v Commission* [2002] ECR II-2585 para 62.
[127] These conditions were also approved by the ECJ. See Case C-413/06 P *Bertelsmann AG and Sony Corporation of America v IMPALA* [2008] ECR I-4951.

of an oligopolistic market structure.[128] Having said this, agreements between the retailer and the supplier are usually not accessible by third parties, namely competing retailers. Accordingly, retailers are, in principle, not able to know under which conditions their competitors procure the products concerned. In addition, the retail and procurement markets are governed by a complex and speedily evolving economic environment. This environment is further blurred by the fact that the products are complex and differentiated from each other rather than homogeneous. This general overview demonstrates that the nature and current dynamics render the procurement market in the retail sector non-transparent, hence making it difficult for the retailers to predict and monitor competitors' behaviours in their procurements.[129]

Accordingly, although the existence of a retaliation mechanism[130] and the absence of the counter reaction of outsiders[131] may be successfully argued, it is hardly likely that the market is found to be conducive to reaching the terms of coordination in the first place and to monitoring any deviations. Given the fact that those conditions are cumulative, procurement markets currently do not seem suitable for the existence of a collective dominance.

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[128] See Competition Commission, 'The Supply of Groceries in the UK Market Investigation' (2008) <http://www.competitioncommission.org.uk/assets/competitioncommission/docs/pdf/non-inquiry/rep_pub/reports/2008/fulltext/538.pdf> accessed 31 December 2012, paras 8.21-23.

[129] Ezrachi (n 35) 268-69; Pera and Bonfitto (n 110) 415.

[130] With respect to this condition, it is not necessary to 'prove that there is a specific retaliation mechanism involving a degree of severity'. See Airtours (n 126) para 195. Once deviating is not beneficial, the sustainability of collective dominance is deemed to be ensured. Besides the possibility to be involved in a price war using the methods of campaigns, loyalty schemes and private labels, retailers may react to a deviation by the ending on-going business relationships. This may be an issue where retailers cooperate in relation to several aspects of the business such as distribution or storage. In addition, retailers may also belong to the same purchasing group. These types of relations may provide a retaliation tool to make deviation unprofitable to the retailers. See Marc Ivaldi, Bruno Jullien, Patrick Rey, Paul Seabright and Jean Tirole 'The Economics of Tacit Collusion - Final Report for DG Competition, European Commission' (2003) <http://ec.-europa.eu/competition/mergers/studies_reports/the_economics_of_tacit_collusion_en.pdf> accessed 31 December 2012, 53-54.

[131] The assessment of the reaction of outsiders should include any constraints from non-coordinating actual or potential competitors and the countervailing power of suppliers. Barriers to entry to the retail market, hence to the procurement market, can be considered high given the sunk costs and the necessity of huge investments involved in this market. Furthermore, although there are strong suppliers, it does not seem very likely that they would end their procurements since retailing constitutes the sole way for their product to reach a wider consumer group.

2. Abuse

Under article 102 TFEU, once dominance is established, it must be examined whether the dominant undertaking abuses its position. The list of practices which can amount to an abuse in the meaning of article 102 is not exhaustive.[132] Although the analysis in the previous section indicates that it is very seldom that the buyer power of retailers results from a dominant position, it should be theoretically discussed which behaviours of retailers in relation to private labels may form an abuse in the sense of article 102 TFEU. As pointed out in the *Competition in Retailing Research Paper*, retailer behaviours requiring special consideration in that regard are exclusive supply obligations, refusal to stock or delisting, minimum supply levels, minimum advertising requirements and sunk facility requirements.[133]

As explained above, exclusive supply obligations require the manufacturer not to supply the products concerned to competing retailers. Through their impact on retail competition, these obligations may substantially affect supply level competition. Indeed, taking especially into consideration the profit margin of private labels and of primary eye-catching brands, there may be no economic incentive for the retailer to promote secondary brands. Thus, it may even delist them. This may lead though to severe economic consequences for these brand suppliers, if they are not able to immediately find another channel to reach consumers.[134]

A more dangerous type of retailer behaviour in relation to private labels that may constitute an abuse under article 102 TFEU is delisting or refusal to stock, which arises when a retailer refuses to give shelf space to a supplier or displays its products in a disadvantageous position within the shop. Those practices will be basically analysed by reference to the principles applicable to refusal to deal. For a refusal to deal to amount to an abuse, three conditions must be satisfied: (i) the refusal must be likely to eliminate all competition in the relevant market on the part of the party requesting the service; (ii) the facility in question must be indispensable to the operation of that party, ie there must not be economically viable alternatives for the party to operate in the market; and (iii) such refusal cannot be objectively

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[132] *Continental Can* (n 86) para 26.
[133] Competition in Retailing Research Paper (n 1) section 2.4.1.
[134] Kuipers (n 52) 195-96.

justified.[135] Although on some occasions the existence of those requirements may be disputed, the first two conditions could be considered to be met in most cases, considering the strong economic dependence of suppliers on retailers, as discussed above.[136] The analysis of the third condition may be more problematic in relation to delisting by the retailer. Indeed, with the emergence of private labels and given the limited nature of shelf space, it may not be economically viable for retailers to allocate shelf and retail space for each branded good. Accordingly, it may be very difficult, particularly for the delisted secondary brand owners, to prove that the delisting cannot be objectively justified. However, this burden of proof may be more easily handled, where the delisting is used by retailers as a threat to discourage primary product manufacturers to utilise their intellectual property rights against the retailer's practice to offer copy-cat private labels. In *Rewe/Meinl*, the Commission considered this practice as a possible harm to competition that would result from the merger leading to a dominant position in the retail and procurement markets.[137]

Moreover, an abuse of dominant position by retailers may take place through requests from suppliers for payments -called under various names- for the marketing and the best positioning of their product. These payments particularly encompass advertising requirements, listing charges, slotting allowances and contribution to promotional expenses.[138] These practices can be argued to lead to efficiencies, such as distributing the risks of failed products between the retailer and the supplier, or providing equilibrium between the numbers of new products that suppliers bring to market and

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[135] See Joined Cases C-6 and 7/73 *Istituto Chemioterapico Italiano S.p.A. and Commercial Solvents Corporation v Commission* [1974] ECR 223; Joined cases C-241/91 P and C-242/91 *P. Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v Commission* [1995] ECR I-743; Case C-7/97 *Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs* [1998] ECR I-7791. See also Sebastien J Evrard, 'Essential Facilities in the European Union: Bronner and Beyond' (2004) 10 Columbia Journal of European Law 491; Angelo Castaldo and Antonio Nicita, 'Essential Facility Access in Europe: Building a Test for Antitrust Policy' (2007) 3 Review of Law & Economics 83. For the existence of such abuse, the Commission seems to additionally require the likelihood of harm to consumers. See also Guidance on the application of 102 (n 85) paras 86-90.

[136] See Jean-Paul Tran Thiet 'The Regulation of Networks and Relations between Industry and Trade: A French perspective' (1998) 19 European Competition Law Review 473, 476-77.

[137] *Rewe/Meinl* (n 96) paras 110-14.

[138] Dobson and others (n 8) 3.

those demanded by consumers.[139] However, retailers may also use those payments in order to limit the competition constraints that their private labels face. In fact, unjustifiably high access fees and contribution may force particularly secondary brands to exit the market. In these cases, such payments may be treated by analogy to delisting under article 102 TFEU. These payments may also decrease the competitiveness of primary brands by widening the price gap between those products and the private labels of the retailer.[140] In such cases, however, these practices may be regarded the same as margin squeeze cases, which are subject to substantive rules quite similar to those applicable to refusals to deal.[141]

Finally, retailers may, engage in predatory pricing in relation to its private labels in order to eliminate its competitor brands.[142] However, considering the more profitable tools discussed above to achieve the same objective, retailers may often not prefer to pursue a predatory pricing strategy.

To conclude, article 102 TFEU does not seem to be an effective means to address the abusive behaviours of retailers in the context of private label either. The main reason is the fact that there is usually no collective or single dominance which is a prerequisite for the application of the provision. However, if dominance can be established in exceptional situations, certain behaviours of retailers, such as delisting, may be deemed to form an abuse in the meaning of article 102 TFEU.

V. Competition Tools Addressing Retailer's Buyer Power in the UK

Despite the awareness of competition problems with regard to private labels at the EU level, as explained above, the EU competition law instruments remain currently ineffective to tackle these problematic quasi-abusive behaviours by quasi-dominant retailers which do not always fall under

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[139] Study on the Impact of Private Labels (n 22) 33-34. See also Guidelines on Vertical Restraints (n 77) paras 207-08.

[140] Kuipers (n 52) 211; Andres Font Galarza 'Private Labels and Article 82 EC' in Ariel Ezrachi and Ulf Bernitz (eds), *Private Labels, Brands and Competition Policy: The Changing Landscape of Retail Competition* (Oxford University Press 2009) 125-35.

[141] See Guidance on the application of Article 102 (n 85) paras 75-90.

[142] Competition Commission, 'Supermarkets: A Report on the Supply of Groceries from Multiple Stores in the United Kingdom' (2000) <http://webarchive.nationalarchive-s.gov.uk/+/http://www.competition-commission.org.uk/rep_pub/reports/2000/446super.htm#full> accessed 31 December 2012; Commission Staff Working Document (n 3) 32.

articles 101 and 102 TEFU.[143] Having said that, several Member States, including the UK, France, Germany, Czech Republic, Hungary, Romania and Latvia, have conducted various investigations and they endeavour to overcome those concerns. In this regard, the UK regime deserves special consideration, given the experience of the UK competition authorities in dealing with competition concerns in relation to the retail market which is characterised by high concentration levels[144] and the high proportion of private labels.[145]

It has been a long time, since when competition problems associated with buyer power and private labels were recognised in the UK. There are several reasons why the UK stands out as one of the Member States with a useful 'toolkit' for the treatment of such competition concerns. For one thing, the characteristics of the British market strengthen the position of retailers against suppliers. As pointed out by Dobson, 'in Britain consumers have an exceptional degree of loyalty towards their favoured retailer and tend not to shop around for grocery products, but instead consistently rely on one store for most or all of their needs'.[146] In addition to this, a high degree of dependency of suppliers on retailers is observed.

In order to address the competition concerns in the retail sector, the first sector investigation was initiated in 1999. This work revealed various anti-competitive practices conducted by retailers in relation to their private labels, including the practice of persistent below-cost selling of some frequently purchased products.[147] To address these practices, the report envisaged the adoption of a code of practice to be applicable to retailers enjoying more than 8% market share in the procurement market. After its entering into force in 2002, the Supermarkets Code of Practice (SCOP

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[143] Kolstad Olav, 'Unfair practices in the grocery supply chain: Analysis and Remedies across Europe' in Report on the Eight Annual Symposium on Retail Competition, 'Trends in Retail Competition: Private Labels, Brands and Competition Policy' (25 May 2012).

[144] The respective market shares of supermarkets in UK (for the 12 weeks to 25 November 2012) had been as follows: Tesco: 30.7%, Asda: 17.3%, Sainsbury's: 16.9%, Morrisons: 11.7%, Waitrose: 4.5%, Aldi: 3.0%, Lidl: 2.8%, Iceland: 2.0%. See Kantar Worldpanel Data <http://www.kantarworldpanel.com/global/News/Grocery-Market-Share-UK-ALDI-10-more-shoppers> accessed 31 December 2012.

[145] Nielsen's Review of Growth Trends indicates that in 2005, the share of private labels in the UK retail sector accounted for 28%, and 82% of customer shopping trips included private label products. Nielsen's Review of Growth Trends (n 40).

[146] Dobson (n 4) 535.

[147] Competition Commission, 'The Supply of Groceries in the UK Market Investigation' (n 142).

2002) was criticised on the ground that it was not sufficiently effective to prevent retailers from requesting suppliers to make certain payments and contributions. Subsequently, in 2006, based on evidence on the widening power gap between retailers and suppliers, the Competition Commission once more placed the sector under investigation upon the OFT's referral.[148]

The final report introduced various measures to improve competition in local areas, such as removal of administrative barriers and elimination of the contractual conditions obstructing market entry. More importantly, concerns with regard to the relationship between retailers and suppliers were contemplated to be addressed by a 'new strengthened and extended' code of practice.[149] The Groceries (Supply Chain Practices) Market Investigation Order 2009 entered into force in 2010 and introduced the Groceries Supply Code of Practice (GSCOP) to be applicable to any retailer exceeding a turnover of £1 billion with respect to the retail supply of the groceries.[150] The Order aims to build fairness in retailer-supplier relations and to establish a framework concerning variations in agreement conditions, pricing and payments, promotions and other duties in relation to the resolution of consumer complaints and the delisting of products.

In order to ensure its implementation, it has been made compulsory for retailers to incorporate the GSCOP in their supply agreements.[151] The record-keeping of practices is provided by the obligation to conclude written contracts with suppliers. The mechanism was further supported by the retailer's employment of an in-house compliance officer, who is to be independent from the buying team. Moreover, the GSCOP also imposes on retailers an obligation not to request or require suppliers to give their consent on the retrospective variations of any supply agreement.[152] Accordingly, unless otherwise provided in the agreement, the retailer must

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[148] Alastair Gorrie 'Retail Competition: The Use Ex-Ante and Ex-Post Remedies' in Ariel Ezrachi and Ulf Bernitz (eds), *Private Labels, Brands and Competition Policy: The Changing Landscape of Retail Competition* (Oxford University Press 2009) 308.

[149] Competition Commission, 'The Supply of Groceries in the UK Market Investigation' (n 142).

[150] Competition Commission, 'The Groceries Market Investigation Order' (2009) Part 4(1).

[151] ibid Part 5.

[152] A retailer may make an adjustment to the terms of supply which has retroactive effect where the relevant supply agreement sets out clearly and unambiguously: (a) any specific change of circumstances (such circumstances being outside the retailer's control) that will allow for such adjustments to be made; and (b) detailed rules that will be used as the basis for calculating the adjustment to the terms of supply. ibid. GSCOP annexed to 2009 Investigation Order (n 150) sec 3.

not require the supplier to make any payment for its costs, such as consumer or market researches or refurbishment of a store.[153] The circumstances under which the retailer could request payment are limited to promotions and the sharing of risks related to stocking, displaying or listing new grocery products. The concept of promotion is defined 'as offer for sale at an introductory or a reduced retail price, intended to subsist only for a specified period'.[154]

With regard to payment requests for marketing costs, it is made clear that, unless it is about a promotion, the retailer must not require a supplier to share such costs.[155] The same principle applies to any payment for the better positioning of, or the allocation of larger shelf spaces to the product concerned. On the other hand, the retailer is under the duty not to require a supplier to predominantly fund the costs associated with promotion.[156] These obligations prevent the retailer from using its power for requesting payments under different marketing plans.

Delisting practices are also covered under the GSCOP. In this regard, a retailer can only delist a supplier based on genuine commercial reasons, and it must, prior the delisting, give the supplier a notice which includes the relevant reasons. In such case, the supplier has the right to ask the senior buyer of the retailer to review the decision, as well as the right to discuss it with the retailer's officer, who is responsible for compliance with the GSCOP.

Notwithstanding the above, the fact that the GSCOP essentially provides for self-regulation has raised doubts as to its effective enforcement. Although the UK has a history of self-regulation culture, which is more ubiquitous in comparison to other parts of the world, this feature of the GSCOP is seen as a factor that hinders its healthy application. In this respect, the lack of effective enforcement of the GSCOP gives rise to a situation whereby the expected outcomes have not been fully achieved. For example, the entry into force of GSCOP did not change the retailers' practice to expect from brand suppliers to provide extensive in-store promotional support for their products through promotion support payments and by participating in the

[153] ibid sec 6.
[154] ibid sec 1.
[155] ibid sec 9.
[156] ibid sec 13.

cost of price promotions.[157] Furthermore, following the entry into force of the GSCOP, the Competition Commission failed to receive from retailers a sufficient number of agreements to monitor the voluntary enforcement of the GSCOP.

In this regard, the UK government has started to discuss the creation of an adjudicator position. The role of the adjudicator will be to act as a referee and police the rules of the GSCOP.[158] In this regard, the Groceries Code Adjudicator Bill (GCA Bill) has been introduced and is currently before the Parliament.[159] The Bill intends to ensure the effectiveness of the GSCOP by granting the adjudicator the power to enforce it by investigating suspected breaches and imposing financial penalties. It can be argued that the overarching aim of the GCA Bill is to maintain and secure fair dealing in the sector. However, while the prevention of anti-competitive practices in the sector falls under this overarching aim, it is only one of the priorities of the GCA Bill, besides its other objectives. In this respect, the Bill also takes it upon itself to protect vulnerable suppliers from unfair commercial terms imposed upon them by retailers.

There are two important enforcement powers of the adjudicator in the event of breaches of the Code: (i) requiring retailers to publish statements about their breaches (public disclosure) and (ii) imposing financial penalties on retailers. The public disclosure clause renders the mechanism more effective by decreasing the incentive of the retailer to engage in any breach given its possible damage to the reputation of the company.[160] This is considered as the primary enforcement power of the adjudicator, whereas imposition of financial penalties will be the case where public disclosure alone proves to be an insufficient remedy due to the specific characteristics of the case in question. These mechanisms of the GCA Bill are regarded as positive steps

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[157] Study on the Impact of Private Labels (n 22) 110.

[158] Department for Business Innovation & Skills, 'Taking Forward the Establishment of a Body to Monitor and Enforce Compliance with the Groceries Supply Code of Practice (GSCOP): The Groceries Code Adjudicator; the Government's policy for a Groceries Code Adjudicator' (31 May 2011) <http://www.bis.gov.uk/assets/biscore/businesslaw/docs/g/11-920-government-policy-groceries-code-adjudicator.pdf> accessed 31 December 2012.

[159] The Bill is due to have its report stage and third reading before the House of Lords on a date yet to be announced Final amendments were made to the Bill during the third reading on 24 July. For more information, see <http://services.parliament.uk/bills/2012-13/groceriescodeadjudicator.html> accessed 31 December 2012.

[160] UK Government, Groceries Code Adjudicator Bill [HL] 2012-13 <http://www.publications.parliament.uk/pa/bills/cbill/2012-2013/0062/20130062.pdf> accessed 31 December 2012.

towards mitigating concerns expressed by the Competition Commission that many retailers may have been in breach of the GSCOP. [161]

VI. Conclusion

In recent decades, the grocery retail sector has witnessed a trend of concentration and as a result, it has been increasingly dominated by large retailers with significant buyer power that enables them to impose their position when bargaining with suppliers. The fact that these retailers have begun to offer private label products competing with brand products has brought a different dimension to this imbalanced relationship between retailers and suppliers. Although the introduction of those own labels has resulted in reduced prices and more choices, on the other hand, it has also increased the large retailers' incentive to abuse their buyer power against brand product suppliers.

The main EU competition law rules, ie articles 101 and 102 TFEU, fall short of effectively addressing those behaviours of quasi-dominant retailers. The reason why article 101 TFEU is not an effective tool in tackling those concerns related to private labels is that the retailers' abusive behaviours usually arise from unilateral conduct falling outside the scope of the provision. However, article 102 TFEU is also unlikely to serve to address those concerns because it is very rare that retailers are found to be individually or collectively in dominant position.

Nevertheless, considering the abusive behaviours of retailers based on their bargaining power, which grants them an economic power similar to that of dominance, it seems necessary to utilise some other tools to eliminate those competition concerns. In this regard, the efforts of the UK competition authorities constitute a good example of how to regulate the relationship between retailers and suppliers. The GSCOP, namely the code of practice adopted by the Competition Commission, seeks to build a fair relationship between retailers and suppliers and requires retailers to comply with its rules as far as practices such as payment requirements and delisting are concerned. However, its voluntary enforcement does not appear sufficient to provide an effective implementation of the GSCOP. For this reason, the

[161] Justine Stefanelli and Philip Marsden, 'Models of Enforcement in Europe for Relations in the Food Supply Chain' (2012) <http://www.biicl.org/research/european_law/b2b_enforcement_report/> accessed 31 December 2012, 13.

GCA Bill which has been introduced to the Parliament by the Government, in order to set up a Groceries Code Adjudicator with the role of enforcing the Code and encouraging compliance with it, may be considered as a step forward towards a more efficient and mandatory regulation.

Representing the European Union in Follow-On Actions for Damages: A Battle between the EU Institutions

IOULIA KAMPOURIDI*

I. Introduction

Brussels is home to many of the European institutions and agencies, occupying an approximate triangle between *Brussels Park*, *Cinquantenaire Park*[1] and *Leopold Park*. The *European Quarter*, as is the unofficial name of this area, is dominated by vast, modern and prolific buildings that contain 45 lifts and 12 escalators. Our story begins with this simple and seemingly unimportant fact. However, the future implications of this mundane detail were hard to predict. The facts that led to the current discussion date back to early 2004, when the Commission decided to start an investigation into the lifts and escalators markets on its own initiative, using information brought to its attention in 'a number of complaints'.[2] This investigation culminated in the adoption of a Decision in early February 2007, finding that four manufacturers of lifts and escalators, i.e. the *Otis*, *KONE*, *Schindler* and *ThyssenKrupp* groups, ran illegal cartels in the Benelux countries and Germany, at least during the period from 1995 till 2004.[3] The companies allocated tenders and other contracts for the sale, installation, maintenance and modernisation of lifts and escalators with the aim of freezing market shares and fixing prices and thus, they were fined just over 992 million in

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[1] French for "Park of the Fiftieth Anniversary".

[2] Case C-199/11 *EuropeseGemeenshcap v Otis and Others* (CJEU, 6 November 2012), para 18.

[3] *PO/Elevators and Escalators* (Case COMP/E-1/38.823) Commission Decision C (2007) 512 final, of 27 February 2007.

total. The undertakings involved appealed this Decision to the General Court, which rejected all of their arguments, although it eventually reduced *ThyssenKrupp*'s fine.[4] Following that judgment, *Otis* lodged an appeal to the Court of Justice of the European Union (CJEU) against the General Court's ruling in which it seeks a reduction of its fine.[5]

The European Commission (Commission), as the representative of the European Union (EU), brought an action for damages before the Brussels Commercial Court (Rechtbank).[6] The Commission argued that overpriced contracts were concluded between the EU institutions and the four companies regarding the installation, maintenance and renovation of escalators and lifts in their buildings. In reply, the lift-makers disputed the 'Commission's capacity to act as the EU's representative in the absence of express authorisation to that effect from the other EU institutions that have allegedly suffered harm as a result of the infringement in question'.[7] They also claimed a lack of impartiality of the Belgian court and violation of the principle of equality of arms due to the particular position that the Commission occupies in the context of article 101 TFEU proceedings.[8] In light of these arguments, the Belgian court sent a preliminary reference to the CJEU.[9] Advocate General (AG) Villalón handed down his Opinion[10] in this case on 26 June 2012. In an impressive demonstration of efficiency and rapidity, the Grand Chamber of the CJEU pronounced its judgement on 6 November 2012.[11]

The two preliminary questions submitted by the referring court concern the legal representation of the Union before national courts and the independence of the judiciary and the equality of arms in a tort action in a

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[4] Joined Cases T-141/07, T-142/07, T-145/07 and T-146/07 *General Technic-Otis and Others v European Commission* [2011] OJ C 269.

[5] Case C-494/11 P *OtisLuxembourg Sàrl and Others v European Commission* OJ 2011 C347/18.

[6] Case C-199/11 *Otis and Others v Commission* (CJEU, 6 November 2012); Opinion of AG Villalón, paras 10 and 13.

[7] Case C-199/11 *EuropeseGemeenschap v Otis and Others* (CJEU, 6 November 2012), para 24.

[8] ibid.

[9] Reference for a preliminary ruling from the Rechtbank van koophandel, Brussel (Belgium), lodged on 28 April 2011 — European Union, represented by *the European Commission v Otis NV and Others*, Case C-199/11,OJ 2011/C 219/03

[10] Case C-199/11 *Otis and Others v Commission* (CJEU, 6 November 2012), Opinion of AG Villalón.

[11] Case C-199/11 *EuropeseGemeenschap v Otis and Others* (CJEU, 6 November 2012).

civil court respectively. The analysis of these two issues forms the two main parts of this article, followed by some concluding remarks.

II. Representing the Union before National Courts: A Role for the Commission or for the Institutions?

Prior to the entry into force of the Lisbon Treaty,[12] article 282 EC (now article 335 TFEU) formed the basis for the legal representation of the Union. This article was interpreted as requiring the Commission to grant a mandate to the EU institution that wanted to bring an action before a national court.[13] With that in mind, the novelty of the *Otis* case is that it constitutes the first time that the Commission lodged itself a complaint before a national court as the legal representative of the Union.[14] This choice of the Commission choice raised the issue of the legal representation of the Union before the national courts and led the Belgian court to send the reference for a preliminary ruling to the CJEU. Thus, in its first question, the Rechtbank asked the following: although article 282 EC states that the Commission is the legal representative of the Union, shouldn't the European institutions themselves be parties to proceedings in national courts in accordance firstly, with article 335 TFEU and articles 101 and 104 of the Financial Regulation[15] and secondly, with the principle "*lex specialis generalibus derogat*" given that the latter constitutes part of Belgian law and to the extent that it is also applicable in European Law, since 'there is no doubt that receipt by contractors etc. of payment of inflated prices as a result of collusive practices comes within the concept of fraud'?[16] Moreover, shouldn't the institutions have at least authorised the Commission 'to represent them for the purpose of safeguarding their legal rights'?[17]

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[12] Consolidated Version of the Treaty on the Functioning of the European Union (hereinafter 'Lisbon Treaty' or 'TFEU'), [2008] OJ C115/47.

[13] See, for example, Case C-137/10 *European Commission v Région de Bruxelles-Capitale* (CJEU, 5 May 2011).

[14] Sophie Mosca, 'Commission may claim compensation for loss caused by cartel' *(Europolitics*, 26 June 2012) <http://www.europolitics.info/commission-may-claim-compensation-for-loss-caused-by-cartel-art338160-32.html> accessed 3 November 2012; Benjamin Fox, 'EU Commission can seek own damages from cartel cases' (EUObserver, 28 June 2012) < http://euobserver.com/institutional/116784> accessed 13 July 2012.

[15] Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities [2002] OJ L 248/1.

[16] See *supra* note 9, Question 1(a).

[17] See *supra* note 9, Question 1(b).

In reformulating the question, the AG acknowledged that it encompasses two tenets, that is the temporal application (*ratione temporis*) of article 282 EC and the proper interpretation of article 335 TFEU respectively.

1. The *Ratione Temporis* Argument

Article 282 provided that the European Commission enjoys the most extensive legal capacity in each Member State and may be a party to legal proceedings in which it represents the Community (now Union).[18] Article 335 TFEU, which replaced article 282 EC, contains the exact same language as article 282 EC, but it also adds that 'the Union shall be represented by each of the institutions, by virtue of their administrative autonomy, in matters relating to their respective operation'.[19]

According to the AG, although article 335 TFEU stipulates in a primary law norm the pre-existing practice of the Union's representation by the various institutions duly authorised for this purpose, it appears to have reversed the rule in article 282 EC. The CJEU's judgement in *European Commission v Région de Bruxelles-Capitale*[20] supports this argument. The Court ruled in that case that 'in accordance with articles 281 EC and 184 EAEC[21] the Communities were a legal person governed by public law. That remains true now under article 47 TEU[22] as regards the EU. Under article 282 EC and article 185 EAEC the Communities enjoyed the most extensive legal personality under the national laws of the Member States'. To that end, the Commission could delegate this power through a mandate to the other institutions 'in matters relating to their respective operation'. Sound administration principles dictated that in actions before national courts the institution concerned represented the Communities as part of its administrative and operational autonomy, because it was better placed to assess and defend the interests of the Communities.[23] Based on these

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[18] Consolidated Version of the Treaty Establishing the European Community [2002] OJ C325/33, art 282.
[19] TFEU, art 335.
[20] Case C-137/10 *European Commission v Région de Bruxelles-Capitale* (CJEU, 5 May 2011).
[21] Consolidated Version of the Treaty Establishing the European Atomic Energy Community [2010] OJ C84/1, art 184.
[22] Consolidated Version of the Treaty on European Union [2008], OJ C115/13, art 47, which states that 'The Union shall have legal personality'.
[23] Case C-137/10 *European Commission v Région de Bruxelles-Capitale* (CJEU, 5 May 2011), paras 18-20.

observations, the AG is of the opinion that articles 282 EC and 335 TFEU are not merely procedural norms, but two substantive rules that relate to the internal organisation of the Union. This means that they positively establish which institution is responsible for the Union's external representation, including representation in current legal proceedings before national courts. Thus, AG Villalón feels that it is important to determine which of the two rules applies to these proceedings that commenced on June 20, 2008, over a year and a half before the entry into force of the Lisbon Treaty.

In this context, it is worth reminding ourselves that the Lisbon Treaty contains no provision relating to the *ratione temporis*. Therefore, there can be no retrospective effect and the *acquis communautaire* and precedents under article 282 EC cannot be called into question. In light of this, the easy conclusion is that article 282 EC is the one applicable in this case. This argumentation seems rational and encompasses a fundamental principle of international law in accordance with article 28 of the Vienna Convention on the Law of Treaties (the Vienna Convention).[24] Article 28 of the Vienna Convention is also binding on the EU institutions, as it constitutes a rule of customary international law and it provides that its provisions do not apply to events or acts that predate its entry into force, in the absence of a contrary intent expressed in the Treaty in question.[25] Moreover, 'there is no indication, whatsoever, in the Treaties of any such different intention under which the European Union's competence could be extended to events, such as those of the case in the main proceedings, which took place before it existed'.[26]

Therefore, in his Opinion AG Villalón engages in a reasonable form of judicial activism, but he does not overstep the limits of his proper role as a vital member of the Court. In that sense, he does not go beyond what the Member States assume and understand as being his duties. In the opposite scenario, excessive judicial activism would enable the AG to 'run amok, actively expanding (...) [European law] in ways not explicitly based on state consent'[27] and may result in the Court 'riding rough-sod over national

[24] Vienna Convention on the Law of Treaties (Vienna Convention) [1969], art 28.
[25] Case C-466/11 *GennaroCurrà and others v Bundesrepublik Deutschland* (CJEU, 12 July 2012), paras 22-23.
[26] ibid.
[27] Karen Alter and Laurence Helfer, 'Nature or Nurture? Judicial Lawmaking in the European Court of Justice and the Andean Tribunal of Justice' (2010) 64 International Organisation 563.

autonomy'.[28] Instead, the AG chooses to merely reply to the question that the referring court asks. He interprets the question in a way that is legally correct by slightly correcting its meaning. In essence though, he refrains from laying out what would happen if article 335 TFEU were applicable, this being a question to be answered in a later case related to proceedings commenced on or after the entry into force of the Lisbon Treaty.

Admittedly this initial approach is purely formalistic: it relies on strict legal rules, such as the *ratione temporis* argument, and avoids answering the difficult question of properly allocating competence for bringing an action in the current case. On the other hand, the use of this specific rule, the *ratione temporis* rule, could be viewed as an attempt to prevent unnecessary analysis and to promote judicial expediency. Besides, the AG gives us the opportunity to ponder whether the answer to this question would be different in a future case initiated after the entry into force of the Lisbon Treaty. One could legitimately argue that the answer would not differ. The last sentence added in article 335 TFEU simply reflects the common sense argument evident in the Court's case law, while its rationale can be also exemplified on grounds of effective allocation of resources and on reasons of administrative efficiency. To put it differently, the addition of the new sentence merely illustrates another occasion, especially prevalent in the field of institutional relations and affairs, in which the Treaty has simply caught up with what has become a standard, common practice.

Regarding this issue, the CJEU does not engage in any sort of analysis and comparison of articles 282 EC and 335 TFEU similar to that of the AG. It rather avoids perplexing the situation by simply acknowledging that article 282 EC applies since 'the action before the referring court was brought' prior to 1 December 2009, the date on which the TFEU entered into force.[29]

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[28] ibid 564.

[29] Case C-199/11 *EuropeseGemeenschap v Otis and Others* (CJEU, 6 November 2012), Opinion of AG Villalón, paras 28 and 29.

2. The AG's Interpretation of Article 282 EC

The AG remarks that prima facie the Commission has exclusive competence for representing the Union under article 282 EC.[30] The defendant companies do not disagree with this rule, but they argue that this is only a general provision complemented by a *lex specialis* relating to the protection of the Community's financial interests under articles 274 EC (now article 317 TFEU) and 279 EC (now article 322 TFEU), as implemented by Regulation 1605/2002.[31] In other words, the companies 'contend that article 282 EC is only a general rule from which articles 274 and 279 EC derogate'.[32] More specifically, article 274 EC provided that '[t]he Commission shall implement the budget, in accordance with the provisions of the regulations made pursuant to Article 279' and that 'the regulations shall lay down detailed rules for each institution concerning its part in effecting its own expenditure'. In addition to this, article 279 granted the power to the European Parliament and the Council to adopt those regulations in accordance with the ordinary legislative procedure. On that basis, Regulation 1605/2002 was adopted. Given the financial burden of instituting and/or being a party to legal proceedings, provision is made in the budget of each institution for the finance of such legal actions. Since each institution is responsible for the planning and implementation of its own budget, each institution alone must also decide whether to institute legal proceedings, especially against private legal and natural persons. Therefore, what the companies argue in this case where there is alleged fraud by contractors, is that each institution may recover the amounts paid and is responsible for the protection of its own interests. This is simply because 'most of the contracts were awarded in [the institutions'] own name and on their own behalf'.[33]

The AG replies to those concerns with the arguments that follow.[34] Firstly, application of the maxim "*lex specialis legi generali derogat*" is not conclusive, because it applies when two conflicts have the same goals, but contradictory content. The latter two conditions are not fulfilled, as article 282 EC relates to the judicial representation/legal capacity of the Union,

[30] AG Villalón Opinion (n 6), para 23.
[31] See *supra* note 15.
[32] Case C-199/11 *EuropeseGemeenschap v Otis and Others* (CJEU, 6 November 2012), para 31.
[33] AG Villalón Opinion (n 6), para 23.
[34] ibid paras 25-31.

whereas articles 274 and 279 EC relate to the budget powers of each institution. In particular, article 282 EC provides that 'each institution is competent to decide on measures to guarantee the financial resources it deserves'. This argumentation is also supported by the CJEU's decision in *Brussels-Capital*[35],in which the institution itself represented the Union before the national court, having obtained a mandate from the Commission. Moreover, this observation holds true in every case where an institution other than the Commission has represented the Union in the course of legal proceedings. The CJEU implicitly agrees with the AG on this point, although it does not spell out this rationale in so much detail. It simply acknowledges that 'the question of Community representation before those courts (i.e. the courts of the Member States) is distinct from the question concerning measures for budgetary implementation adopted by a Community institution'.[36] Article 282 EC governs the former, whereas article 274 and 279 EC regulate the latter. Additionally, the Court points out that 'articles 103 and 104 TFEU of the Financial Regulation, to which the referring court alludes when formulating its first question, (....) contain rules relating to the award and enforcement of public contracts and not to the representation of the EU before the courts of the Member States'.[37] Moreover, the AG highlights that there is no reported case in which the Union's representation by the institution concerned was based on articles 274 and 279 EC or the aforementioned Regulation,[38] contrary to what the defendants contend.[39] Therefore, the CJEU's case law supports the AG's contention that the only competent body to bring an action before a national court is the Commission, regardless of whether it can *ad hoc* delegate this power to other institutions according to the issue at hand.

In addition to this, the AG also argues that if it were otherwise, the reforms to article 282 EC - manifested in article 335 TFEU - would be superfluous. Thus, the Commission was right in its reliance on article 282 EC, because it is the *Community* and *not* the Commission that is party to the proceedings before the national court. The Commission, as the Union's legal representative under article 282 EC, had the right to refuse to delegate the

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[35] Case C-137/10 *European Commission v Région de Bruxelles-Capitale* (CJEU, 5 May 2011)
[36] Case C-199/11 *EuropeseGemeenschap v Otis and Others* (CJEU, 6 November 2012), para 32.
[37] ibid, para 33.
[38] See *supra* note 15.
[39] AG Villalón Opinion (n 6), para 29.

legal representation to each institution and thus ensure the defence of the Community as a whole. Therefore the answer to the referring court's first question is that article 282 EC should be interpreted as allowing the Commission, as the Union's legal representative, to lodge a claim for compensation for damage suffered by it, such damage also being attributable to various institutions and organs of the Union. The AG makes a logical argument here, because it is indeed the Union that is being represented in the legal proceedings before the Rechtbank and not the institutions themselves. With that in mind, if we accept that the institutions are the ones entitled to bring the action and not the Commission, this would not still have as a consequence that the institutions and not the Union are represented before the national courts. In both situations, the question is not who is the party to the legal proceedings. There is no doubt that this is typically the Union. The real issue is rather "who has the legal capacity to represent the Union": the Commission or the institutions.

The CJEU adopts a slightly different angle on this point, holding that:

> so far as Article 335 TFEU is concerned, it is to be noted that the Treaty contains no transitional provisions concerning the representation of the EU in proceedings which were brought before the courts of the Member States prior to that Treaty's entry into force but which were still pending thereafter. In those circumstances, the relevant provision governing that representation is Article 282 EC, since the main proceedings were commenced before the entry into force of the [T]FEU Treaty.[40]

Thus, the CJEU provides the same answer as the AG to the referring court's first question, but again it avoids engaging in a discussion about the potential interpretation of article 335 TFEU, insofar as such analysis would be pointless. The absence of any indication to the contrary makes it clear that article 282 EC is the only provision applicable here.

III. Fundamental Rights Have Their Say: The Effect of Article 47 of the Charter

Nonetheless, the issue of the legal representation of the European Union by the Commission or by the institutions cannot be completely answered

[40] Case C-199/11 *EuropeseGemeenschap v Otis and Others* (CJEU, 6 November 2012), para 35.

without taking into consideration first, human rights and their impact in the specific context of competition law; and second, the importance of private enforcement and the greater attention paid to it over the recent years. The ability to seek for damages constitutes an indispensable foundation of that private enforcement system. In light of this, the CJEU established the Member States' obligation, 'as a matter of EU law, to provide a remedy in damages where harm has been inflicted as a result of an infringement of the competition rules'[41] (i.e. articles 101 and 102 TFEU) in 2001 in its judgment in *Courage Ltd v Crehan*.[42] As the Court emphasised, the right to damages ensures the full effectiveness of article 101 TFEU and discourages the breach of the EU competition rules, thus making a 'significant contribution to the maintenance of effective competition in the EU'.[43] *Manfredi*[44] confirmed this right and further established the requirement of a 'causal link between the harm suffered and an agreement or practice prohibited under Article [101 TFEU]'.[45] Moreover, *Manfredi*[46] recognises that since 'Member States retain autonomy in relation to the procedural rules of their domestic judicial systems, as well as the substantive rules of recovery in tort, delict, restitutionary and other actions'[47], they are able to maintain such rules even though they 'might inhibit successful damages claims'.[48] The CJEU held in this case that the 'EU, therefore, also enjoys this right'[49] and that 'when that right is exercised, (…) the fundamental rights of the defendants, as safeguarded, inter alia, by the Charter must be observed'.[50]

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[41] Richard Whish and David Bailey, *Competition Law* (7th edition, OUP 2012) p 297.
[42] Case C-453/99 *Courage Ltd v Crehan* [2001] ECR I-6297.
[43] ibid paras 26-27; Case C-199/11 *EuropeseGemeenschap v Otis and Others* (CJEU, 6 November 2012), paras 41 and 42.
[44] Joined Cases C-295/04 to C-298/04 *Vincenzo Manfredi v Lloyd AdriaticoAssicurazioniSpA* [2006] ECR I-6619.
[45] ibid, para 61; Case C-199/11 *EuropeseGemeenschap v Otis and Others* (CJEU, 6 November 2012), para 43.
[46] Joined Cases C-295/04 to C-298/04 *Vincenzo Manfredi v Lloyd AdriaticoAssicurazioniSpA* [2006] ECR I-6619.
[47] Whish (n 41), p 300.
[48] ibid (citations omitted).
[49] Case C-199/11 *EuropeseGemeenschap v Otis and Others* (CJEU, 6 November 2012), para 44.
[50] ibid, para 45.

1. The Requirement for an Independent and Impartial Tribunal

The second issue raised by the national court concerns the potential effect of fundamental rights and, in particular, of article 47 of the Charter of Fundamental Rights of the EU[51](Charter)[52] and article 6(1) of the European Convention on Human Rights[53] (ECHR) on the question of the Commission's capacity to legally represent the Union in actions for damages caused by breaches of the competition rules. In its second question the Belgian court asks whether the fact that the Commission is responsible both for penalising unlawful conduct under article 101 TFEU, after having conducted its investigation as the competition authority and for subsequently preparing a claim for compensation before the national court, the latter being bound by the Commission's decision imposing penalties, is reconcilable with the right to a fair trial and the related principle that no-one can be the judge in his or her own case, as such principle is guaranteed by article 47 of the Charter and article 6(1) ECHR.[54] Moreover, if there is irreconcilability, how can the victim, i.e. the Commission and/or the institutions and/or the Union in this case, of unlawful conduct, i.e. of a cartel in this case, assert its right to compensation under European law, which is itself a fundamental right?[55]

In analysing the question, the AG identifies that the national court's concern is that it will not be an independent and impartial tribunal because the action for damages is based on a violation of article 81 EC, now article 101 TFEU, as decided by the Commission.[56] This is based on the premise that the Belgian court feels bound by the Commission's decision. In accordance with this latter sentiment, the defendant companies argue that the fact that the Belgian court is bound by the Commission's decision violates the principle of judiciary independence, as is implicit in article 47 of the Charter and explicit in article 6 ECHR. The CJEU reiterates the referring court's concern in the following manner:

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[51] Charter of Fundamental Rights of the European Union [2000] OJ C364/1.
[52] Article 6 TEU provides that the Charter shall have the same legal value as the Treaties. Thus, in accordance with article 51, the Charter has become legally binding on the institutions, bodies, offices and agencies of the Union and on the Member States, when they are implementing Union law.
[53] European Convention for the Protection of Human Rights and Fundamental Freedoms [1950].
[54] See *supra* note 9, Question 2(a).
[55] See *supra* note 9, Question 2(b).
[56] AG Villalón Opinion (n 6), para 34.

> [t]he referring court states that a decision adopted by one of the parties to the dispute requires it to accept the finding of an infringement of article 81 EC, which thus prevents the national court from considering in its absolute discretion one of the elements conferring entitlement to compensation, namely the occurrence of an event giving rise to damage (a 'harmful event').[57]

On its part, the Commission argues that it has acted legally and there is no incompatibility between on the one hand its position as applicant in the main proceedings and upstream as a competition authority, and on the other hand the requirements of article 47 of the Charter and article 6 ECHR.

According to the AG, the above arguments relating to the independence of the competent jurisdiction, namely the Rechtbank in this case, pertain more to the extent of the competence, rather than to the impartiality of the judge.[58] The AG then provides the following summary of the concern of the Brussels commercial court. The Commission's decision finding an illegal agreement under article 101 TFEU is binding on all public authorities, including the national competition authorities. Were the Commission to institute before a national court a claim for damages for the harm suffered by the Union as a result of this anticompetitive behaviour, 'there will be legitimate grounds for doubting the conformity of the procedure in question with the right of any person to be tried by an impartial tribunal.'[59] The Rechtbank believes that to the extent that the competent authority, in this case itself, must declare the existence of the injury based on an illegality that is imposed on it, the resulting diminution of the judge's margin of appreciation seems to constitute an unjustifiable restriction of his independence.[60]

However, the AG finds this concern unfounded based on the arguments that follow.[61] First of all, the Union and not the Commission is bringing the action in damages. Consequently, this is not a case in which the Commission has taken an action and then is trying to claim itself compensation for the damage it has suffered. These observations weaken the applicants' arguments, since the dual functions of the Commission that they

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[57] Case C-199/11 *EuropeseGemeenschap v Otis and Others* (CJEU, 6 November 2012), para 38.
[58] AG Villalón Opinion(n 6), para 37.
[59] ibid, para 38. It is the author's own translation, as at the time of writing the official translation in English of the Opinion had not been published yet.
[60] ibid.
[61] AG Villalón Opinion (n 6), paras 39-41.

expose are a consequence of the normal distribution of power within a politico-administrative complex, such as the EU. These dual functions include the design and implementation of public policies and the defence of their rights and lawful interests in any jurisdiction. Secondly, the AG stresses that the Commission's jurisdiction in competition matters and its power to represent the Union in legal proceedings is not the manifestation of an arbitrary division of powers as the applicants claim.[62] It should be noted that all political organisations, including the Member States, provide for legal remedies to 'enforce their rights and interests'.[63] Additionally, a government's right of access to the ordinary courts is a vital aspect of the rule of law, under which governments gradually lose their powers of self-defence and entrust their rights to the courts that ensure that law is applicable to everybody. This observation is also related to the current case, in which the Union has recourse to the national court to obtain compensation for unlawful damages, since it does not itself possess such a court. The Union's legal representation in such circumstances is entrusted to the Commission in accordance with article 282 EC and independently of the subject matter in question. In line with the foregoing, the Commission does not participate in the legal proceedings as a public authority responsible for guaranteeing competition in the internal market, but as a client, a consumer (i.e. as a private party), of the companies who are presumed responsible for having caused illegal damage.[64] This same argument was also made by the Commission and the Council with a different wording. In light of these, the AG concludes that contrary to the defendants' arguments, there is no superposition of functions, but two actions clearly differentiated not only in time, but also in means and objectives.[65]

The CJEU approaches the defendant companies' complaint from a different legal perspective, analysing it under the right of access to a tribunal which is one of the various elements that comprise the principle of effective judicial protection laid down in article 47 of the Charter.[66] Under the right of access to a tribunal, 'for a tribunal to be able to determine a dispute concerning

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[62] ibid, para 41.
[63] ibid.
[64] AG Villalón Opinion (n 6), para 42.
[65] ibid.
[66] Case C-199/11 *EuropeseGemeenschap v Otis and Others* (CJEU, 6 November 2012), para 47. In para 48, it is further explained that 'Article 47 of the Charter also comprises the rights of the defence, the principle of equality of arms, and the right to be advised, defended and represented'.

rights and obligations arising under EU law in accordance with article 47 of the Charter, it must have the power to consider all questions of fact and law that are relevant to the case before it'.[67] Approaching the issue from this perspective, the AG turns to the analysis of the question whether a decision that is adopted by one of the institutions, and in this case the Commission, and is binding on all national authorities including national courts, unjustifiably deprives the national court of its independence, since it is asked to rule on a claim for damages based on this decision. Thus phrased, it is clear -as the AG argues- that the objection is not addressed to the Rechtbank's independence, but rather to its ability to resolve a civil case before it as a sovereign court. In order to alleviate this doubt, the AG invokes two different arguments; first, the nature of the Commission's decision in question and its judicial effects before the national jurisdictions; and second, the fact that the Commission's decision is subject to the right of full recourse in the EU courts and that the national jurisdictions are those who are obliged to determine the harm during the proceedings for damages caused and the causal link between the infringement and the harm suffered.

Examining the nature of the Commission Decision, the AG's conclusion is that the Rechtbank's judicial power is not limited but rather that its power is exercised within a framework of a normal distribution of functions between the national jurisdiction and that of the Union. In support of this conclusion, the AG refers to article 16 of Regulation 1/2003,[68] which states that 'when national courts rule on agreements, decisions or practices under article [101] or article [102] of the Treaty which are already the subject of a Commission decision, they cannot take decisions running counter to the decision adopted by the Commission.'[69] In other words, the Commission's decisions based on these provisions bind the national courts.

> This means that if the European Commission has adopted a decision finding that one or more undertakings have committed an infringement of articles 101 or 102 TFEU, a court of an EU Member State ruling on an action for damages brought against one or more of

[67] Case C-199/11 *EuropeseGemeenschap v Otis and Others* (CJEU, 6 November 2012), para 49.
[68] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L 1/1.
[69] ibid.

> these same undertakings on the basis of the same infringement must take as proven the existence of the infringement.[70]

Moreover, since the appeal of the defendants, who were the addressees of the Commission's Decision, in the current proceedings before the national court, has been rejected by the General Court, the decision is definitive vis-à-vis these companies.[71] The CJEU follows the AG's reasoning and completes the analysis by further highlighting the element of 'sincere cooperation between the national courts, on the one hand, and the Commission and the EU courts, on the other, in the context of which, each acts on the basis of the role assigned to it by the Treaty' as the basis when applying the EU competition rules'.[72]

Coming to the second part of his reasoning, the AG explains that the binding effect of the Commission Decision extends only to the existence of the breach in question i.e. the harmful event. It does not cover the existence of damages nor the existence of a causal link between the infringement and the harm suffered.[73] These are issues for the Commission to prove; so even if the national court is bound to follow a pre-existing Commission Decision, it does not necessarily follow from this that damages will be awarded to the Commission, as there is still a number of contentious matters to examine.[74] The issue here is not really the impartiality or independence of the national court. Were it so, the same issue would arise in every follow-on action, where the national court would be forced to align with the Commission's findings and in such a situation the national court would practically be deprived of the right to formulate its own independent opinion on the facts of the case. The reason why we are concerned about the Commission's legal capacity to bring an action for damages in such cases is the observed "conflict of roles" on the part of the Commission, which reasonably rings a "moral" bell to our ears regarding its legitimacy. Moreover, the binding effect should not be seen as a mechanism depriving the independence of the national court, but rather as a vehicle to facilitate the discharge of the

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[70] Woulter Wils, 'The Relationship between Public Antitrust Enforcement and Private Actions for Damages' [2009] 32 World Competition 3, 16.
[71] Joined Cases T-125/97 and T-127/97 *The Coca-Cola Company and Coca-Cola Enterprises v. Commission* [2000] ECR II-1733.
[72] Case C-199/11 *EuropeseGemeenschap v Otis and Others* (CJEU, 6 November 2012), para 52 (references omitted).
[73] ibid.
[74] ibid.

burden of proof on the party bearing it and as a way of saving valuable resources and time by not wasting effort and money to prove something that has already been credibly established.[75]

Besides, as the AG points out, the finding of illegal conduct contained in the Commission's Decision is imposed in all cases on national courts.[76] This finding forms the basis for any action in tort, which requires that the plaintiff has suffered injury as a result of the defendant's actions.[77] The AG is of the opinion that the referring court would justifiably be suspicious of a claim lodged by a public authority that has itself predetermined the offence with the resulting effects as above mentioned, which forms the basis of its claim for damages.[78] As the Commission rightly pointed out in its written observations, this circumstance ceases to be problematic the moment an effective right of recourse to the EU courts exists to challenge the decision that constitutes the offence. Although the jurisdiction of a national court may be limited without justification if the national court lost the ability to see or challenge the finding of a misdemeanour in the context of a follow-on action for damages, this is not the case here for the following reasons.

Firstly, although the national court cannot directly challenge the Commission's Decision since it is an act of an EU institution (*Fotofrost*)[79] , it can refer a question to the CJEU regarding its validity. The CJEU also makes this very same point,[80] highlighting that this rule is 'a specific expression of the division of powers, within the EU, between, on the one hand, national courts, and on the other, the Commission and the EU courts'.[81] It goes on to explain that 'that rule does not mean however that the defendants in the main proceedings are denied their right of access to a tribunal, as referred to in article 47 of the Charter'[82] because 'EU law provides for a system of judicial review of Commission decisions relating to proceedings under article 101 TFEU which affords all the safeguards

[75] Wils (n 70) p 14.
[76] AG Villalón Opinion (n 6), para 47.
[77] ibid.
[78] AG Villalón Opinion(n 6), para 48.
[79] Case 314/85 *Foto-Frost v Hauptzollamt Lübeck-Ost* [1987] ECR 4199.
[80] Case C-199/11 *EuropeseGemeenschap v Otis and Others* (CJEU, 6 November 2012), para 53.
[81] ibid, para 54.
[82] Case C-199/11 *EuropeseGemeenschap v Otis and Others* (CJEU, 6 November 2012), para 55.

required by article 47 of the Charter'.[83] Both the Court[84] and the AG refer to the fact that the defendant companies in the proceedings before the national court are able to institute proceedings under article 263 TFEU for the annulment of the Commission's Decision addressed to them. The CJEU also reminds us that the companies have indeed already taken advantage of this possibility.[85]

Second, although the Court's jurisprudence recognises that the Commission enjoys a technical margin of appreciation, this does not mean that there is protection *a minima*, as the companies claim. The recognition of this margin finds its equivalent in the administrative law of the different legal systems represented in the EU, where the administration is controlled through the adjudication of legal issues in which the technical aspects are submitted to an examination based on the "manifest error" standard. This latter standard is applied when the validity of a European Commission Decision is challenged before the CJEU and annulment is sought.[86] The extent and the intensity of this type of judicial control in the Member States are compatible with the ECHR.[87] Thus, the AG is of the opinion that 'the control effected by the courts of the European Union on the Commission Decisions adopted under article 81 EC (now article 101 TFEU) constitutes, in a general sense, a complete judicial control, which in the case in which the Decision is unfounded, guarantees to the litigant an effective protection of his rights.'[88] In light of this, the AG concludes that the national court's judicial powers were not restricted and that the defendant parties were not deprived of their right of access to a judge having full jurisdiction.

The CJEU tackles the defendant companies' argument 'that the review of legality carried out by the EU courts under article 263 TFEU in the sphere of competition law is insufficient because of, inter alia, the margin of discretion which those Courts allow the Commission in economic matters'[89] in a different way, analysing the elements of this review. Thus the CJEU reiterates what constitutes settled case law in the field and explains that the

[83] ibid, para 56.
[84] ibid, para 57.
[85] ibid, para 57.
[86] See for example Case C-12/03 *Tetra Laval v Commission* [2005] ECR I-987.
[87] AG Villalón Opinion (n 6), para 50 (references omitted).
[88] AG Villalón Opinion (n 6), para 50 (references omitted).
[89]Case C-199/11 *EuropeseGemeenschap v Otis and Others* (CJEU, 6 November 2012), para 58.

EU Courts do not adopt a hands-off approach when issues of judicial review of economic assessments come to the discussion. On the contrary, the Courts

> must, among other things, not only establish whether the evidence relied on is factually accurate, reliable and consistent but also ascertain whether that evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it.[90]

Moreover, the EU Courts must ascertain 'of their own motion' whether the Commission has 'stated reasons for its decision' and the amount of weight that it has attributed to the different factors that it took into account[91]. To that end, the CJEU must carry out an in-depth review based on the 'evidence adduced by the applicant in support of the pleas in law put forward without being able to rely on the Commission's margin of discretion.'[92] Additionally, the EU Courts enjoy unlimited jurisdiction that article 17 of Regulation 1/2003 confers on them, thus being able to not only 'carry out a mere review of the lawfulness of the penalty', but also to 'substitute their own appraisal for the Commission's and consequently to cancel, reduce or increase the fine or penalty imposed.'[93]

In addition to this, the CJEU also holds that the safeguards embedded in the Treaty that ensure the Court's impartiality and independence undermine the companies' argument questioning the CJEU's independence 'on the ground that the Court is itself an EU institution'.[94] The Court also highlights a rather obvious point that is part of the accepted legal reality and a fundamental rock on which the modern nation-state system is founded, that 'all judicial bodies form part of the State or the supranational organisation to which they belong, a fact which on its own is not capable of entailing an infringement of article 47 of the Charter or article 6 of the ECHR'.[95] Finally, the CJEU also makes a fundamental point regarding the elements that must be established in a civil action for damages such as the action before the referring court, which, apart from a harmful event, also include the 'loss and

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[90] ibid, para 59.
[91] ibid, para 60.
[92] ibid, para 61 (references omitted).
[93] ibid, para 62 (references omitted).
[94] ibid, para 63.
[95] ibid, para 64.

a direct link between the loss and the harmful event'.[96] The national court itself must assess the latter two elements for each individual party, this assessment not being 'contrary to article 16 of Regulation 1/2003'.[97] Thus, the CJEU concludes that 'in view of all the foregoing considerations, the Commission cannot be regarded as a judge and party in its own cause in the context of a dispute such as that in the main proceedings'.[98]

2. The Implications of the Principle of Equality of Arms

Another set of arguments invoked by the defendant companies concerned an alleged breach of the principle of equality of arms, as guaranteed by article 47 of the Charter and article 6 of the ECHR. According to the defendants, this principle was violated, because the Commission in its function and quality as a competition authority had inside information about them to which they did not have access. This principle is important because it is 'a corollary of the very concept of a fair hearing' and 'implies that each party must be afforded a reasonable opportunity to present his case, including his evidence, under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent'.[99] The Commission counter-argued that the members of the legal service representing the Commission in the current proceedings did not communicate with the members of the legal service responsible for competition issues. To that end, the Commission makes two arguments to show that it is 'on an equal footing with every other litigant'.[100] Firstly the Commission assures the Court that 'when preparing the action in the main proceedings, it made use only of information in the public version of the decision of 27 February 2007.[101,102] Secondly, the 'Commission also explains that the departments responsible for the main proceedings, namely the Offices for "Infrastructure and Logistics" in Brussels (...) do not have a right of access to the confidential file of the Directorate-General for Competition'.[103] These Commission arguments seem to suffer from serious weaknesses. On the one hand, taking

[96] ibid, para 65.
[97] ibid, paras 65 and 66.
[98] ibid, para 67.
[99] ibid, para 71.
[100] ibid, para 70.
[101] *PO/Elevators and Escalators* (n 3).
[102] Case C-199/11 *EuropeseGemeenschap v Otis and Others* (CJEU, 6 November 2012), para 70.
[103] Case C-199/11 *EuropeseGemeenschap v Otis and Others* (CJEU, 6 November 2012), para 70.

into consideration its small size, it is hard to believe that no communication between the various members of the legal service takes indeed place. Besides, on the other hand, the Commission failed to make an important point which would significantly strengthen its objections to an alleged infringement of the principle of the equality of arms. That point is the fact that when issuing its statement of objections, the Commission is required to list all the documents on the basis of which it reached a finding of breach of the competition rules. The right of the parties to access that list rather constitutes a strong application of the equality of arms principle.

Considering the parties' arguments, the AG accepted the premise inherent in the defendant companies' pleas and analysed whether this violates the equality of arms principle, which forms a longstanding part of EU law.[104] The AG examines its invocation in the context of national procedures for the implementation of EU law by the Member States, drawing heavily on the relevant jurisprudence of the European Court of Human Rights.[105] According to the latter Court, equality of arms is intended to create a level playing field for the parties, thus ensuring that any document presented to the court can be assessed and challenged by each party in the proceedings. 'Inversely, any harm that is caused by the imbalance between the parties must be proved by the party having suffered'.[106] The CJEU also accepts these points, referring explicitly to them.[107] However, the CJEU disagrees with the use of case law from the European Court of Human Rights by emphasising that 'it must be borne in mind (...) that the principle of effective judicial protection is a general principle of EU law, to which expression is given by article 47 of the Charter'.[108] Article 47 of the Charter 'secures in EU law the protection afforded by article 6(1) of the ECHR [and] it is necessary therefore to refer only to article 47'.[109]

Turning to the case at hand, the AG accepted that the fact that the Commission did not file to the judge any information protected as professional secrets, was capable of creating the necessary circumstances

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[104] AG Villalón Opinion (n 6), para 57.
[105] ibid, paras 58-59.
[106] ibid, para 58 (references omitted).
[107] Case C-199/11 *EuropeseGemeenschap v Otis and Others* (CJEU, 6 November 2012), para 72.
[108] ibid, para 46 (references omitted).
[109] ibid, para 47 (references omitted).

for this impermissible imbalance between the parties to be created.[110] This AG argument though seems to be strange and partly conflicting with his previous comments on the nature of the Commission Decision as binding on the national courts on the ground of the structure of the EU system. Besides, if one considers that the action before the Rechtbank simply aims to assess the amount of damage the EU suffered as a result of the operation of the cartel, but it does not question the very existence of the cartel, it is hard to understand why the Commission should have provided the national court with the confidential information collected during its investigation to the extent that such data concern the verification and establishment of the infringement and not of the damage suffered. With that in mind, such information seems not to be relevant in a private action for damages.

Nonetheless, the AG went on saying that the Commission is not in an advantageous position simply because some of its officials possess information that the lift-makers may not have. In order for the Commission to use such information in the proceedings before the national court, such information must be included in its case file shared with the defence and the judge, in which case the companies are able to defend themselves. Otherwise, if this information is not divulged, a judge would be unable to tip the balance in favour of the Commission. This reasoning disposes of the lift-makers' first argument as unfounded. The AG is also convinced that the Commission erects effective "Chinese walls"[111] that prevent any information between the officials of its legal service who worked on the cartel investigation and those who prepared its claim for damages at the Brussels Commercial Court. Advocate General Villalón is not simply applauding the Commission's goodwill and practice but highlights the fulfilment of its obligation under article 28 of Regulation 1/2003. This article prohibits the Commission from utilising information collected during an investigation for any other purpose than this one.

The CJEU also endorses this reasoning, thus disposing of the defendants' argument 'in the main proceedings [...] that the balance between the parties has been jeopardised because the Commission conducted the investigation into the infringement of article 101 TFEU with the aim of subsequently

[110] AG Villalón Opinion (n 6), para 63.

[111] The fact that the Commission legal service is small does not preclude it from being able to adopt this practice effectively. In my experience, law firms routinely utilise this method, even in their small offices, without any complaints. Having experienced a demonstration of such a use, it should be prepared to accept the AG's argument.

claiming compensation for the loss sustained as a result of that infringement'.[112] The CJEU also adds that

> the fact that both the decision of 27 February 2007[113] and the decision to bring the action for damages in the main proceedings were taken by the College of Commissioners [does not] call the foregoing considerations in question, since EU law contains sufficient number of safeguards to ensure that the principle of equality of arms is observed in such an action – for example, the safeguards derived from article 339 TFEU,[114] article 28 of Regulation 1/2003 and point 26 of the Commission Notice on the co-operation between the Commission and the Courts of the EU Member States in the application of articles 81 and 82 EC.[115]

Finally, the AG argues that since the Commission's conduct is prescribed by the aforementioned Regulation, the burden of proof regarding an alleged violation of this obligation lies on the lift-makers.[116] Since the latter has not furnished any evidence of such an allegation, their complaint regarding the violation of the principle of equality of arms is unfounded. The Advocate General's last word on the matter is that article 47 of the Charter, incorporating the principle of equality of arms, does not preclude the Commission from participation in a follow-on action for damages, even though its decision finding a violation of article 101 TFEU forms the basis for this action. Similarly, the CJEU fully endorsed the AG suggestions and also concluded that the Commission bringing an action as a representative of the EU before a national court for damages for loss sustained as a result of an agreement it had found to infringe article 101 TFEU does not violate article 47 of the Charter.[117],[118]

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[112] Case C-199/11 *EuropeseGemeenschap v Otis and Others* (CJEU, 6 November 2012), para 74.
[113] *PO/Elevators and Escalators* (n 3).
[114] It provides that 'The Members of the institutions of the Union, the members of the committees and the officials and other servants of the Union shall be required, even after their duties have ceased, not to disclose information of this kind covered by the obligation of professional secrecy (...)'.
[115] Case C-199/11 *EuropeseGemeenschap v Otis and Others* (CJEU, 6 November 2012), para 75.
[116] AG Villalón Opinion (n 6), para 70.
[117] ibid, para 77.
[118] It is worth mentioning here that the CJEU refused to accept the arguments that the defendants made on the basis of the Court judgment in *Yvon v France*. At paragraph 76, the

IV. Conclusion

To sum up, there is no doubt that in his Opinion Advocate General Villalón provided arguments in favour of the Commission on all counts and has enabled history to be made. This case not only marks the first time in which the EU itself has sought damages for harm suffered as a result of firms' anticompetitive behaviour, but also could pave the way for the Union to directly claim compensation from companies as a customer.[119] As *Neelie Kroes*, former Commissioner for Competition, has said, 'the Commission is doing its utmost to encourage and facilitate actions for damages before national courts by victims of anticompetitive behaviour. In this case, we are leading by example'.[120] Moreover, this Opinion does not frustrate the underlying reasons for which the Commission has brought this action. As the Commission Vice-President *Siim Kallas*, in charge of administration, audit and anti-fraud explained,

> this case represents an important example of a coherent attitude of the Commission in acting both as market regulator and as diligent administrator of EU taxpayers' money. As a result of the anticompetitive behaviour of these companies, the EU institutions, and so the European taxpayer, have suffered financially by paying over the odds for the installation and maintenance of lifts and escalators. It is our duty to seek compensation for these damages. We act firmly where we find contractors act illegally.[121]

To that end, the CJEU has followed the AG's Opinion, also lending its considerable weight and leverage in support of the private enforcement

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Court made clear that the factors that led the European Court of Human Rights to make a finding of infringement of Art 6 ECHR – which include, inter alia, the considerable impact of the Government Commissioner's submissions on the assessment of the court dealing with expropriation cases and the rules concerning the Government Commissioner's access to, and use of, relevant information – were not accompanied, unlike the factors characterising the case in the main proceedings here, by judicial review or safeguards comparable or equivalent to those'.

[119] Benjamin Fox, 'EU Commission can seek own damages from cartel cases', (*EUObserver*, 28 June 2012) <http://euobserver.com/18/116784> accessed 13 July 2012.

[120] 'Commission goes to court over damages suffered from elevators cartel' (*Rapid Europa Press release*, 24 June 2008) <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/998&type=HTML> accessed 1 September 2012.

[121] 'Commission goes to court over damages suffered from elevators cartel' (*European Law Monitor*) <http://www.europeanlawmonitor.org/latest-eu-news/commission-goes-to-court-over-damages-suffered-from-elevators-cartel.html> accessed 13 July 2012.

mechanism that the European Commission is trying to promote and enhance in the Member States. Moreover, by holding that the Commission and not the institutions have the legal capacity to bring follow-on actions for damages, the CJEU has practically achieved a seemingly conflicting and difficult goal. On the one hand, it has confirmed and cemented the central position of the Commission in the EU competition regime. On the other hand, though, it has also strengthened the private enforcement system, since in the case discussed the Commission is not acting as a public authority entrusted with the enforcement of competition law, but rather in its private capacity as a party to contracts.

In addition, an important side consequence of this CJEU and AG concurrence of views is the emphasis given on the conservation of the financial resources of the institutions. Such a concurrence of views is also important for the clarification regarding the binding effect of Commission Decisions on national courts, where the CJEU has understandably been particularly careful in setting any hard and fast rules. The CJEU's indication on the balancing between public and private enforcement of the competition regime in the EU and the interaction between these two interlinked systems will be a very welcome clarification and addition to the debate currently raging in the Member States. In tilting the balance towards the strengthening of private enforcement, there is no doubt that the CJEU has successfully risen to this challenge. Besides, the CJEU's decision has also breached the gap between the pre- and post-Lisbon Treaty reality regarding the Union's representation in actions before national courts of the Member States. The CJEU has continued its long, time honoured tradition of pushing towards more integration and also towards the use, as well as the application, of rights that natural and legal persons derive from EU law in the domestic legal systems of the Member States. Therefore, this decision has all the potential to hopefully mark the start of a new era for the private enforcement of EU competition law in the Member States.

Origins and Challenges of Pakistan's Competition Regime

SYED UMAIR JAVED*

This essay presents two basic arguments. First, that Pakistan's contemporary competition law owes its existence to the globalisation of national competition laws, in particular to the application of international soft law. Secondly, that the competition regime in Pakistan faces several sustainability challenges, many as a result of the globalised transformation, which need to be addressed at the earliest.

I. The Globalisation of Competition Law

According to the Asian Development Bank, over a hundred jurisdictions around the globe have an enactment dealing with competition matters.[1] The membership of the International Competition Network (ICN)[2], based on competition agencies, is a staggering 189.[3] The 56 member states of the Organisation of Islamic Conference [4] have begun deliberating on competition issues confronted by the member states.[5] The Korea Policy

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[1] ADB, 'Competition Law Toolkit' (Countries with Competition Law Systems, ADB 2007) <http://www2.adb.org/Documents/Others/OGCToolkits/CompetitionLaw/complaw030000.asp> accessed 3 January 2012.

[2] ICN, 'About' <http://www.internationalcompetitionnetwork.org/> accessed 11 December 2012.

[3] ICN, 'Member Directory' (ICN) <http://www.internationalcompetitionnetwork-.org/members/member-directory.aspx> accessed 3 January 2012.

[4] OIC, 'About OIC' <http://www.oic-oci.org/page_detail.asp?p_id=52> accessed 11 December 2012

[5] Rekabet Kurumu, 'Istanbul Conference on Needs Assessment of the OIC Member States in the Field of Competition Law and Policy' (Rekabet Kurumu 2011) <http://www.rekabet.-gov.tr/index.php?Sayfa=sayfahtml&Id=1759&Lang=EN> accessed 3 January 2012.

Centre (KPC)[6] is undertaking efforts[7] to shore up discussion on competition matters in Asia. Since the enactment of the Competition Act in 1889 in Canada, among the first[8] national competition laws in any modern state, the world has come a long way in globalising economic and legal principles that affect how businesses compete with each other and how states or supranational bodies, intervene in markets to ensure free and effective competition. Competition law has truly become global. The world has, over the last few decades, rapidly moved away from using 'ineffective'[9] traditional diplomatic methods and towards adoption of the more 'flexible'[10] soft law framework – 'acts of international actors having a prescriptive content and non-binding effect'[11] – to reconstruct international economic governance regime in place since the end of the second world war.

While the globalisation of competition law is a more recent phenomenon, traditional diplomatic efforts to create an international competition framework are much older.[12] As far back as 1947, there were calls to introduce international rules regarding competition on the International Trade Organisation forum through the Havana Charter.[13] The organisation was never formed and the General Agreement on Tariffs and Trade made no mention of competition rules.[14] Efforts to internationalise competition rules through United Nations Economic and Social Council in the 1950s and through the voluntary UN General Assembly's Set of Multilaterally Agreed Equitable Principles and Rules for Control of Restrictive Business Practices in 1980 met similar fate.[15] There was a short lived hope with the Working Group on the Interaction between Trade and Competition Policy, along with

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[6] KPC, 'History and Function' <http://www.oecdkorea.org/centre/sc_history_eng.asp> accessed 11 December 2012.

[7] 'OECD-Korea Policy Centre – Competition Programme – Events in 2011', (KPC 2011) <http://www.oecd.org/document/14/0,3746,en_40382599_40393092_46799566_1_1_1_1,00.html> accessed 3 January 2012.

[8] The Canadian Competition Act 1889 is chronologically among the very first national competition legislation to be enacted in any modern day jurisdiction and ahead of the more famous U.S. Sherman Act 1890.

[9] Fiammetta Borgia, 'New Governance Mechanisms in International Economic Law: The Role of Soft Law' (2010) Society of International Economic Law Paper 2010/31, 3 <http://ssrn.com/abstract=1633984> accessed 5 January 2012.

[10] ibid.

[11] ibid.

[12] Einer Elhauge and Damien Geradin, *Global Competition Law and Economics* (2nd edn, Hart Publishing 2011) 1239-42.

[13] ibid.

[14] ibid.

[15] ibid.

the adoption of the Doha Ministerial Declaration in 2001.[16] In 2004, however, the Doha Work Program Decision stopped all efforts in this regard.[17]

The involvement of international and regional organisations greatly changed the situation. The most prominent organisations in this regard have been the World Bank (WB) and the International Monetary Fund (IMF), the Organisation of Economic Conference and Development (OECD), and the United Nations Commission of Trade and Development (UNCTAD).[18] The IMF and the WB have been instrumental since, in many instances, they make adoption or improvement of competition laws as one of the conditions states must agree to before getting access to their fiscal resources.[19] The OECD is primarily active in providing technical capacity building assistance to states which have recently adopted competition legislations, or have plans to adopt it in the near future, China being one major example.[20] Finally, the UNCTAD considers itself to be an informal platform where discussions about competition policy can take place. It recommends domestic competition legislation, has published a model competition law and provides technical assistance.[21]

II. The Impact of Globalisation on Competition Law in Pakistan

1. Early Anti-monopoly Law

Pakistan enacted its first competition law in the 1970s with the promulgation of the Monopolies and Restrictive Trade Practices (Control and Prevention) Ordinance, 1970 (MRTPO 1970).[22] The concentration of economic power in the hands of few family based business groups[23] back

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[16] ibid.
[17] ibid.
[18] Mark Williams, *Competition Policy and Law in China, Hong Kong and Taiwan* (Cambridge University Press 2005) 76.
[19] ibid 84-85. See also Borgia (n 9) 7-9.
[20] Williams (n 18) 80-84.
[21] Williams (n 18) 77-80.
[22] Monopolies and Restrictive Trade Practices (Control and Prevention) Ordinance, 1970 (PAK) (Published in the Gazette of Pakistan, Extraordinary on 26 February 1970) <http://www.globalcompetitionforum.org/regions/asia/pakistan/ATT01665.pdf> accessed 21 December 2011.
[23] Joseph Wilson, 'At the Crossroads: Making Competition Law Effective in Pakistan' (2006) 26 Northwestern Journal of International Law & Business 565, 568-69 <http://www.cc.gov.pk/images/Interview/wilson_jilb.pdf> accessed 22 December 2011.

then, led the country to adopt legislation that aimed to prevent 'undue concentration of economic power, growth of unreasonable monopoly power and unreasonably restrictive trade practices'.[24] The bare reading of the provisions, leads to the conclusion that the MRTPO 1970 was designed mainly to break up single or familial[25] ownership of businesses in the country by introducing ceilings on private ownership[26]and limits on mergers and acquisitions.[27] To oversee implementation, the Monopoly Control Authority (MCA)[28] was formed.

Despite being ambitious, the MRTPO 1970 proved far from efficacious due to several legal, economic and political considerations. Almost immediately after its promulgation, the government nationalised all major industries, which then, due to the exemption[29] given to state owned enterprises, did not attract the application of the MRTPO 1970 until the privatisation process started in the nineties.[30] The MCA lost its independent existence, and the MRTPO 1970 was pushed further on the backburner in 1981, when it was made part of Pakistan's Corporate Law Authority.[31] While the MRTPO 1970 still existed on paper, it lost its significance compared to the primary task undertaken by the Corporate Law Authority, ie registering companies and regulating corporate affairs. By the time the MCA regained its independence in 1994, the desire to attract private and foreign investment, made the notion of applying competition law less desirable for the government.[32] In wake of the changing economic realities, the MCA found itself to be rather toothless: it had no power to make pre-merger notification mandatory, or go after state owned enterprises, or to do anything more than slap a violator on the wrist.[33]

2. Towards a Globalised National Competition Law

With the liberalisation and privatisation regime of the nineties, Pakistan started the process to reform its competition law. Although there were calls

[24] MRTPO 1970 Preamble; Wilson (n 23) 568-69.
[25] MRTPO 1970, s 2(2).
[26] MRTPO 1970, s 4.
[27] MRTPO 1970, s 5.
[28] MRTPO 1970, s 8.
[29] MRTPO 1970, ss 25 (a) and (b).
[30] Wilson (n 23) 583-84.
[31] ibid.
[32] ibid.
[33] ibid 584 and 565.

to overhaul the competition regime as early as 1993,[34] the government only really became serious when the soft law framework of various international organisations came into play in the last decade. To restructure Pakistan's largely nationalised economy, the government turned to the IMF and WB for financial and technical support. Since 1995 Pakistan has accessed IMF resources[35] though three Standby Credit Facilities (1995-1997,[36] 2000-2001,[37] 2008-2011[38]), one three-year combined Enhanced Structural Adjustment Facility/Extended Fund Facility (1997-2000),[39] and one three year Poverty Reduction and Growth Facility (2001-2004).[40] As part of the understanding to obtain these facilities, Pakistan prepared three national strategies in the last decade titled Poverty Reduction Strategy Papers (PRSP): the Interim PRSP[41] in 2001 (I-PRSP), the PRSP-I[42] in 2003 and PRSP-II[43] in 2009. These papers were prepared with the active involvement

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[34] ibid 589.

[35] Borgia (n 9) 7.

[36] IMF, 'IMF Approves Standby Credit for Pakistan' (Press Release 95/66, 13 December 1995) < http://www.imf.org/external/np/sec/pr/1995/pr9566.htm> accessed 4 January 2012; IMF, 'IMF Approves Extension and Augmentation of Standby Credit to Pakistan' (Press Release 96/63, 17 December 1996) <http://www.imf.org/external/np/sec-/pr/1996/pr9663.htm> accessed 4 January 2012

[37] IMF, 'IMF Approves US$596 Million Standby Credit for Pakistan' (Press Release 00/64, 29 November 2000) < http://www.imf.org/external/np/sec/pr/2000/pr0064.htm> accessed 4 January 2012.

[38] IMF, 'IMF Executive Board Approves US$7.6 Billion Standby Arrangement for Pakistan' (Press Release 08/303, 24 November 2008) <http://www.imf.org/external/-np/sec/pr/2008/pr08303.htm> accessed 4 January 2012; IMF, 'IMF Completes Second Review under Standby Arrangement for Pakistan and Increased Financial Support to US$ 11.3 Billion (Press Release 09/281, 7 August 2009) <http://www.imf.org/-external/np/sec/pr/2009/pr09281.htm> accessed 4 January 2012; IMF, 'IMF Approves Nine Month Extension of Standby Arrangement for Pakistan' (Press Release 10/515, 27 December 2010) < http://www.imf.org/external-/np/sec/pr/2010/pr10515.htm> accessed 4 January 2012.

[39] IMF, 'IMF Approves Combined ESAF/EFF Financing for Pakistan' (Press Release 97/48, 20 October 1997) < http://www.imf.org/external/np/sec/pr/1997/pr9748.htm> accessed 4 January 2012.

[40] IMF, 'IMF Executive Board Approves US$1.3 Billion PRGF Credit to Pakistan' (Press Release 01/51, 7 December 2001) < http://www.imf.org/external/np/sec/pr/2001/pr-0151.htm> accessed 4 January 2012.

[41] Government of Pakistan, 'Interim Poverty Reduction and Strategy Paper' (IMF 2001) <http://www.imf.org/external/np/prsp/2001/pak/01/113001.pdf> accessed 23 December 2011.

[42] Government of Pakistan, 'Poverty Reduction and Strategy Paper' (Country Report 04/24, IMF 2004) <http://www.imf.org/external/pubs/ft/scr/2004/cr0424.pdf> accessed 23 December 2011.

[43] Government of Pakistan, 'Poverty Reduction and Strategy Paper – II' (Country Report 10/183, IMF 2010) < http://www.imf.org/external/pubs/ft/scr/2010/cr10183.pdf> accessed 23 December 2011.

of numerous international organisations.[44] While considering regulatory reforms in PRSP-I, the government announced plans to restructure the MCA and adopt a new competition law.[45]

While the MCA had advocated reform using German and OECD models in 1993 and 2001, respectively, it was the first time the government paid serious attention to this issue. Pakistan's desire to reform its economic structures in order to obtain IMF and WB funding, and the latter's involvement provided the much needed push to promote this issue on the government's agenda. Several other factors provide support to the view that international organisations played an almost pivotal role in the reform process. In 2005, the government requested the technical assistance of the WB to develop the new competition law and policy framework.[46] The WB in turn engaged a Brussels-based law firm, to draft a proposed law.[47] The firm, arguably naturally, developed a law modelled after the EU, a 'framework with which it was most familiar'.[48] The law was tailored by the executive branch of the government which by-passed the country's legislature[49] and promulgated it as the Competition Ordinance, 2007 (CO 2007).[50]

The CO 2007 greatly retained the overarching EU legal characteristics and language. Section 3 and Section 4, two of the four substantive provisions[51] relating to abuse of dominance and prohibited agreements, bore striking resemblance to Article 101 and 103 of the Treaty on the Functioning of the European Union,[52] which is evident on bare reading. In 2009, the government reported the progress in reforming the competition law to the

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[44] Government of Pakistan, 'PRSP' (n 42) Cover and 7.
[45] ibid 41.
[46] Joseph Wilson, 'Crossing the Crossroads: Making Competition Law Effective in Pakistan' (2011) 8(2) Loyola University Chicago International Law Review 105, 106.
[47] ibid 111.
[48] ibid.
[49] Under Pakistan's 1973 Constitution, laws, called Acts, are to be passed the Parliament. The executive branch may pass temporary legislation by issuing Ordinances through the office of the President. See also Wilson, 'Crossing the Crossroads' (n 46) 106-09.
[50] Competition Ordinance, 2007 (PAK) (Ordinance LII of 2007, Published in the Gazette of Pakistan, Extraordinary, Part 1 on 2 October 2007) <http://www.na.gov.pk/uploads-/documents-/1302737461_746.pdf> accessed on 24 December 2011.
[51] CO 2007, ss 3,4,10 and 11.
[52] Consolidated Version of the Treaty on the Functioning of the European Union (TFEU) [2010] OJ C 83/47.

international organisation in PRSP-II[53] while seeking a new funding facility. As a rough indicator of the importance the government was giving to this issue, the term 'competition' appears no less than thirty times[54] in PRSP-II in relation to various sectors of the economy.

3. Pakistan's New Competition Regime

With the promulgation of CO 2007, the MRTPO 1970 was repealed and the MCA was dissolved.[55] The government notified the establishment of the Competition Commission of Pakistan (CCP) in place of the MCA.[56] CO 2007, in line with the global trends and best practices, focused on protecting competition and increasing consumer welfare,[57] and outlawed four categories of anti-competitive behaviour: abuse of dominance, collusive agreements, deceptive marketing practices, and certain mergers & acquisitions.[58] The changed perspective on the rationale for competition law appeared clear, with the notion of curbing monopolies for wealth distribution converted into the idea of promoting competition for economic efficiency and growth.

Under CO 2007, the CCP was mandated and empowered to do three main functions to protect and promote competition. First, it was authorised to undertake law-enforcement actions by conduction investigations into possible violations of the substantive provisions[59]; to order remedial measures to restore competition where violations were found, and to impose substantial[60] penalties on the violators.[61] Second, it was mandated to conduct research into the competitiveness of various sectors of the economy.[62] Third, it was also empowered to increase awareness about competition to all stakeholders in the society, and to suggest policy and legislative reviews to the government.[63] To carry out these functions, the

[53] Government of Pakistan, 'PRSP-II' (n 43) 158-59.
[54] Government of Pakistan, 'PRSP-II' (n 43).
[55] CO 2007, ss 59(a) and 59 (b).
[56] Wilson, 'Crossing the Crossroads' (n 46) 107.
[57] ibid 109-11.
[58] CO 2007, ss 3,4,10 and 11.
[59] CO 2007, s 37.
[60] PKR 75 million or 10% of last annual turnover.
[61] CO 2007, ss 31 and 38.
[62] CO 2007, s 28 (1)(b).
[63] CO 2007, s 29.

CCP was given powers to collect information from various sources,[64] conduct inspections and impound evidence,[65] record testimony and documentary evidence,[66] request assistance from other private and public agencies,[67] give leniency,[68] and exercise broad powers for the recovery of penalties.[69] The decisions of the CCP were made appealable before the Supreme Court of Pakistan, the country's apex court, directly.[70] The new law, therefore, not only created a contemporary regime, very similar to the ones found in advanced legal jurisdictions, in accordance with global best practices, but also empowered it substantially to enforce the law.

III. Challenges for the New Competition Regime

Despite having introduced a modern competition law, Pakistan still faces numerous challenges, the primary one being to create acceptability for the regime. Some of the challenges arise from the fact that the law has been adopted as the result of globalisation rather than due to domestic political and economic demands. Contributing to the challenges are the big business interests in numerous economic sectors, some controlled by the state itself due to decades of nationalisation and continued mixed planned-market economic policies. Some of the major challenges – political acceptance, enforcement, financial autonomy, capacity building, and judicial review – are discussed below.

1. Political Acceptance

CO 2007 was essentially introduced without ever having received a proper legislative discourse in the country's Parliament. As mentioned earlier,[71] the contemporary competition law was promulgated as an Ordinance, a temporary legislative instrument, on 3 October 2007. Under Pakistan's 1973 Constitution, all Ordinances are to be approved by the Parliament failing which they lapse after 120 days. On 3 November 2007, General Pervaiz Musharraf, the President of Pakistan, who was also the Chief of the Army Staff and who had previously imposed martial law in the country in 1999,

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[64] CO 2007, ss 36, 47 and 48.
[65] CO 2007, ss 34 and 35.
[66] CO 2007, s 33(1).
[67] CO 2007, s 51.
[68] CO 2007, s 39.
[69] CO 2007, s 40.
[70] CO 2007, s 42.
[71] See *supra* note 49.

proclaimed an 'emergency' and issued a Provisional Constitutional Order (PCO). The PCO, *inter alia*, purportedly gave permanency to all legal instruments taken and issued by the President, including the CO 2007, which had not yet been presented before the Parliament.[72] While the sitting parliament passed a resolution endorsing the PCO,[73] it never passed an amendment to the Constitution to condone the President's actions and legal instruments.

Therefore, the newly established competition regime in Pakistan faced its first major test of acceptability when the permanent status of CO 2007 was withdrawn as a result of the nullification of the emergency and of the PCO by the Supreme Court of Pakistan.[74] The future of the law was in doldrums. At the same time, however, this uncertainty provided the opportunity to the political parties to debate this law for the first time. As the debate took place, the newly elected democratic government reintroduced the law as temporary legislation twice in form of Competition Ordinance 2009 and Competition Ordinance 2010 as stop-gag measures.[75] Despite anticipated opposition from big businesses interests,[76] the CCP was able to successfully defend the law at hearings before a Parliamentary committee which unanimously approved the draft law.[77] The law was eventually passed as the Competition Act 2010 (CA 2010).[78]

The passage of the CA 2010 marked a major sign of real domestic endorsement of the new competition paradigm by the political forces in Pakistan and ensured competition an important place in the country's economic policy. More importantly, the debate and discussion preceding the

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[72]Provisional Constitutional Order Number 1 of 2007 <http://www.dailytimes-.com.pk/default.asp?page=2007%5C11%5C04%5Cstory_4-11-2007_pg7_27> accessed 11 November 2012.

[73] Staff Report, 'National Assembly Approves emergency, PCO' *Daily Times* (Islamabad, 8 November 2007) < http://www.dailytimes.com.pk/default.asp?page=2007%5C11%5-C08%5Cstory_8-11-2007-_pg7_3> accessed 12 November 2012.

[74] *Sindh High Court Bar Association v Federation of Pakistan* (PLD 2009 SC 879).

[75] Wilson, 'Crossing the Crossroad' (n 46) 108-09.

[76] Afshan Subohi, 'Throwing Spanner in the Works' *Dawn* (Islamabad, 15 March 2010) <http://archives.dawn.com/archives/25125> accessed 30 December 2011.

[77] Sajid Chaudhry, 'Further Improvements: Senate Body Approves Competition Bill 2010' *The News* (Islamabad, 6 May 2010) < http://www.dailytimes.com.pk-/default.asp?page=2010/05/06/story_6-5-2010_pg5_12> accessed 30 December 2011; Wilson, 'Crossing the Crossroad' (n 46) 108-09.

[78] Competition Act, 2010 (PAK) (Act XIX of 2010, Published in the Gazette of Pakistan, Extraordinary on 13 October 2010) <http://www.cc.gov.pk/images/Downloads-/competitionn_act_2010.pdf> accessed 4 January 2012.

passage of CA 2010 meant that legislators understood the rationale for having a contemporary competition law. CA 2010, incorporating some changes over the CO 2007, introduced a Competition Appellate Tribunal (CAT) to hear appeals against CCP's decisions,[79] increased the maximum penalty for undertakings with ascertained turnovers,[80] decreased the maximum penalty for undertakings with unascertained turnovers,[81] and took away CCP's authority to deposit fines in its funds.[82] Except for these changes, CA 2010 remains substantially identical to CO 2007.

2. Enforcement

One of the most important challenges that can be faced by any new competition agency is that of consistent and sustainable enforcement. Since its inception, the CCP has done a significant amount of work covering all mandated areas. As of the end of October 2012, it has, *inter alia*, compiled thirty five enquiry reports,[83] issued fifty nine orders,[84] drafted thirteen policy notes and opinions[85], undertaken two hundred and forty seven merger reviews,[86] held five conferences,[87] conducted eight sector studies,[88] written two 'state of competition' reports,[89] and has even authored a voluntary compliance code for the private sector.[90] For an institution barely five years into existence, the numbers are fairly significant.

Soon after its formation, the CCP targeted price and production fixing cartels operating through the trade associations which had, despite being the proverbial low-hanging fruits, plagued Pakistan's economy. These cartels

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[79] CA 2010, s 43.
[80] CA 2010, s 38(2)(a).
[81] CA 2010, s 38(2)(a).
[82] Done by removing the word 'penalties' from s 20(2)(b) of CA 2010.
[83] CCP, 'Enquiry Reports' <http://www.cc.gov.pk/index.php?option=com_content&view=-article&id=36&Itemid=90> accessed 4 January 2012.
[84] CCP, 'Orders' <http://www.cc.gov.pk/index.php?option=com_content&view=article&i-d=168&Itemid=41> accessed 4 January 2012.
[85] CCP, 'Policy Notes & Opinions' <http://www.cc.gov.pk/index.php?option=com_con-tent&view=article&id=21&Itemid=42> accessed 4 January 2012.
[86] CCP, 'Mergers & Acquisitions' <http://www.cc.gov.pk/index.php?option=com_con-tent&view=article&id=76&Itemid=137> accessed 4 January 2012.
[87] CCP, 'Conference/Seminar' <http://www.cc.gov.pk/index.php?option=com_content-&view=article&id=25&Itemid=49> accessed 4 January 2012.
[88] CCP, 'Research & Publication' <http://www.cc.gov.pk/index.php?option=com_cont-ent&view=article&id=92&Itemid=138> accessed 4 January 2012.
[89] ibid.
[90] ibid.

had done little to hide their collusive practices. In the past five years, the CCP has identified collusion in many sectors of the economy namely banking,[91] accountancy,[92] securities,[93] cement,[94] dredging,[95] poultry,[96] jute bags,[97] sugar,[98] shipping,[99] oil and gas,[100] edible oil,[101] electric power equipment,[102] and even the print media.[103] At the same time, the institution has not been shy of taking on more complex abuse of dominance cases. In fact, CCP maintains a near parity between enforcement actions against abuse of dominance and collusion. Till the end of October 2012, CCP has

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[91] *In re*: Pakistan Bank Association and Others (10 June 2010) <http://www.cc.-gov.pk/images/Downloads/Final%20PBA%20Order%2010.06.09.pdf> accessed 4 January 2012.

[92] *In re*: Institute of Chartered Accountants of Pakistan (11 March 2009) <http://www.cc.-gov.pk/images/Downloads/ICAP%20Final%20Order%20(11-3-09).pdf> accessed 4 January 2012.

[93] *In re*: Karachi Stock Exchange, Lahore Stock Exchange & Islamabad Stock Exchange (26 November 2009) <http://www.cc.gov.pk/images/Downloads/kse_floor_pricing-_order.pdf> accessed 4 January 2012.

[94] *In re*: All Pakistan Cement Manufacturers (27 July 2009) <http://www.cc.gov.pk-/images/Downloads/Cement%20(final%20order)%2027-08-2009.pdf> accessed 4 January 2012.

[95] *In re*: Dredging Companies (23 July 2010) <http://www.cc.gov.pk/-images/Downloads/dredging_finalised_order_23_07_10.pdf> accessed 4 July 2012.

[96] *In re*: Pakistan Poultry Association (16 August 2010) <http://www.cc.gov.pk/-images/Downloads/ppa_order_16_august_2010.pdf> accessed 4 January 2010.

[97] *In re*: Pakistan Jute Mills Association (3 February 2011) <http://www.cc.gov.pk/images-/Downloads/pjma_order_3%20feb_2011.pdf> accessed 4 January 2012.

[98] Shaista Bano Gilani and Syed Umair Javed, 'Collusive Practices in the Sugar Industry' (CCP, 21 October 2009) <http://www.cc.gov.pk/images/Downloads/enquiry_report_o-ctober_2009.pdf> accessed 4 January 2012.

[99] *In re*: Pakistan Ships' Agents Association (22 June 2011) <http://www.cc.gov-.pk/images/Downloads/psaa_order_22_june_2011.pdf> accessed 4 January 2011.

[100] *In re*: LPG Association of Pakistan & JJVL (14 December 2009) <http://www.cc.gov.pk/-images/Downloads/lpg_final_order_proof_15_december_2009.pdf> accessed 4 January 2012.

[101] *In re*: Pakistan Vanaspati Manufacturing Association (30 June 2011) <http://www.cc.gov.pk-/images/Downloads/pvma_30_june.pdf> accessed 4 January 2012.

[102] Nadia Nabi, Syed Umair Javed and Mohammad Fahad, 'Cartelisation Between Electric Power Equipment Manufacturers' (CCP, September 2011) <http://www.cc.gov.pk-/images/Downloads/pel_et_al_enquiry_report_20_sept_2011.pdf> accessed 4 January 2012.

[103] *In re*: All Pakistan Akhbar Faroosh Association and Others (23 April 2009) <http://www.cc.gov.pk/images/Downloads/APNS%20Final%20Order.pdf> accessed 4 January 2012.

issued orders in over a dozen instances where it has found tying,[104] price discrimination,[105] or refusal to deal.[106]

CCP has recently announced its intent to include anti-competitive practices in public procurement and concessions in its enforcement priorities.[107] Given the massive contribution of these sectors in Pakistan's economy – public procurement alone amounting to an equivalent of around 25 percent of the national GDP at one estimate[108] - the choice appears to be rational. It is estimated that curbing malpractices, which includes collusive bidding and tendering, in public procurement alone would save around eight billion dollars a year.[109] In 2011 alone, the two most significant cartels found, in the jute bags manufacturing[110] and electric power equipment manufacturing[111] sectors, seemed focused on collusive bidding. Previously, collusive bidding was found in the sugar[112] as well as the dredging sector.[113]

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[104] *In re*: Bahria University (24 July 2008) < http://www.cc.gov.pk/images/Downloads-/order/Bahria%20University.pdf> accessed 4 January 2012; *In re*: Tetra Pak Pakistan (13 August 2010) <http://www.cc.gov.pk/images/Downloads/tetra_pak_final_order.pdf> accessed 4 January 2012; *In re*: Cinepax (28 March 2011) <http://www.cc.gov.pk/images/Downloads-/cinepax_order_mar_31_2011_1.pdf> accessed 4 January 2012.

[105] *In re*: Pakistan International Airlines (20 November 2009) <http://www.cc.-gov.pk/images/Downloads/PIA%20Hajj%20Fare%20Final%20Order%20%2020%20November%202009.pdf> accessed 4 January 2012; *In re*: Pakistan International Airlines (20 December 2009) <http://www.cc.gov.pk/images/Downloads/PIA%20ReschedulingCancellation%20Order%20[8%20Dec%202009].pdf> accessed 4 January 2012; *In re*: Pakistan Vanaspati Manufacturing Association (30 June 2011) <http://www.cc.gov-.pk/images/Downloads/pvma_30_june.pdf> accessed 4 January 2012.

[106] *In re*: Siza Foods (24 April 2009) < http://www.cc.gov.pk/images/-Downloads/Final%20Order-Siza%20Foods.pdf> accessed 4 January 2012; *In re*: Karachi Stock Exchange (29 May 2009) < http://www.cc.gov.pk/images/Downloads/Latest%20KSE-Order%2029-5-09.pdf> accessed 4 January 2012; *In re*: Pakistan Steel Mills (22 March 2010) <http://www.cc.gov.pk/images/Downloads/PSM-Final-Order-March%2022-10.pdf> accessed 4 January 2012; *In re*: Engro Vopak Terminal (29 June 2011) < http://www.cc.gov.pk/images/Downloads/section_3_order.pdf> accessed 4 January 2012.

[107] Pakistan Today, 'CCP Probes Government's Concessionary Deals' *Pakistan Today* (Islamabad, 8 July 2011) <http://www.pakistantoday.com.pk/2011/07/ccp-probes-government%E2%80%99s-concessionary-deals/> accessed 5 January 2012; Mehtab Haider, 'CCP to share Information with Investigation Agencies' *The News* (Islamabad, 3 December 2011) <http://www.thenews.com.pk/TodaysPrintDetail.aspx?ID=80544&-Cat=3> accessed 5 January 2012

[108] Ansar Abbasi, 'Pakistan can save $8 Billion: MD PPRA' *The News* (Islamabad, 22 June 2010) <http://e.thenews.com.pk/tp_details.asp?id=29596> accessed 11 November 2012.

[109] Haider (n 107).

[110] See n 97.

[111] See n 102.

[112] See n 98.

The enforcement choice therefore seems not only warranted but greatly natural as well.

To knit a broader strategy, the CCP is in the process to develop a partnership with the national regulator concerned with public procurement issues.[114] In the concessions sector, the CCP has just recently directed a major concession holder in container terminal operations to review its trade practices with its customers.[115] The years ahead will no doubt be crucial in how successful the CCP is in mainstreaming enforcement in the priority areas defined.

3. Financial Autonomy

In the past two decades, Pakistan has seen a rapid growth of autonomous sector regulators. This process started off in 1996 with the establishment of the Pakistan Telecommunication Authority[116] to regulate the telecommunication industry in wake of liberalisation in the sector. In 1997, the Securities and Exchange Commission of Pakistan[117] was formed to regulate the corporate and securities market sectors. The same year the National Electric Power Regulatory Authority[118] was formed to regulate the power sector. The Pakistani Electronic Media Regulatory Authority[119] came into being in 2002. The same year, the Oil and Gas Regulatory Authority[120] was established to provide oversight in middle and downstream markets in petroleum sector.

The idea behind establishing these authorities was to take regulation of liberalised sectors away from the bureaucracy and place it in the hands of

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[113] See n 95.
[114] Haider (n 107).
[115] *In re*: Engro Vopak Terminal (29 June 2011) <http://www.cc.gov-.pk/images/Downloads/section_3_order.pdf> accessed 5 January 2012.
[116] Pakistan Telecommunications Authority, 'History' <http://www.pta.gov.pk/index.-php?option=com_content&view=article&id=358&Itemid=320> accessed 11 December 2012.
[117] Securities and Exchange Commission of Pakistan, 'About SECP – The Establishment of the Commission' <http://www.secp.gov.pk/about_secp.asp> accessed 11 December 2012.
[118] National Electric Power Regulatory Authority, 'National Electric Power Regulatory Authority' <http://www.nepra.org.pk/nepra.htm> accessed 11 December 2012.
[119] Pakistan Electronic Media Regulatory Authority, 'PEMRA'S Mandate' <http://www.-pemra.gov.pk/pemra/index.php?option=com_content&view=article&id=1&Itemid=2> accessed 11 December 2012.
[120] Oil and Gas Regulatory Authority, 'Introduction' <http://www.ogra.org.pk/cats_-disp.php?cat=8> accessed 11 December 2012.

specialised statutory organisations. The formation of these special statutory organisations conveyed an important message of impartiality to the business concerns: regulation would be transparent, professional and apolitical. To ensure impartiality, these authorities were given operational, administrative and financial autonomy. The authorities were allowed to recruit their own staff, take regulatory decisions and, most importantly, generate their own funds by levying fees and penalties on those it regulated. The non-reliance on tax-payer money was important for many reasons. Not only did it ensure an operating environment free of political intervention, it allowed these organisations to offer special salary scales to lure better skill sets from the private sector.

CCP was given similar autonomy by CO 2007. Given that it would enforce competition laws across various regulated sectors and would not have any revenue generating activities per se, the CCP was mandated to receive a percentage of the revenue generated by the sector regulators.[121] In addition, it was allowed to take grants from the government[122] and, with the latter's permission, from donors,[123] and retain penalties recovered from violators.[124] This scheme did not work out as intended. Perhaps unforeseeable at the time of promulgation and despite assurances from the government, no regulatory authority has agreed to give the CCP a share in its revenue.[125] The CA 2010 took away the CCP's ability to receive penalties imposed.[126] In theory, this was a bona fide move, one that removed a structural bias in levy of penalties. As a practical consequence, however, the CCP has been made completely dependent on allocations made by the government, putting at risk its operational and administrative autonomy.

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[121] CO 2007, s 20(2)(f).
[122] CO 2007, s 20(2)(a).
[123] CO 2007, s 20(2)(c).
[124] CO 2007, s 20(2)(b).
[125] The News, 'Row over CCP Fee remains Unsolved' *The News* (Islamabad, 23 April 2011) <http://www.thenews.com.pk/TodaysPrintDetail.aspx?ID=5494&Cat=13> accessed 5 January 2012; Sohail Sarfraz, 'Prime Minister assures CCP secured Funding' *Business Recorder* (Islamabad, 3 December 2011) <http://www.brecorder.com/market-data/stocks-a-bonds/single/636/0/1257327/> accessed 5 January 2012; Business Recorder, 'Three Percent Fee: SECP not in league with CCP' *Business Recorder* (Islamabad, 30 December 2011) <http://www.brecorder.com/market-data/stocks-a-bonds/single/636/202:pakistan/1266154:three-percent-fee-secp-not-in-league-with-ccp/?date=2011-12-30> accessed 5 January 2012.
[126] See *supra* note 82.

Whether as a result of insufficient law making or turf issues of sector regulators, the CCP today faces the additional challenge of not being perceived as an extension of the government. If the CCP is perceived as such, its reputation as an impartial law enforcer and adjudicator will be damaged, which in turn would increase hesitance among private sector businesses to approach the institution. With no visible cracks appearing in the resolve of the sector regulators, the CCP must be extra vigilant to ward off any notion that the government is able to influence its operational decisions, especially those regarding public sector commercial bodies, through financial leverage. At the same time it must ensure compliance from the regulators; thorough proactive advocacy; and prompt legal recourse through the judicial system.

4. Capacity Building

As a nascent law enforcing institution implementing a new law, the CCP's need for well-trained professionals cannot be over emphasised. Realising this importance, the CCP has exposed the rank and file of its employees to trainings, seminars and conferences related to their respective fields. It used capacity building funds made available by the WB[127] to train its employees in competition law and economics, competition law enforcement tools, competition advocacy, and even computer forensics. Collaborations for these trainings were made around with various competition agencies, such as the Turkish Competition Authority, leading academic institutes like Kings College London, and policy institutes, like the KPC. These exercises constituted an important short-medium term strategy by the CCP to increase the ability of employees to undertake their assignments. Moreover, a recent amendment to CCP's Service Regulations means that employees who have worked with CCP for three consecutive years can be allowed a one year paid study leave to undertake higher studies in competition related fields.[128] This policy is expected to greatly increase the capacity of CCP employees in the years to come.

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[127] Ihtashamul Haque, 'WB's Concern over Delay in Formal Working of CCP' *Dawn* (Islamabad, 16 January 2008) <http://archives.dawn.com/2008/01/16/ebr2.htm> accessed 5 January 2012.

[128] Service Regulations, ch 10 reg 10 as amended by CCP decision dated 22 July 2012 <http://www.cc.gov.pk/images/Downloads/amendment_in_the_service_regulations.pdf> accessed 5 January 2012.

However, the CCP cannot rely solely on on-job trainings or study leaves to increase capacity in the long run. If the competition regime is to really take root, the CCP must ensure that lawyers, economists, policy makers, regulators, accountants, and business managers are trained in competition matters within the country. Currently, there is no university in Pakistan which offers any competition related course in its undergraduate or post graduate programs. This is a major challenge for the competition regime as the lack of academic training, research and debate in competition matters will severely hamper long term sustainability of the competition framework.

Suggestions have already been made to include competition law as an LL.B course in law schools.[129] The CCP must play a proactive role in this regard and develop links with the academic community in the country. It needs to encourage not only law schools but also business and economic schools and faculties to offer competition law and economics as part of their syllabus. This can be done by providing academic institutions with technical assistance in developing such courses and by providing visiting faculty from CCP's employees. In addition to providing the CCP with potential future employees, this initiative would also help in developing a broader academic, legal and political awareness about competition law and policy in the country.

5. Judicial Review

Of all the challenges confronting this new regime, nothing is as serious as acceptance of this law, and its underpinning principles, in the appellate courts of this country. The CCP functions as a quasi-judicial body with the power to issue remedial orders and impose penalties. According to Section 43 of CA 2010, these orders and penalties are appealable before the CAT, whereas the decisions of the CAT are appealable before the Supreme Court of Pakistan, as per Section 44 of CA 2010. In addition, writ petitions against CA 2010 are also possible before various High Courts[130] as part of the constitutional rights[131] afforded to people.

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[129] Wilson, 'Crossing the Crossroads' (n 46) 120-21.

[130] There are currently five High Courts in Pakistan: the Islamabad High Court, the Lahore High Court, the Peshawar High Court, the Sindh High Court and the Balochistan High Court.

[131] Under Pakistan's 1973 Constitution, High Courts can entertain petitions against the government functionaries under art 199.

While the CCP has produced a large number of decisions, the various appellate forums have been slow in hearing appeals filed against the former. The CAT is currently non-functional since the government has not fully constituted it yet.[132] In any event, of the almost 170 cases[133] of varying nature before the High Courts and Supreme Court of Pakistan, only one has been decided, and that too relating to a procedural matter.[134] Nonetheless, the orders of the CCP can have no bearing on the economy unless they are given finality at the highest judicial level. Only then can the CCP actually enforce its decision, recover penalties and maintain an effective deterrent.

The challenge before the courts is not just of expediency. It is as much about substance.[135] Due to the lack of any domestic jurisprudence or precedents on competition law, CCP is developing jurisprudence by learning from the legal and economic principles in place in various jurisdictions around the globe. The perusal of CCP's enquiry reports and orders clearly reveals that reliance is regularly made on principles and precedents set up by US and EU competition agencies and courts. In one of its first decision, the CCP used principles derived from EU and US case law, such as *US v Trenton Potteries*[136] and *Volkswagen v CEC*[137] to determine the object and effect of anti-competitive agreements and hold the Pakistan Bank's Association guilty of cartelisation. Similarly, a recent CCP enquiry in the telecom sector adopted the EU's margin squeeze tests, enunciated in *Deutsche Telekom v*

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[132] Shahbaz Rana, 'White Elephants live on: Govt Interference ruined State Owned Enterprises' *The Express Tribune* (Islamabad, 2 December 2011) < http://tribune.com.pk/story/300990/white-elephants-live-on-govt-interference-ruined-state-owned-enterprises/> accessed 5 January 2012. See also Wilson, 'Crossing the Crossroads' (n 46) 123-24.

[133] The Nation, 'Over 170 Cases of CCP Pending in Various Courts' *The Nation* (Islamabad, 3 November 2011) <http://www.nation.com.pk/pakistan-news-newspaper-daily-englishonline-/Business/03-Nov-2011/Over-170-cases-of-CCP-pending-in-various-courts> accessed 5 January 2012.

[134] *In re*: Merger Clearance-FFC (23 November 2011) <http://www.cc.gov.pk/images-/Downloads/ffc_order_23_11_11_final.pdf> accessed 5 January 2012.

[135] Wilson, 'Crossing the Crossroads' (n 46) 124.

[136] *United States v Trenton Potteries* 273 US 392 (1927).

[137] Case T-62/98 *Wolkswagen AG v Commission of the European Communities* [2000] ECR II-2702

EC[138] and *Wanadoo Espana v Telephonica*,[139] to find a price squeeze in the DSL broadband market in Pakistan.[140]

An argument almost always made by respondents before the CCP, and subsequently in appeals and writ petitions, is that foreign principles are transplanted into domestic law. Given that no original contemporary competition law jurisprudence existed in the country prior to CO 2007, this argument may not be as persuasive as it appears. However, with no decision emanating from the appeals process, it largely remains to be seen whether the appellate courts of Pakistan agree with the broader framework of interpretation adopted by the CCP or not.

The situation is not helped by the fact that the judiciary in Pakistan is generally not very receptive to suggestions of on-the-job knowledge building. This concern would normally be offset by the adversarial system – judges learn as arguments are made before them. However, with these courts swamped with cases and a huge backlog – 138,945 at one count in 2009 – [141] the question arises whether judges will have the time to appreciate the very delicate nuances of competition law and economics without having being exposed to them beforehand. As a welcome first, a serving judge of the Supreme Court of Pakistan and the Chairperson of the CAT attended the 'Competition Workshop for Judges in the Asian Region' organised by the KPC in November 2011.[142] However, if this initiative is not followed by other judges, enough momentum to institutionalise the process may not happen.

While the CCP can only play a limited role in encouraging the judiciary to consider knowledge building exercises such as the one mentioned in the preceding paragraph, it can certainly offer training courses and hold seminars for lawyers by approaching the various bar councils. Since judges

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[138] Case C-280/08 P. *Deutsche Telekom AG v European Union* [2010] ECR I-09555.

[139] *Wanadoo España v Telefónic* (Case COMP/38.784) Commission Decision of 4 July 2007.

[140] Shaista Bano and Mehreen Ibrahim Khan, 'PTCL Broadband DSL' (CCP, June 2012) <http://cc.gov.pk/images/Downloads/enquiry_reports/ptcl_dsl_enquiry_report_11_june_2012.pdf> accessed 11 November 2012.

[141] Law and Justice Commission of Pakistan, 'National Judicial Policy 2009' (LJCP 2009) <http://www.supremecourt.gov.pk/web/user_files/File/NJP2009.pdf> accessed 5 January 2012.

[142] OECD-KPC, 'Annual Report 2011', 10 <http://www.oecd.org/daf/competition/7.%-202011%20Annual%20Performance%20Report.pdf> accessed 10 November 2012.

are selected from within the lawyers in Pakistan, this approach may yield long term benefits for the competition regime. For early disposal of pending cases, the CCP should actively request the High Courts and the Supreme Court of Pakistan to establish a dedicated bench for hearing competition law cases.

IV. Conclusion

The contemporary competition regime in Pakistan, brought about by the globalisation of national competition regimes and the application of the international soft law framework, has started to take some root due to political acceptance and a good enforcement strategy. However, it is still too early to comment on the long term sustainability and efficacy of the law. This essay has identified some challenges which will continue to confront the regime in the years to come and provides some recommendations to address them. In the long run, the ability to attract professionals well versed in competition theory, and a judicial discourse based on sound economic rationale will be as important, if not more, as consistent enforcement of the law itself.

United Kingdom – Decision ME/4638/10 of the Office of Fair Trading

The OFT's Approach to Attributing Merging Parties' Private Labels to Retailers for its Competitive Assessment: An Economic Comment Based on Bargaining Theory

SERGEY KHODJAMIRIAN*

I. Introduction

The *Symington/Cockburn* merger decision[1] sets out the conditions under which the Office of Fair Trading (OFT) is prepared to allocate private label (PL) sales of the merging parties to their retailer customers for the purposes of the competitive assessment. This case note comments on these conditions from the perspective of an economic framework based on bargaining theory. Thus, we will first provide some background on PLs. Second, we will summarise the *Symington/Cockburn* decision, focusing on the conditions that the OFT deemed relevant to justify allocating PLs to retailers. Third, we will present a relevant economic framework based on bargaining theory. Finally, we will comment on the conditions set out in *Symington/Cockburn* from the perspective of that economic framework. In summary, we find that the OFT's reasons for allocating PLs to retailers for the competitive assessment in *Symington/Cockburn* were mostly in line with bargaining theory.

II. Background on PLs

A PL, which is also known as an 'own brand', 'store brand' or 'retailer brand', is a product sold exclusively at a particular retailer. A PL normally carries the retailer's name or a brand name that is owned by the retailer. PLs are usually manufactured

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[1] *ME/4638/10 – Symington/Cockburn*.

by an upstream producer on behalf of the retailer who is in control of virtually all aspects of the product, from product design and quality to marketing and pricing. This is in contrast with branded products, which are introduced by the manufacturer, carry the manufacturer's brand and are sold across many different retailers. PLs are now estimated to account for 25% of total supermarket sales globally, with certain countries, such as the United Kingdom (UK), experiencing a penetration of almost 50 %.[2]

PLs are either produced by specialised independent small and medium-sized enterprises (SMEs) or large manufacturers of branded products. For example, Coca Cola produces ASDA's PL cola in the UK.[3] However, the latter arrangement of a producer producing both branded and PL products is less common.[4] Indeed, such a PL-branded 'dual production' may at first seem like a counterproductive strategy. This is because, by supplying PLs to retailers, branded manufacturers are in essence supplying products that may directly compete with and threaten the sales of their own branded products which normally earn them a higher margin than PLs. However, the economic literature suggests a number of plausible explanations for this behaviour, including wanting to utilise spare capacity for economies of scale, to improve bargaining position vis-à-vis the retailer, or simply to earn revenues on a product that would be supplied anyway.

There have been a number of cases involving mergers between such 'dual producers'. In some of these cases, the merging parties argued that their PL sales should be attributed to the retailers for the purposes of the competitive analysis.[5] One such case is the OFT's *Symington/Cockburn* merger, which is the focus of this case note.

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[2] Claire Chambolle, Clémence Christin, and Guy Meunier, 'Who produces private labels?' (2012) preliminary draft <http://crem.univ-rennes1.fr/Documents/Docs_sem_eco_appliquee/ 2012-2013/12-10-11_Christin.pdf> accessed 20 October 2012.

[3] Fabian Bergès-Sennou, 'Store loyalty, bargaining power and the private label production issue' (2006) 33 European Review of Agricultural Economics 315.

[4] Fabian Bergès-Sennou and Zohra Bouamra-Mechemache, 'Is producing a private label counterproductive for a branded manufacturer?' (2012) 39 European Review of Agricultural Economics 213.

[5] For example, *IV/M.623 – Kimberly-Clark/Scott*, *ME/4960/11 – Princes/Premier*, *COMP/M.4344 – Lactalis / Nestle / JV (II)*, and *COMP/M.6321 – Buitenfood / Ad van Geloven Holding / JV*.

III. Summary of the Symington / Cockburn Merger

1. The Parties and the Transaction

Symington Family Estates (Symington) is a wine company and port house in Portugal. Symington operates several vineyards and wineries. It owns the port brands Dow's, Graham's and Warre's, and produces and supplies PL port to multiple retailers in the UK. *Cockburn's* was a port brand owned by *Beam Global Spirits & Wine Inc.* (Beam). Beam did not own any vineyards or wineries and purchased all of its port from Symington through a long-term supply agreement. Beam did not supply PL port. On 6 October 2010, Symington agreed to acquire the Cockburn's brand and associated goodwill.[6]

2. The Merger Decision

The parties overlapped in the supply of port in the UK. The OFT determined that the merged entity would control over 25% of the supply of port in the UK and therefore, it would result in the creation of a relevant merger situation. After having reviewed the merger on 7 December 2011, the OFT decided not to refer the merger to the UK Competition Commission (CC) under section 22(1) of the Enterprise Act 2002, thus clearing the merger.

3. Product Market Definition

Regarding the product market definition, the parties made two submissions: 1) that port is distinct from wine; and 2) that no distinction should be drawn between (a) different types of port; (b) the retail channel where the port is sold (i.e. on- or off-trade); and (c) branded, PL, and high/low brand port.[7]

Based on the evidence the OFT agreed with all of the above points, except 2b, where it held that the on- and off-trade channels should be treated separately. Given this market definition, the OFT found that the parties' combined share of port branded, PL and high/low brand in the UK retail channel would be around 39% in volume terms and 52% in value terms.[8]

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[6] The long-term supply agreement was consequently internalised and ceased.

[7] High-low brands are a hybrid between branded and private label port. They carry the brand of the manufacturer, but are created specifically for a particular retailer. For example, 'Cockburn's Acclaimed' is a high-low brand supplied by Cockburn's exclusively to Morrison's.

[8] *ME/4638/10*, para 49.

4. The OFT's Approach to PL Attribution

Under the assumption that the relevant product market included branded, PL and high/low brand port, the parties submitted that for the purposes of the competitive assessment, the sales of PL and high/low brand port should be attributed to the retailers and not to the producer of the PLs, *i.e.* Symington. In particular, the parties submitted the following arguments in support of their assertion:[9] first, that for the purposes of allocating market shares the question is not whose name is on the product but 'which company controls the sales in seeking to exercise market power', and, in this case, it is the retailers who control the PL and high/low brand port. Second, the relevant test is 'whether retailers would be able to seek alternative suppliers for post-merger'[10] and in this case the retailer could readily switch supplier given significant spare capacity. Finally, the PL and high/low brands are created specifically for a given retailer such that if the retailer de-lists the PL or high/low brand then the product disappears. Therefore and in light of the above assertions, the parties submitted that allocating PLs and high/low brands to retailers would reduce the parties' combined share to 34%.[11]

The OFT agreed with the parties' contention that PLs are 'correctly attributable to its customer [the retailer]' and set out the following additional reasons:[12] first, that contracts for supply of PL port 'rarely exist'; second, that all promotional activity is done by the retailer; third, that the retailer generates business and sets terms of trade; and forth, that if the retailer were to reduce the output of the particular PL, the producer would not be able to sell the same volume elsewhere. However, on a cautious basis, the OFT did not accept that high/low brands should be attributed to the retailers, because, among other reasons, 'there is a greater tendency towards longer- term (one- to two-year) supply arrangements'.[13]

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[9] ibid, para 50.
[10] The parties cited the European Commission in *Kimberley-Clark/Scott*, which stated that the 'essential question' for attribution is whether retailers would have sufficient scope for switching their PL needs to alternative suppliers post-merger (*IV/M.623*, para 123).
[11] *ME/4638/10*, footnote 26. It is not clear from the decision whether this figure is in volume or in value terms.
[12] ibid, para 51.
[13] ibid, paras 52-56.

IV. Economic Framework Based on Bargaining Theory

In assessing demand-side substitution in *Symington/Cockburn*, the OFT found it more appropriate to focus on substitution at the *upstream level* where the merging parties were active, as opposed to the *downstream level*.[14]

At the upstream level, competition takes place with respect to shelf space and prices are negotiated bilaterally between the producer and the retailer. The relevant economic framework for assessing pricing constraints at the upstream level is the one based on bargaining theory, which takes into account the outside options of both the retailer and the producer. The simplest bargaining model describes bilateral negotiations between one manufacturer and one retailer.[15] The manufacturer's outside option is to sell its product elsewhere. The manufacturer will not agree to a price that results in a lower margin than it can obtain from its outside option. Thus, the manufacturer's outside option determines its lower-bound price. On the other hand, the retailer's outside option is to purchase an alternative product to sell downstream. The retailer will not agree to a price that results in a lower margin than this alternative product. Thus, the retailer's outside option determines the upper-bound price. Provided that the manufacturer's lower-bound price is lower than the retailer's upper-bound price, there is space within which they can negotiate and achieve a price that they will both be willing to accept.

Therefore, the resulting price will fall between the manufacturer's lower-bound price and the retailer's upper-bound price. Where exactly will depend on two things: (a) the relative outside options and (b) the relative negotiating power of the retailer and the manufacturer. [16] The retailer's outside option depends on the extent to which consumers view the alternative product as a substitute for the manufacturer's product. If consumers view the two products as close substitutes, then, the retailer's outside option is more valuable. This is because wholesale demand is 'derived demand', which means that retailers only demand products that are in turn demanded by consumers. Regarding the retailer's outside option, this also depends on the ease with which it can switch to alternative products. If there is

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[14] ibid, footnote 18. The upstream level is where producers sell products to their customers (the retailers), whereas the downstream level is where retailers sell to end-consumers.

[15] This is described in Roman Inderst and Greg Shaffer, 'Buyer Power in Merger Control' in Wayne D. Collins (ed), *Antitrust Section Handbook, Issues in Competition Law and Policy* (ABA 2008).

[16] Economic theory does not explain the source of this negotiating power well, although it has been suggested that it depends on 'patience' (i.e. the cost of continuing negotiations) and the balance of information that negotiating parties have about one another (in particular, information about the other side's outside option). See Inderst and Shaffer (n 15).

sufficient spare capacity of the alternative product, then the retailer will find it easier to switch and its outside option would thus be strengthened.[17]

With this in mind, it is worth noting that the manufacturer's outside option is related to how 'economically dependent' the manufacturer is on the retailer for selling its product. If the retailer is large or acts as a 'gatekeeper' to important segments of the downstream market, then the manufacturer's outside option is reduced, because it will find it difficult to sell its volumes elsewhere. If the manufacturer can only achieve limited volumes and or margins in alternative channels, then its outside option would be weakened. Moreover, an additional factor that is relevant to outside options is the length of any existing contract between the manufacturer and the retailer.[18] If the retailer and the manufacturer are locked into a long-term agreement, then both parties' outside options are reduced.

V. Applying the Bargaining Framework to the OFT's PL Allocation

In *Symington/Cockburn*, for the purposes of the competitive assessment, the OFT treated PL sales as sales by the retailers rather than sales by the merging parties in order to better reflect the balance of power in the upstream market. In the bargaining framework, the balance of power would be captured by the relative outside options of the merged entity and the retailer. Thus, within this framework, the OFT would be justified to reflect the merged entity's reduced market power (*i.e.*, allocate PLs to retailers) if the outside option of the merged entity was weaker than the outside option of the retailers. The OFT finally allocated PLs to retailers on the following basis: first, alternative suppliers and sufficient spare PL capacity would exist post-merger such that retailers can readily switch. Second, contracts 'rarely exist' and/or are shorter than one to two years. Third, the retailer does all the promotional activity and generates business for the PL, and if it were to reduce output of or de-list the PL, the PL would 'disappear' and the producer 'would not be able to sell the same volume elsewhere'.

In what follows, we will comment on the extent to which the above three conditions are consistent with the merged entity having a weaker outside option relative to the retailers. As a preliminary point, however, we can recall that the strength of the retailer's outside option depends on the extent to which consumers view the 'alternative product' – that is the product the retailer would threaten to

[17] Paul Dobson and Roman Inderst, 'The Waterbed Effect: Where buying and selling power come together' (American Antitrust Institute 8th Annual Conference, Washington, DC, 1 January 2007) <http://hosted.law.wisc.edu/lawreview/issues/2008-2/dobson_inderst_-_final.pdf> accessed 19 December 2012.

[18] Roman Inderst and Nicola Mazzarotto, 'Buyer power in distribution' in Wayne D. Collins (ed), *Antitrust Section Handbook, Issues in Competition Law and Policy* (ABA 2008).

switch to – as a substitute for the manufacturer's product. If consumers view the two as close substitutes, then the retailer's outside option is strengthened. In this case, the 'alternative product' would most likely be PL port produced by an alternative supplier.[19] As explained above, the retailer is in control of all aspects of a PL including product taste, quality, design, pricing and so on. Thus, in switching to an alternative PL supplier, all aspects of the PL product would remain the same with the only difference being the producer of the PL. Thus, we would expect consumers to view the new PL port as virtually indistinguishable from the PL port that was produced by the merging parties. Therefore, the retailer's outside option should be strengthened. We now turn to the OFT's three conditions.

1. The OFT's First Condition: Sufficient Alternative PL Suppliers and Spare Capacity

The OFT held that PLs should be allocated to retailers, because of the existence of sufficient alternative PL suppliers and of spare capacity allowing retailers to readily switch their PL requirements.[20] According to the bargaining framework, spare capacity on the market strengthens the retailer's outside option relative to the merged entity. Thus, in this respect, the OFT is justified to use sufficient spare capacity as a relevant condition for allocating PLs to retailers. However, we should add here that, although *existing* spare capacity is important, *potential* post-merger capacity may also be relevant, whether via new entry or expansion. This is particularly the case for PLs, because an entrant into PL supply would not need to invest in a brand. Indeed, post-merger entry in PL was an important factor for the CC's *Kerry/Headland* clearance.[21]

2. The OFT's Second Condition: Contracts 'Rarely Exist' and/or Are Short-term

The OFT held that the parties' PLs should be allocated to retailers, because contracts for PLs 'rarely exist'. The OFT also considered that high/low brands

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[19] In principle, the retailer has other outside options, such as purchasing more branded port, high/low brands, wine, spirits, or some other FMCG.

[20] This is consistent with the precedent. See *Kimberly-Clark/Scott* (n 5), para 123; Case *COMP/M.2779 – Imperial Tobacco Group plc/Reemtsma Cigarettenfabriken GmbH*, para 30; and *Case 7313/318 - NPM Capital - Lion Capital - Buitenfood - Ad van Geloven*, paras 109, 114.

[21] This merger involved the UK's two largest producers of PL frozen ready meals. Pre-merger imports were small and customers were not familiar with overseas suppliers, but post-merger price rises had 'created the incentive for customers actively to research their import options and for potential importers actively to make themselves known to UK customers'. *UK Competition Commission – Kerry Foods Ltd / Headland Foods Ltd merger inquiry*, para 7.41 <http://www.competition-commission.org.uk/our-work/directory-of-all-inquiries/kerry-foods-headland-foods> accessed 19 December 2012.

should not be allocated to retailers, because contracts for high/low brands exist and tend to last one to two years. Thus, the OFT appears to consider that, if contracts do not exist or tend to be short, then it is justified to shift PLs from the merged entity for the purposes of the competitive assessment. However, according to the bargaining framework, short-term contracts improve the outside option of *both* the retailer and the manufacturer, because under short-term contracts both players would be free to switch to their alternatives. Thus, in this respect, the OFT should be careful when using the length or existence of contracts as conditions for allocating PLs to retailers.

3. The OFT's Third Condition: Retailers Promote and Generate Business for the PL, and Can Terminate the Parties' PL Volumes

The OFT agreed with the parties that their PLs should be allocated to the retailers, because the retailers promote and generate business for the PL product, and if the retailer were to reduce output of or de-list the PL, the PL would 'disappear' and the producer 'would not be able to sell the same volume elsewhere'. It could be argued that these conditions are consistent with the merging parties being 'economically dependent' on the retailers. According to the bargaining framework, the manufacturer's outside option is reduced when it is 'economically dependent' on the retailer to sell its volumes. Thus, in this respect, the OFT was right to use the above conditions to justify allocating PLs to retailers.

VI. Conclusion

In conclusion, we find that the OFT's conditions for allocating PLs to retailers for the competitive assessment in *Symington/Cockburn* were mostly in line with bargaining theory, because the conditions were consistent with the retailer's outside options being stronger than the merged entity's outside options.

Malta - Application Number 1/2011

The Honourable Joe Mizzi v Enemalta Corporation and Water Services Corporation, 21 March 2012, Competition and Consumer Appeals Tribunal
The Role of the Office for Competition

ANNALIES AZZOPARDI*

On 21 March 2012 the Competition and Consumer Appeals Tribunal (Tribunal) handed down a decree in the ongoing litigation in the names *Mizzi v Enemalta Corporation and Water Services Corporation.* For the first time since the enactment of the Competition Act[1] parties involved in litigation in front of the Tribunal raised a question regarding the role of the Office for Competition (OFC), the national competition authority, in proceedings in front of the said Tribunal, and the extent of its participation in such proceedings. The Tribunal in this partial judgment held that the OFC should always be the legitimate defendant in review proceedings in front of it, and should therefore be made a defendant in cases in front of the Tribunal both where the OFC has taken a decision subject to review and where it issues report subject to a decision. However the active participation of the OFC is not unlimited, and is subject to the restrictions described in the decree. In reaching its decision, the Tribunal also considered the role and functions of the OFC more generally.

I. Legal Background

Act VI of 2011, by amending the Competition Act and enacting the Malta Competition and Consumer Affairs Act,[2] modified the Maltese competition law regime, overhauling procedural competition rules in Malta. One of the by-products of this overhaul was the establishment of the Tribunal; an administrative court

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[1] Laws of Malta 2011, ch 379 (Competition Act).

[2] ibid ch 510 (MCCAA).

which has jurisdiction[3] over all the matters assigned to it in terms of the MCCAA Act, the Competition Act and Consumer Affairs Act.[4] Prior to the creation of the Tribunal, the Commission for Fair Trading (CFT), established by Act XXXI of 1994, had jurisdiction to review infringement decisions, non-infringement decisions, cease and desist orders and compliance orders issued by the OFC.[5] Article 70(3) of the MCCAA Act vests the Tribunal with the powers of the CFT, meaning that cases commenced in front of the CFT, like the case being presently analysed, are now determined by the Tribunal.

The amendments to the Competition Act necessitated a transitory provision. Article 70 of the MCCAA Act provides that cases which have already commenced under the old regime continue to be regulated by the law prior to the amendments. The Tribunal commences its decree by referring to this provision and noting that since these proceedings were commenced prior to the entry into force of Act VI of 2011, the provisions of the Competition Act as they stood prior to the enactment of the said Act were applicable. Therefore any reference made to the Competition Act in the decree refers to the Competition Act prior to the amendments which came into force in 2011.

II.The Facts

The facts of this case, in brief, are as follows. Joe Mizzi lodged a complaint with the OFC regarding increases in utility tariffs by Enemalta Corporation, the electrical power provider in Malta, and the Water Services Corporation, the water service provider in Malta. From court records it appears that the complainant is, *inter alia,* claiming that his right to a fair hearing was breached since allegedly the OFC never contacted him regarding the merits of his complaint after it was lodged.[6]

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[3] ibid, article 31.

[4] Laws of Malta (n 1), ch 378 (Consumer Affairs Act).

[5] Competition Act (n 1) (prior to amendment), articles 13A, 14. Prior to amendment, the Competition Act provided for review of such decisions, and not appeal therefrom. On the issues raised by the use of such a term, see Complaint No. 1/2009 *Hompesch Service Station Ltd v Enemalta Corporation et,* 29 March 2010 (Commission for Fair Trading); see also Complaint No 2/2003 *Carmel Mifsud vs Malta Transport Authority,* 5 July 2004; *Federated Mills,* 28 April 2008; Complaint No 1/2004 *Bargain Holidays Ltd et v Malta Tourism Authority,* 17 October 2006; *Medical Laboratory Services Ltd et,* 9 October 2006; Complaint No 5.2006 *Cassar Fuels Ltd v Enemalta Corporation,* 20 April 2007; Complaint No. 2/2007 *S&D Yachts v Government of Malta et,* 6 October 2008 (all Commission for Fair Trading).

[6] *Vide* Court records (*verbal*) of the sitting on 24 April 2012.

This decision, however, focuses solely on the role of the OFC in review proceedings in front of the Tribunal. It therefore does not go into the substantive merits of the case and makes no reference to the particular facts of the case.

III.Legal Bases

As it stood prior to 2011, the Competition Act assigned to the OFC the functions relating to investigation, determination and suppression of restrictive practices (article 3). The OFC could undertake investigations *ex officio* or upon the request of the relevant Minister, a complainant, a designated national competition authority of another European Union (EU) Member Sate or the European Commission (article 12). In order to carry out investigations, the OFC was given wide powers and was also empowered with executive search powers. Once an investigation was completed, it also had the right to issue the sanctions allowed by law where the breach of the Competition Act involved was not, in terms of the said Act, a serious breach (articles 12A(1) and 13(1)). In cases involving a serious breach of the Competition Act or a breach of Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU), the OFC was only empowered to issue a report; the final decision was taken by the CFT (article 12A(2) and (3) and article 13(2)).

A party aggrieved from a decision of the OFC finding a (non-serious) infringement of the competition rules had the possibility to request a review of the decision. These review proceedings were commenced by a letter to the OFC, whereby the aggrieved party informed the OFC that it desired a review of the OFC's decision (article 13A), rather than an appeal, application or a letter sent directly to the Tribunal. The OFC was then obliged in terms of law to bring to the Tribunal's attention the opening of the review proceedings.

In its deliberations the Tribunal considered the First Schedule of the Competition Act which contained the Rules of Procedures applicable to the CFT. It focused particularly on Rule 8:

> Meetings of the [CFT] shall be held in camera provided that:
> (a) the Director [of the OFC] shall have a right to be present during all meetings;
> (b) the relevant undertaking and any complainant shall have a right to make submissions on any matter before the [CFT], as well as to present any documents or other evidence that may be relevant to the matter;
> (c) the European Commission in all cases involving the application of Article [101] and, or Article [102] of the [TFEU] shall have a right to make submissions on any matter before the [CFT], as well as to present any documents or other evidence that may be relevant to the matter.

IV.The Merits of the Decision

The Tribunal first notes that the function of the OFC is the objective and indiscriminate application of the competition rules in the public interest, whether with respect to an individual, association or undertaking. In addition, the OFC is an administrative authority with quasi-judicial powers and has the exclusive right to undertake and conclude investigations regarding competition matters. Such investigations are of a public nature in the sense that investigations must be carried out in the public interest and in certain instances in the EU's interest.

The Tribunal then considers Rule 8 of the First Schedule. It points out that it is significant that Rule 8 does not give the same rights to the complainant and the undertaking concerned as it does to the OFC. It specifies that had the legislator wanted to grant the complainant, the undertaking and the OFC the same rights, it would have done so explicitly. On the contrary, Rule 8 makes a clear distinction, granting the OFC only the right to be present during review proceedings. Therefore, the Appeals Tribunal needed to examine the effect to be given to the OFC's 'presence' in proceedings in front of it.

Proceedings by the OFC, whether commenced *ex officio* or after a complaint, are not adversarial. The OFC's role is to ensure fair competition and to safeguard the general interests of undertakings, associations and ultimately consumers. The OFC investigates and concludes investigations with the finding of a breach or no breach. In this role, the OFC is not a party to the cause since it does not have a personal interest or an interest in the name of a third party in the cause. The OFC is *supra partes*, acting in the interests of commerce and fair competition. Its role is to act as watchdog to ensure there is no abuse or infringement of the competition rules and to intervene if that is the case. Although its decisions are subject to review, the OFC is still bound to build every investigation on the rule of law and the principles of natural justice to ensure it has the necessary, adequate, creditable and certain information to arrive to its conclusions.

The Tribunal, however, then comments that although the OFC is not a party, every request for review is made in relation to what is decided by the OFC, and in this sense, the legitimate defendant of every request for review must be the OFC since every request must be made against the entity carrying out the investigation and taking a decision. Therefore the active participation of the OFC is required in front of the Tribunal so that if so required or requested, it can explain and clarify what led it to its conclusions or decision. In this manner, the OFC can concretely sustain its decision.

Although the OFC's role at the stage of review by the Tribunal or a decision by the Tribunal following an OFC report is not passive, and it defends what has been

concluded and clarifies and aids the Tribunal and the parties in the search for the truth, the OFC is *not* a party to proceedings in the ordinary sense. This means it cannot bring forward new evidence of its own accord, nor subpoena witnesses. Its role in front of the Appeals Tribunal is to act as watching of the Tribunal's proceedings to ensure that what it has concluded is construed in the sense concluded and, as the entity against whose decision a review is requested, to defend and clarify its position in the ambit of what has already been concluded. The Tribunal concludes that it is in this sense that the OFC needs to be present in review proceedings. It highlights that the OFC cannot be allowed to bring other evidence or substantiate its conclusions with ulterior evidence or documents which had not been examined during the OFC's proceedings. It would be inimical to the review if the OFC were not bound only to what it had gathered and led it to its decision or report. However, the Tribunal also notes that since every case is particular, there is no obstacle to the Tribunal itself, either *ex officio* or upon a specific demand, requesting or allowing the OFC to bring new evidence which the Tribunal deems necessary and required in the interests of justice for a just and equitable solution of the case. This, however, is a prerogative of the Tribunal and not a right of the OFC.

V.Commentary

Since the extent of the OFC's role in front of the Tribunal was raised in a case commenced in front of the CFT, the Tribunal limited its pronouncement to the role of the OFC in proceedings for review of decisions in terms of Articles 13A and 14 of the Competition Act prior to amendment. Section 5.1 below will comment on the decision on this basis. The extent to which this decision is applicable to cases commenced after the introduction of Act VI of 2011 will be examined in Section 5.2 below.

1. The Role of the OFC in Review Proceedings

This decision of the Tribunal is ground-breaking, if uncontroversial, in that it specifically lays down what the OFC's position in review proceedings is, as well as its position in proceedings following its report, avoiding any possible argument as to what the OFC is meant to do, or indeed allowed to do, during proceedings in front of the Tribunal. The decision also examines the primary role of the OFC, that is, the nature of its investigative and quasi-judicial functions.

The Tribunal examines the OFC's primary functions in order to determine the extent of its functions in review proceedings. The Tribunal's assessment of the OFC's main functions is noteworthy not because it is particularly revolutionary, but because it specifically delineates the OFC's responsibility to supervise the state of competition on the market, and by so doing, the Tribunal specifies what market-

players and consumers are to expect from the OFC. The OFC's ultimate focus should be safeguarding competition, and therefore by keeping the interests of commerce and fair competition in mind, ensure that no infringement of the competition rules occur and to act when it does. It is somewhat unfortunate that the Tribunal comments that the OFC's function is to safeguard the general interests of undertakings, associations and ultimately consumers, as this may imply that the competition rules are there to protect (inefficient) competitors; however when taken within the context of the whole judgment, it appears clear that rather than *competitors*, the Tribunal was highlighting the fact that the OFC is to safeguard the interests of *competition*.

The most important pronouncement made by the Tribunal however, is that the OFC is to be cited as defendant in all review proceedings. This ensures that the OFC is indeed present during sittings of the Tribunal, as required by Rule 8. Moreover, it ensures that the decision-making authority is part of proceedings in order to justify the position taken in its decisions. In the Tribunal's view however, the OFC is not a party to proceedings in the normal sense; its role is limited to explaining its position and to aid the Tribunal to arrive at the correct conclusion. Importantly, no new evidence is to be brought forward by the OFC. In essence therefore, the OFC's role in review proceedings, or in proceedings following a report, is limited to justifying its decision or conclusions and defending its position as specified in the contested decision/report.

2. Applicability of This Decision to Proceedings Commenced in Term of the New Competition Regime

By virtue of Act VI of 2011, parties involved in investigations carried out by the OFC may now appeal from decisions taken by the OFC, rather than request a review. The Tribunal is empowered to hear appeals from the undertakings and/or associations of undertakings concerned from infringement decisions, cease and desist orders and compliance orders, as well as administrative fines and any penalty payments imposed.[7] Complainants may also appeal to the Appeals Tribunal, either from decisions of the OFC rejecting the complaint or from decisions of the OFC finding that there was no infringement.[8]The procedure for filing an appeal has now changed; article 13A of the Act specifies that an appeal is filed by application before the Tribunal which is then notified to the Director General (Competition), who may file a reply.

[7] Competition Act (n 1), article13A(1).
[8] ibid, article 14(3).

Although the provisions on the functions of the OFC have changed,[9] and the OFC has been granted wider executive and quasi-judicial powers (including the power to take a decision even in cases of a serious breach of the competition rules or of the TFEU[10]) the OFC in essence is still the authority empowered to conduct investigations into breaches of the competition rules. Therefore, any comments made by the Tribunal as regards the primary role and function of the OFC still hold true and it can still be said that:

- the OFC's function is the objective and indiscrimination application of competition law in the public interest;
- investigations carried out by the OFC are of a public nature;
- the OFC's role is to ensure competition and to safeguard the interests of the market players and consumers;
- the OFC is not a party to the cause, but should act *supra partes* and act as a watchdog to ensure respect for competition law.

What remains to be determined then, is to what extent the OFC's role in appeal proceedings is similar to the OFC's role in review proceedings. The First Schedule of the Competition Act referred to by the Tribunal is now the Second Schedule of the MCCAA Act; what was Rule 8 has been amended and is now Rule 5. Rule 5 does not provide for the rights of any of the parties in competition proceedings; it simply provides that the Director General (Competition) and other officers duly authorised by the same have the right to be present in all proceedings. Articles 13A and 14 of the Competition Act, besides stating that the appeal application is to be notified to the Director General (Competition), do not specify whether other parties or entities are to be notified. Therefore it appears that with amendment, although the rights of the OFC have been consolidated, the rights of the undertakings/associations concerned and the complainant have been somewhat ignored.

This notwithstanding, the rule that the OFC is to be present at all proceedings in front of the Tribunal has been re-affirmed. As a result, the Tribunal's rule that the OFC has to be cited as legitimate defendant in proceedings in front of the Tribunal likely stands. What is not so clear is whether the OFC's role in review proceedings is limited to justifying the position taken in the decision/report, and in particular whether the OFC can bring forward new evidence.

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[9] Article 3 of the Competition Act is now supplemented with Article 14 of the MCCAA Act.

[10] See Competition Act (n 1), article 12A.

In terms of the Code of Organization and Civil Procedure[11], new documents and witnesses may be brought forward in appeal proceedings in certain specified circumstances. It may be argued that the OFC is now party to proceedings in a wider sense, in particular since it is *de jure* notified of appeals and has a right to reply, and that therefore the OFC has the right to bring forward new evidence in the circumstances delineated in the COCP. On the other hand, it can equally be argued that the OFC is *not* a party to appeal proceedings in the ordinary sense of the word, much as the OFC is not considered a full party in review proceedings. Specifically, since under the un-amended Competition Act the OFC was in practice still notified of review proceedings and was allowed to make submissions in response to the request for review the OFC now has in essence the same rights it had under the Competition Act prior to amendment. If this latter view is taken, the OFC will not be able to bring forward new evidence, and is limited to defending its position as specified in the decision being appealed. Although one may speculate, this question remains to be determined by the Tribunal, and no conclusive answer can be given until the question is raised by parties in appeal proceedings under the amended Competition Act.

[11] Laws of Malta (2011), ch 12 (COCP).

Book review

International Antitrust Litigation: Conflict of Laws and Coordination

By Jürgen Basedow, Stéphanie Francq and Laurence Idot (eds.)
Hart Publishing, Oxford 2012, pp. 460, ISBN: 9 78-1-84946-039-2

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'International Antitrust Litigation – Conflict of Laws and Coordination' is the eighth volume in the series 'Studies in Private International Law' by Hart Publishing. This volume is the result of a research project funded by the European Commission in the frame of the "Civil Justice Programme 2007-2013". It is edited by three of the leading private international law ("PIL") scholars in Europe, ie Jürgen Basedow, Stéphanie Francq and Laurence Idot and features contributions by several PIL experts from academia, private practice and policy-making from across Europe and the US.

Antitrust disputes in PIL have become an emerging topic in the European Union ("EU") following the decentralisation of competition law enforcement and the raise of private enforcement. These two developments have significantly altered the way competition rules are applied in the EU and thus, cross-border antitrust cases are continuously increasing. Furthermore, also outside Europe, antitrust disputes are becoming more and more international. An increasing number of both public and private actions involve companies located in different jurisdictions and multi-jurisdictional procedures with factual patterns and evidentiary material spread across various countries. Hence, the need for clear and workable rules to coordinate cross-border actions is greater than ever.

Apart from underlining the importance of the topic and the need for its further analysis, the introductory chapter by the three editors also sets out the aims of the research project and gives a brief overview of the content

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and structure of the book. The aims are threefold: the first aim is to identify and highlight problems related to the international dimension of antitrust litigation; the second aim is to test the adequacy of existing EU instruments regarding the needs of international antitrust litigation; and the final aim of the research project is to propose practical solutions.

The book consists of sixteen chapters (excluding the introductory one) which are divided into two parts. Part I of the book deals with conflict-of-law issues, while Part II looks at coordination issues. The chapters cover the relevant provisions of the Brussels I and Rome I and II Regulations, the cooperation mechanisms provided for by Regulation 1/2003 and selected issues of US procedural law. The contributions cover seven major subjects concerning international antitrust litigation: (i) allocation of jurisdiction; (ii) applicable law; (iii) obtaining evidence; (iv) recognition and enforcement of foreign decisions; (v) collective redress; (vi) coordination of proceedings and cooperation between authorities; and (vii) arbitration. Some contributions address several of these issues, which are interdependent, while others consider a single issue individually. Moreover, some of these issues are analysed with respect to both the EU and US experience. The use of comparative legal study is practical as some US solutions to PIL problems are deemed to be more advanced than the equivalent European ones.

In summary, this volume is currently one of the most extensive and most current books on international antitrust litigation. The book is well structured and the chapters are put together in a comprehensible manner. The contributions throughout the book successfully manage to point out problems in relation to selected issues of international antitrust litigation, examine the adequacy of current pieces of legislation, and convincingly suggest practical solutions. The collection of recommended interpretations and proposed amendments formulated by each author at the end of the book puts a finishing touch to this volume. Thus, this book can be highly recommended for academics, practitioners and policy-makers with an interest in competition law and/or private international law.

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*.

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