

The Interdisciplinary
Centre for Competition
Law and Policy (ICC)



**GLOBAL ANTITRUST
REVIEW**

ISSUE 10, 2017

ICC Global Antitrust Review

A PUBLICATION OF THE INTERDISCIPLINARY CENTRE FOR
COMPETITION LAW AND POLICY (ICC)

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ICC GLOBAL ANTITRUST REVIEW

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EDITORIAL BOARD'S MESSAGE		5
ARTICLES		
Private Enforcement of EU Competition Law: An Imperative with Differing Consequences	NANDINI PAHARI	7
'Value-Of-Transaction' Threshold in EU Merger Control: Filing an Enforcement Gap or Overcomplicating Already Complex Proceedings?	THOMAS SERVIÈRES	44
Online Marketplace Bans: Mapping the Landscape under the Light of the Commission's E-commerce Sector Inquiry	VYRON ANASTASIADIS	86
Remedies in Airline Mergers in The European Union	SZYMON MUREK	131
ESSAY		
Export Cartels and The Case for Global Welfare	MICHAEL RISTANIEMI	173
BOOK REVIEW		
European Union Law of State Aid	MARLENE WIMMER- NISTELBERGER	200

EDITORIAL BOARD'S MESSAGE

In line with the GAR's commitment to provide a forum for academic debate on matters of international competition law and policy, the 2017 volume consists of contributions discussing a diverse selection of prominent and controversial topics.

The articles in this volume cover several of the current 'big issues' in competition law. The first two articles scrutinize different areas of enforcement – private enforcement and enforcement-issues related to the threshold in EU merger control. The first article places particular emphasis on private and public enforcement in context of the Directive on Private Enforcement and analyses potential shortcomings and uncertainties of the Directive. The article on enforcement in EU merger control focusses on mergers in context of the digital economy. It examines the desirability of applying merger rules to this sector and investigates potential enforcement gaps arising from applying the current rules to specific types of concentrations.

The following article also deals with competition law in a digital environment and context. It deals with online marketplace bans and analyses and evaluates the debate surrounding their legal treatment in the light of the results of the European Commission's E-Commerce Sector Inquiry. Further, it comments on the Advocate General's opinion in Coty.

The last article concludes with the ever-relevant topic of airline mergers, the topic enjoying renewed popularity because of the acquisitions of parts of Air Berlin after its insolvency. The article offers a discussion of past mergers in the sector and then offers thoughts on sector-specific remedies and ways to improve the factors and processes relevant to the assessment of airline mergers.

This volume is complemented by an insightful essay questioning the role of export cartels and their treatment in the wider context of global welfare. It also considers ways to better address the frictions caused by export cartels. The 2017 volume of the GAR concludes with a book review of the 3rd edition of Kelyn Bacon's well-known publication on State Aid.

As always, we would like to especially thank Prof. Eyad Maher Dabbah, the director of the ICC, for his guidance and endless support in our efforts.

We hope you will enjoy this volume, and we already look forward to receiving excellent contributions from all interested young scholars for the next one.

The GAR Editorial Board
December 2017

PRIVATE ENFORCEMENT OF EU COMPETITION LAW: AN IMPERATIVE WITH DIFFERING CONSEQUENCES

S. Nandini Pahari*

*Since 2000, several major changes took place in the enforcement regime of EU's competition law, such as the adoption of Regulation 1/2003 and judgements like *Courage v Crehan*. Although the existing public enforcement framework successfully dealt with issues at macro-economic level, its limitations were felt while protecting micro-economic subjects that are affected by anticompetitive practices. These subjects are end consumers and indirect purchasers. Consequently, the new Directive on Private Enforcement in October 2014 was passed to tackle these lacunae. While the Directive awaits to be applied in all the Member States of the EU, uncertainty prevails over its implications upon the existing tools of public enforcement system. It increases the scope for unfavourable consequences regarding the future of indirect purchasers, settlement procedures and leniency programs. This requires balancing these adversities to facilitate private competition law enforcement in the EU.*

I. Introduction

Despite debates and differences in opinions, the framework of private enforcement in competition law has gained acceptance from the European Commission (Commission) through the new Damages Directive of 2014 (Directive).¹ As the Directive completed its execution in all the Member States of the European Union (EU) on the 27th December 2016, uncertainty still prevails over its implications and effects on the existing public enforcement system of the competition law.

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¹ Directive 2014/104/ EU of the European Parliament and of the Council of 26 November 2014 on Certain Rules Governing Actions for Damages Under National Law for Infringements of the Competition Law Provisions of the Member States and of the European Union [2014] OJ L349/1.

So far, the EU is considered to be one of the most sophisticated competition law regimes of the world.² This is largely due to the various schemes articulated by the Commission as part of the public enforcement domain like leniency and settlement procedures, apart from the strict ones in the form of prohibition decisions,³ which have been helpful in curbing anticompetitive practices for a reasonable period of time. The nature of such public enforcement has been administrative whereby punishment to wrongdoers taking part in anticompetitive practices is mainly in the form of fines and is administered by three major players namely the Commission, National Competition Authorities (NCAs) and National Courts (NCs). However, since 2000, a series of changes to the enforcement and application of EU competition law took place through a few developments like the Commission Notice on Cooperation with the National Courts in 1993,⁴ the European Court of Justice's (ECJ) decisions in the cases of *Courage v. Crehan*⁵ and *Manfredi v. Llyod Adriatico*⁶ and the introduction of the modernisation package through Regulation 1/2003. The Treaty on the Functioning of the European Union (TFEU) which was brought into effect through the Treaty of Lisbon in 2009 is another example that gives way to a more reformed and substantive approach in dealing with the anticompetitive practices in consonance to Regulation of 1/2003.

A major change came about with the realisation that although the public enforcement of competition law in the EU was successful in dealing with the issues at the macro-economic level, it was insufficient to protect micro-economic subjects, such as end consumers, indirect purchasers and direct competitors. Eventually, a prominent need was felt to protect these subjects, which led to the adoption of the new Damages Directive in October 2014.⁷ Even if the motive to give way to a private enforcement regime despite an existing public one was to enhance deterrence and effectiveness of the EU

² Maher M. Dabbah, *International and Comparative Competition Law* (Cambridge University Press 2010) 160.

³ Council Regulation (EC) 1/2003 on the Implementation of the Rules on Competition Laid Down in Articles 81 and 82 of the Treaty [2003] OJ L1/1 (Regulation 1/2003), art 9.

⁴ Commission Notice on Cooperation between National Courts and the Commission in applying Articles 85 and 86 of the EEC Treaty [1993] OJ C 39/6 (1993 Notice).

⁵ Case C-453/99 *Courage Ltd v Bernard Crehan* and *Bernard Crehan v Courage Ltd and others* [2001] ECR I-6297.

⁶ Joined Cases C-295/04 to 298/04 *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA et al* [2006] ECR I-6619.

⁷ Directive (n 1).

competition law, a lot of scope remains for conflict of interests between these two systems.

In consideration of all the discussions and concerns encircling the new Directive, this article takes a critical approach towards it and throws light on some of the areas that lack clarity. The literature will try to provide an original consolidated work to help its readers understand the possible obstacles that this new set of rules poses. It will elaborately talk about the less visited issues of the interplay between the private and the public enforcement systems and will try to provide suggestions to ensure the development of a harmonised competition law enforcement framework in the EU.

Therefore, this article discusses the status and the implications of the new Directive through certain specific issues. The first issue relates to the interplay of public and private enforcement regimes which is evident upon the execution of the Directive. To elaborate further, there seems to be a grey area while deciding the real objective of the Directive, i.e., whether it wants to use the private enforcement mechanism of competition law as a means of deterrence or compensation to consumers or as a complementary supportive system to the public enforcement framework.⁸

The other concern here is about the conflict of interest that might arise from the interplay of the private and public enforcement domains after the execution of the Directive. There is room for a lot of divergences as the public enforcement schemes like leniency and settlement programmes require non-disclosure of important documents.⁹ On the contrary the courts require disclosure of such documents while dealing with the claims of consumers.¹⁰ Although the Directive contains provisions to allow limited disclosure of these documents in the courts,¹¹ this may not be in consonance with the best interests of the claimants who will need all documents to establish a strong case in their favour. In case the Directive seeks to build a more deterrent competition law enforcement system, it may prefer to follow the footsteps of

⁸ Luís Silva Morais 'Integrating Public and Private Enforcement of Competition Law in Europe - Legal and Jurisdictional Issues' [2014] 2 Journal of the Faculty of Law of the Universidade São Judas Tadeu <<http://www.usjt.br/revistadireito/numero-2/04-luis-silva.pdf>> accessed 10 April 2017.

⁹ Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases [2006] OJ C 298/11, (2006 Notice) paras 33 and 40.

¹⁰ Case C-360/09 *Pfleiderer AG v Bundeskartellamt* [2011] ECR I-5161.

¹¹ Directive (n 1), art 6.

the decision in *Pfleiderer* case,¹² where there was disclosure of leniency documents in a follow-on suit of damages to establish a compelling case favouring the claimants. Such a practice can lessen the motivation for cartelists to help the Commission uncover their cartel activities.

This article will also deal with the condition of the indirect purchasers as dealt by the Directive. Here a critical analysis is made to show that the Directive does not address these prominent issues properly though this is necessary for an effective private enforcement mechanism. A brief explanation will also be given to portray the other essential provisions that are not dealt with by the Directive properly, like, those pertaining to binding collective actions mechanism for the benefit of the consumers.

The rest of the article is divided into five parts. The second part of the article gives more insight into the competition enforcement mechanism of EU and explains why the need for the Directive was felt. This section showcases the inadequacies of the prevailing public enforcement mechanism.

The third part of the article considers whether private enforcement will be ideally effective in strengthening the competition regime of the EU and discusses the deficiencies in the existing system. Here evaluation is done of all the previous efforts that contributed to the adoption of the new Directive like the *Green Paper* and the *White Paper*.

The fourth part of the article essentially focuses on the implications of the new Directive on the existing enforcement system of the Commission and the Member States in consonance to the issues raised in the second part. A critical analysis will be made of the new Directive regarding the uncertainties and the threats that it poses to leniency programmes. Other shortcomings of the Directive are also highlighted where no clarifications have been made on the issues of passing-on, quantification of damages and collective actions by consumers.

The fifth part of the article mainly deals with the recommendations of the author and contains suggestions to resolve the concerns raised by the new Directive as discussed earlier.

Finally, the sixth part of the article presents some concluding remarks, containing brief reflections on the discussions and the arguments that were

¹² *Pfleiderer* (n 10).

discussed throughout the article. These remarks will try to draw an inference as to whether the new Directive would ensure a brighter future for the competition law enforcement of the EU.

II. An insight into the competition law enforcement framework of the European Union

1. Origin and development of the EU competition law enforcement policy

The purpose of introducing competition law within the framework of the Treaty of Rome in 1957 was to support a unique political idea. The Treaty of Rome intended to establish not only a single market within which goods and services were able to move freely but also a closer union among the people of Europe.¹³ Such an objective somewhere constituted the foundations of a public enforcement framework for competition law in the EU. This required autonomous bodies to regulate the competition law regime in various Member States and in Europe as a whole, in order to make the EU competition law system effective and sound. Regulation 17/62 was enacted to give the initial structure to the enforcement of competition law regime in the EU which had a public nature.¹⁴

The term ‘public enforcement’ refers to enforcement of competition rules by the state authorities. They generally function in two stages: *firstly*, by detecting the infringement or the anticompetitive harm caused and *secondly* by intervening into such practices.¹⁵ This can be related to the kind of powers that the Commission enjoyed under Regulation 17/62.¹⁶

2. Changing phase of EU’s enforcement regime

After years of having a centralised enforcement system and no major developments in the competition law enforcement regime in the EU, finally from the mid-1980s the need for decentralisation of the whole system was

¹³ Dabbah (n 2) 161.

¹⁴ Council Regulation (EEC) 17/62 First Regulation Implementing Articles 85 and 86 of the Treaty, [1962] OJ P013 (Regulation 17/62).

¹⁵ Kai Hüschelrath and Sebastian Peyer, ‘*Public and Private Enforcement of Competition Law a Differentiated Approach*’ Economic & Social Research Council April 2013 CCP Working Paper 13-5.

¹⁶ Regulation 17/62, arts 9, 12, 14 and 15.

felt.¹⁷ The Commission adopted the Notices on cooperation between the Commission and the NCs as well as the NCAs in 1993 and 1996 respectively.¹⁸ Following the above Notices, on the 28th of April 1999, the Commission introduced its White Paper on Modernisation Reforms.¹⁹ The Modernisation Reforms or Package led to a rethinking of the policies under Regulation 17/62 and brought into effect Regulation 1/2003 in its place. It contained several notices and guidelines which replaced many existing norms and made significant changes to the enforcement of the EU competition law regime.²⁰

Regulation 1/2003 brought into effect the European Competition Network (ECN) which is a network of public authorities applying EU competition rules in close cooperation.²¹ Apart from this, the effective enforcement of the competition principles under Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) is also a result of the sound functioning of innovative schemes of the Commission like the leniency and the settlement programmes.

These programmes form an integral part of the public enforcement policy of competition law as they have been useful in uncovering and bringing the infringement of the competition rules to an end.²² The leniency programme was developed by the Commission's Notice on Immunity from fines and reduction of fines in cartel cases.²³ On the other hand, the settlement programme developed in 2008 through an amendment to the Commission's

¹⁷ Dabbah (n 2) 179.

¹⁸ 1993 Notice (n 4). Its counterpart was published in 1997 as Commission Notice on Cooperation between the Commission and the National Competition Authorities in Handling Cases Falling within the Scope of Article 85 and 86 EC [1997] OJ C 313/3. These Notices are no longer valid under the Modernisation Package of 2004, see note 20 below.

¹⁹ Commission White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC [1999] OJ C 132/1.

²⁰ The Modernisation Reforms Package 2004 was published alongside Regulation 1/2003. It introduced the following: Commission Notice on Cooperation within the Network of the Commission and the National Courts [2004] OJ C 101/54; Commission Guidelines on Effect on Trade between Member States [2004] OJ C 101/65; Commission Guidelines on the Application of Article 101(3) TFEU [2004] OJ C 101/97 (Modernisation Package 2004).

²¹ Regulation 1/2003, recital 15.

²² Xavier Grousot and Justin Pierce, 'Transparency and Liability in Leniency Programmes: A Question of Balancing?' in Maria Bergstrom, Marios Iacovides and Magnus Strand (eds), *Harmonising EU Competition Litigation: The New Directive and Beyond* (Swedish Studies in European Law, 8, Hart 2016).

²³ 2006 Notice (n 10).

Regulation 773/2004²⁴ and the introduction of a Notice on the conduct of settlement procedures.²⁵ Regulation 1/2003 along-with schemes like leniency and settlement programmes are the reasons for a strong public enforcement framework in the EU, which has made its competition law regime into one of the most influential ones in the world.²⁶

3. Has public enforcement of competition law been self-sufficient for the EU?

Before the enactment of Regulation 1/2003, the whole concept of private enforcement or the practice of entertaining private damages claims in competition matters was underdeveloped.²⁷ This was partially because public enforcement policy was thought to be superior and effective in deterring anticompetitive activities. The question that arises here is whether the public enforcement of competition law, which was based upon the theory of deterrence, has been self-sufficient and successful in achieving its objectives so far.²⁸

Imposition of administrative fines is so far considered as the main measure of deterrence by the EU's public enforcement policy depending upon the reasoning of the optimal deterrence model. According to the model, a risk-neutral undertaking would not engage in illegal cartel activities if the probable costs of being penalised, if caught by the authorities, exceed the profits that the cartel would earn out of these activities.²⁹ This has been incorporated under Article 23 of Regulation 1/2003 that permits the Commission to charge

²⁴ Commission Regulation (EC) No 773/2004 of 7 April 2003 on Relating to the Conduct of Proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty [2004] OJ L 123/18, as amended by Commission Regulation (EC) No 622/2008 of 30 June 2008 amending Regulation (EC) No 773/2004, as regards the conduct of Settlement Procedures in Cartel Cases [2008] OJ L 171/ 3.

²⁵ Commission Notice on the Conduct of Settlement Procedures in View of the Adoption of Decisions pursuant to Articles 7 and 23 of Council Regulation (EC) No 1/2003 in Cartel Cases [2008] OJ C 167/1–6.

²⁶ Flavio Laina, and Elina Laurinen, 'The EU Cartel Settlement Procedure: Current Status and Challenges' [2013] *Journal of European Competition Law & Practice* <http://ec.europa.eu/competition/cartels/legislation/cartels_settlements/settlement_procedure_en.pdf> accessed 10 April 2017.

²⁷ Christopher H. Bovis and Charles M. Clarke, 'Private Enforcement of EU Competition Law' [2015] 36/1, *Liverpool Law Review* <<http://link.springer.com/article/10.1007/s10991-015-9164-9>> accessed 10 April 2017.

²⁸ *ibid* 51.

²⁹ Emmanuel Combe and Constance Monnier, 'Fines against Hard Core Cartels in Europe: The Myth of Over-enforcement' [2011] 56/2 Summer, *The Antitrust Bulletin* 235, 245-46.

fining up to a maximum of ten per cent of the company's turnover of the preceding year. However, the concern that remains is whether the existing level of fines is effective in deterring the undertakings from engaging in anticompetitive practices.

In a study conducted by Combe and Monnier, it was found that imposition of fines had not reached an adequate deterrence level and was suboptimal.³⁰ The study also shows the persistence of recidivism or repeat offenders. This demonstrates that offenders who were subjected to fines as sanction were still not deterred from breaking the rules.³¹ Such alleged insufficiency of fines in the current public enforcement regime mandates the need for other alternative or additional measures. These measures could be imposition of criminal sanctions on the participating companies and individuals involved in the cartel activities or inclusion of private actions for damages.³²

There is more support in favour of inclusion of private actions for damages along with the current public enforcement system. This is because the public authorities or enforcers have limited resources through which they ensure that anticompetitive violations leading to harm in consumer welfare are caught and deterred.³³ In various circumstances the parties to an agreement or customers of a dominant undertaking are in a better place to reveal the infringements relating to the abuse of dominant position or breaches in vertical agreements than the Commission.³⁴ Therefore, engaging the consumers more in the enforcement mechanism through private enforcement seems to be a reasonable alternative.

Hence, overall it could be inferred that the public enforcement of competition law, although necessary, is not sufficient to deter the anticompetitive practices and ensure the welfare of the consumers absolutely. Therefore, the new

³⁰ *ibid* 245-46.

³¹ Christopher Harding, 'Cartel Deterrence: The Search for Evidence and Argument' [2011] Volume 56, *The Antitrust Bulletin* 345, 368-74.

³² Wouter P. J. Wils, 'Should Private Antitrust Enforcement be Encouraged in Europe?' [2003] 26/3, *World Competition* 473 at 481.

³³ Alison Jones, 'Private Enforcement of EU Competition Law: A Comparison with, and Lessons from, the US' in Maria Bergstrom, Marios Iacovides and Magnus Strand (eds), *Harmonising EU Competition Litigation: The New Directive and Beyond* (8, Hart 2016) 16.

³⁴ Vladimir Bastidas Venegas, 'The Damages Directive and Other Enforcement Measures in EU Competition Law' in Maria Bergstrom, Marios Iacovides and Magnus Strand (eds), *Harmonising EU Competition Litigation: The New Directive and Beyond* (8, Hart 2016) 87.

Directive is an imperative to the EU's competition law enforcement framework.

III. Private Enforcement in EU Competition Law: Development and Concerns

1. The need for the new Directive 2014

After the enactment of Regulation 1/2003, the NCs got the opportunity to entertain private claims for damages in competition cases,³⁵ but a problem remained. Unlike the decisions of the Commission, there was no binding effect of their decisions on the NCs and the NCAs of the other Member States.³⁶ The approach to private enforcement under such circumstances was very individualistic in nature, i.e., the NCAs used their own national enforcement procedures based on standards that varied from one Member State to the other.³⁷ The lack of a regulatory uniformity led to many deficiencies and ambiguities about the possibility of a consistent and concrete private enforcement system.

Although the competitors, consumers and indirect purchasers got the right to claim damages from the infringement of competition laws,³⁸ they faced other problems. Some of these difficulties were gathering substantial evidence, uncertainties in the outcomes of the cases filed, risks associated with the dismissal of the claims and excessive costs of litigation.³⁹

Another major setback of the present system pertains to the difficulty in establishing the *locus standi* of the claimants especially in 'stand-alone cases'.⁴⁰ Such cases refer to the situations where claimants need to gather substantial evidence, documentary or otherwise, known as 'court proof' to prove the loss that they have incurred through the infringement of the competition law alone against a company.⁴¹ Sometimes a case may deal with

³⁵ Regulation 1/2003, recital 7.

³⁶ *ibid* art 16.

³⁷ John S. Kortmann and Christopher R. A. Swaak, 'The EC White Paper on Antitrust Damages Actions: Why the Member States are (right to be) less than enthusiastic' [2009] 30 *European Competition Law Review* 340.

³⁸ *Courage* (n 6).

³⁹ Commission Staff Working Paper Annex to the Green Paper on Damages actions for breach of the EC antitrust rules *European Commission SEC* [2005] 1732, para 6.

⁴⁰ *Bovis* (n 27) 56.

⁴¹ *ibid*.

an issue that was not addressed previously by the Commission or an NCA, in which case a claimant bears a higher burden of proof alone to establish the infringement and the loss. These evidential requirements constrict stand-alone cases.⁴² An example here can also be taken from the case of *Enron Coal Services Ltd*⁴³ where the claimant failed to prove causation and quantum of loss due to evidential complications. Furthermore, in the absence of an effective system of collective or ‘representative’ actions,⁴⁴ the excessive costs and inconveniences associated with legal proceedings discourage private individuals to pursue their claims.

After considering all these problems the Commission adopted the Directive. It is important to note that after the execution of the Directive in all the Member States, it is expected to work as a strong reference point for building a uniform mechanism for private enforcement in EU competition law.⁴⁵

2. The new Directive 2014: an insight on its development

The success of the private enforcement system of antitrust infringement in the United States of America (USA) had stimulated the EU to adopt similar measures.⁴⁶ In 2001, through the judgement of *Courage*⁴⁷, the ECJ recalled that direct effects are produced by Articles 101(1) and 102 TFEU on individuals which create certain rights that must be safeguarded by the Courts.⁴⁸ Consequently in the latter case of *Manfredi*⁴⁹ in 2006, the ECJ was more precise in stating that victims of competition infringement cases could seek both the actual loss (*damnum emergens*) and the loss of profit (*lucrum cessans*) with interest.

⁴² *Chester City Council v Arriva* [2007] EWHC 1373 (Ch).

⁴³ *Enron Coal Services Limited (in liquidation) v English Welsh & Scottish Railway Ltd* [2009] CAT 36.

⁴⁴ A class action, class suit, or representative action is a type of lawsuit where one of the parties is a group of people who are represented collectively by a member of that group.

⁴⁵ Directive (n 1), recitals 6, 7 and 8.

⁴⁶ Ulf Bernitz, ‘Introduction to the Directive on Competition Damages Actions’ in Maria Bergstrom, Marios Iacovides and Magnus Strand (eds), *Harmonising EU Competition Litigation: The New Directive and Beyond* (Vol 8, Hart 2016) 5.

⁴⁷ *Courage* (n 5).

⁴⁸ Case 127/73 *Belgische Radio en televisie and societe belge des auteurs, compositeurs et editeurs v SV SABAM and NV Fonior* [1974] ECR 51, para 16.

⁴⁹ *Manfredi* (n 6).

The Commission in 2006 engaged a major law firm to conduct a study on its behalf to determine the conditions and limitations to claim damages in cases of infringement of EC competition laws in various Member States. This study commonly known as the ‘Ashurst Study’ revealed astonishing diversity and underdevelopment of laws concerning the domain of private enforcement in the Member States. The data showed that a very small percentage of victims got relief in these cases.⁵⁰ Only the states of United Kingdom, Germany and the Netherlands had a specific statutory basis for bringing such damages claims. The greatest obstacle for private enforcement in this case was the lack of clarity in identifying the conditions necessary to establish the liability in the courts. Moreover, the Study also revealed the existing problems pertaining to private enforcement. Some of them were; difficulty in getting hold of the relevant evidence, high burden of proof on the claimants, absence of collective claims measures and uncertainty on issues like passing-on defence and quantification of damages.⁵¹ The report stressed the importance of clarity on these issues especially from the aspect of the outcome of the damages cases. Following the Ashurst Study, the Commission published two major documents which played an important role in giving birth to the Directive as discussed below.

a. The *Green Paper* on Damages Actions

The *Green Paper*⁵² was adopted by the Commission on 19 December 2005 and focused on antitrust damages action. It gave equal importance to ‘follow-on’ actions⁵³ and stand-alone claims and considered these actions to serve a two-fold purpose. Firstly, these actions would compensate the victims of competition law infringements and secondly, they would strengthen deterrence against anticompetitive practices.⁵⁴ The *Green Paper* came about

⁵⁰ Denis Waelbroeck, Donald Slater and Gil Even-Soshan, ‘Study on the Conditions of Claims for Damages in Case of Infringement of EC Competition Rules: Comparative Report’ [2004] Ashurst Brussels <http://ec.europa.eu/competition/antitrust/actionsdamages/comparative_report_clean_en.pdf> accessed 10 April 2017.

⁵¹ *ibid* 1-12.

⁵² Commission, ‘Green Paper on damages actions for breach of the Commission antitrust rules’ COM [2005] 672 final.

⁵³ A follow-on action is one which follows enforcement proceedings initiated by the Commission or action brought before national competition authorities.

⁵⁴ Eddy De Smijter, Constanze Stropp and Donncadh Woods, ‘Green Paper on damages actions for breach of the EC antitrust rules’ [2006] Issue Number 1 Spring Competition Policy Newsletter <http://ec.europa.eu/competition/speeches/text/2006_1_1_en.pdf> 10 April 2017.

as a reference point to make the private enforcement regime viable with efficient analysis and solutions to the existing obstacles. Some of the issues it addressed are discussed below.

i. Access to evidence

The *Green Paper* states that in order to prevent difficulties for victims of competition law infringement cases, introduction of means to access evidence is foremost to make their claims effective. Obligation must also be put on the defendant to disclose documents containing evidence that they usually present before the NCAs. As a solution, it provides some ways by which the evidence should be disclosed. Such disclosure can be after the relevant facts of the case have been set out, or by court order whereby the court would preserve such relevant evidence before a civil action begins and have access to evidence held by the Commission. The issue of alleviated burden of proof is also addressed whereby the decisions of the NCAs must be made binding upon the NCs and unjustified refusal to turn over evidence by a party must not be entertained.⁵⁵

ii. Damages

This is another important issue that is taken up in the *Green Paper*. To some extent, it follows the US approach to ‘treble damages’ here.⁵⁶ It brings attention to the issue of having a justified incentive for the victims to undergo the hassles of litigation by proposing doubling of damages for most serious injuries and asks for a proper definition of damages. For quantification of damages it raises valid questions and proposes ideas like ‘split proceedings’⁵⁷ between the infringer's liability and the amount of damages to be awarded, to establish a unified method of calculation.

iii. The passing-on defence and indirect purchaser's right to claim damages

The *Green Paper* recognises the ‘passing-on defence’⁵⁸ concerns and validly raises the question as to whether such a defence should be allowed for the

⁵⁵ *Green Paper* (n 52) 5-6.

⁵⁶ Clayton Act 1914 (US), s 4.

⁵⁷ *Green Paper* (n 52) 7. To simplify litigation between the liability of the infringer and the quantum of damages to be awarded is split.

⁵⁸ The ‘passing-on defence’ is a legal concept in private action litigation, where a downstream company seeking damages from an upstream supplier for overcharging, the latter (defendant)

defendants. This is because an infringer using this defence would put the claims of a direct purchaser to risk by stating that the damages caused to the latter have been passed on to the end consumers or indirect purchasers. Even the indirect purchasers who are allowed to claim under the EU regime for damages would find it difficult to establish their charges as it would be extremely complicated for them to prove the extent to which the damages had been passed onto them down the supply chain. Due to this problem, the *Green Paper* comes up with various alternatives. It excludes the use of passing-on defence in the private claims completely and tries to establish a fair compensatory mechanism although the pragmatic application of such a proposition is doubtful.⁵⁹

iv. Defending consumer interests

The *Green Paper* identifies the importance of collective and representative actions to protect the rights of the consumers with small claims. This is because such collective actions can consolidate several small claims into a large one thereby saving time and costs. It also tried to save costs for consumers by proposing that unsuccessful claimants must not be subjected to cost recovery unless they acted very unreasonably in the suites.⁶⁰

v. Coordination of public and private enforcement

According to the *Green Paper*, the two enforcement methods are complementary to each other and optimum coordination between the two is needed. There is a need to consider the implications of damages claims on the functioning of the leniency programmes. To this end, the *Green Paper* suggests protection of the confidentiality of the leniency documents and other means to guard the leniency applicants from excessive damages.

The *Green Paper* is undoubtedly an influential predecessor of the 2014 Directive as it deals with all the issues for which a need for a more unified system of private enforcement was felt. Despite having room for further development, the *Green Paper* did propose some creative initiatives in uplifting the status of private enforcement mechanism in the EU.

can counter-claim that some or all the overcharges have been passed to consumers, thus mitigating or negating the damages claim.

⁵⁹ *Green Paper* (n 52) 8.

⁶⁰ *ibid* 8-9.

b. The *White Paper* on Damages Action

The *White Paper*⁶¹ followed the *Green Paper* in 2008, along-with the consolidated Staff Working Paper⁶² on damages. Having concurred with the findings in the *Green Paper*, the European Parliament decided to bring in the *White Paper* to provide detailed proposals to address the obstacles to effective antitrust damages actions. It contained several legislative proposals and proposed innovative initiatives like the ‘opt-in’ collective actions⁶³ suites and representative actions. It wanted to ensure that the victims of antitrust infringement cases are fully compensated for the harm that they suffered. It gave more importance to compensatory justice and considered the deterrence aspect of private actions for damages as one of the indirect effects.⁶⁴ This meant that unlike the *Green Paper* which considered private enforcement to play a major role in deterrence, the *White Paper* considered it more as a compensatory justice mechanism. While many scholars have considered this approach of the *White Paper* to represent a more realistic approach to the *Green Paper*,⁶⁵ the author of this article considers it to be a watered-down approach for many reasons. To understand those reasons, it is important to consider the issues dealt by the *White Paper* as discussed below.

i. Standing of indirect purchasers and collective redress

The Commission through the *White Paper* welcomes damage claims of every individual including indirect purchasers and small businesses. A combination of the representative actions and opt-in collective actions was suggested to compensate to address the issues of uncertainty, high costs, and procedural inefficiencies that such victims face. The representative actions were to be brought in by the qualified entities while the opt-in collective actions were to be brought in by victims who decide to combine their individual claims into a single action for the harm suffered.⁶⁶

⁶¹ Commission, ‘White Paper on Damages Actions for Breach of the EC Antitrust Rules’ COM [2008] 164 final.

⁶² Commission Staff Working Paper accompanying the White Paper on Damages Actions for Breach of the EC Antitrust Rules SEC [2008] 404.

⁶³ These actions require claimants to opt into the action for damages.

⁶⁴ *Morais* (n 8) 6.

⁶⁵ *ibid.*

⁶⁶ *White Paper* (n 61) 4.

ii. Access to evidence

The *White Paper* encourages access to evidence subject to fact pleading and strict judicial control of the prospect of the claim and the proportionality of such disclosure request. It encourages specified categories of evidence to be disclosed which the NCs have the power to determine. More deterrent sanctions are included in the *White Paper* in cases of destruction of relevant evidence than the *Green Paper*.⁶⁷

iii. Binding effect of NCA decisions

The Commission specifically mentions in the *White Paper* that in order to maintain a more consistent application of Articles 101 and 102 TFEU and to increase legal certainty, NCs dealing with damages claims must not take decisions contrary to the one taken by an NCA in the ECN on the application of these Articles.⁶⁸ The same principle holds true in cases where a review court has given a final judgement upholding the decision of an NCA or has itself given out a judgement finding an infringement of the above Articles.

iv. Damages

The Commission depends upon the Court of Justice to confirm the types of harms for which the victims of antitrust infringement should be compensated in order to determine the quantum of these damages.⁶⁹ It then suggests calculation of such damages in a hypothetical scenario of a competitive market. This method is excessively difficult to comprehend and carry out and hence is subject to criticism.⁷⁰

v. Passing-on overcharges

Unlike the *Green Paper*, the *White Paper* does not propose exclusion of passing-on defence in favour of the infringer absolutely. It considers the principle of unjust enrichment which states that in the absence of the passing-on defence, purchasers who might have passed on the overcharge caused due to the antitrust practices of the infringer to the others in the supply chain may get disproportionate multiple compensations.⁷¹ It tries to maintain the balance

⁶⁷ *ibid* 4-5.

⁶⁸ *ibid* 5-6.

⁶⁹ *Manfredi* (n 6).

⁷⁰ *White Paper* (n 61) 7.

⁷¹ *ibid* 7-8.

by stating that defendants entitled to use passing-on defence must have the same burden of proof as that of the claimants who are trying to prove the damages. Moreover, the Commission also suggests in the *White Paper* that to lighten the burden of the indirect purchasers who are mostly placed at the end of the supply chain and are in distance from the infringement, they may rely on the rebuttable presumption that the unlawful overcharge was passed on to them in its entirety.⁷²

vi. Interaction between leniency programmes and actions for damages

The *White Paper* asks for adequate protection of leniency programmes by guarding disclosure of corporate statements even if such disclosure is ordered by the courts. Moreover, it also proposes a possibility of limiting the civil liability of the leniency applicant, entitled to immunity from the damages claims of his direct or indirect commercial partners. The leniency applicants would, however, bear the burden of proving the extent of limitation of his liability in this case.⁷³ It is interesting to note here that though the *White Paper* refers to the need to protect the leniency programmes, it does not provide any elaborate means to determine in what ways private enforcement would take an effective shape in the presence of such strict norms protecting leniency. It also does not explore the possibility of how much protection could be given to leniency programmes if the private enforcement is encouraged optimally in the EU.

By going through the issues and the solutions provided by both the *Green Paper* and the *White Paper*, it can be inferred that while they differ in their objectives, where the *Green Paper* looks upon private enforcement as a means of deterrence and the *White Paper* looks at it as means of compensation, they both give importance to protecting the public enforcement mechanism. While the *White Paper*, being more comprehensive, recognises the need to protect leniency documents, it does not provide any details on how such a proposal would be executed. The same observation holds true in cases of entertaining claims of indirect purchasers where reliance has been put solely upon a rebuttable presumption, which does not serve a very pragmatic scenario. Even regarding the proper methodology for calculation of damages, no concrete foundations are laid. Apart from the

⁷² *ibid.*

⁷³ *ibid* 11.

above reasons, absence of heavy penalties in comparison to the *Green Paper*,⁷⁴ makes the *White Paper* a more watered-down version of its predecessor. It would be interesting to analyse how well the 2014 Directive tackles these lacunae and provides for a definite solution to the existing anomalies.

c. The new Directive on Damages 2014

Even after the adoption of the *Green Paper* and the *White Paper* by the Commission, in its endeavour to introduce a formal and unified private enforcement mechanism in the EU, the formal proposal for the Directive was only presented to the EU Parliament in 2013.⁷⁵ The delay was caused by the concern over handling of the evidence of leniency programmes presented to the Commission. Moreover, a lot of confusion persisted in introduction of a collective redress mechanism which was finally dropped during the consultation process and was brought under a separate ‘Commission Recommendation’.⁷⁶

i. Aims of the Directive

The basic objective of this Directive is to promote an effective enforcement mechanism against cartel and other anticompetitive practices. It also aims to secure the complete right to compensation for victims of antitrust infringement to ‘concrete victims’ to the extent of the actual loss, the loss of profit and the payment of the interest.⁷⁷ These victims involve direct and indirect customers of the infringers as well as its competitors and their customers. Such victims also include the small and medium sized enterprises.⁷⁸

However, it is observed that although the Directive was ideally thought to

⁷⁴ *Green Paper* (n 52) 7; See the objective of doubling of damages.

⁷⁵ Commission, ‘Proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union’ COM [2013] 404 final (Proposal for Directive).

⁷⁶ Commission Recommendation 2013/396/EU of 11 June 2013 on Common Principles for Injunctive and Compensatory Collective Redress Mechanisms in the Member States concerning violation of rights granted under Union Law [2013] OJ L201/60.

⁷⁷ Directive (n 1), art 3 (1).

⁷⁸ ‘Actions for Damages Overview: Towards more effective antitrust damages actions’ (*European Commission Competition Antitrust* 8 February 2016) <<http://ec.europa.eu/competition/antitrust/actionsdamages/>> accessed 10 April 2017.

have been enacted to raise the standard of deterrence in the EU competition enforcement framework, it takes a much watered-down approach to this. It absolutely lacks the suggestions of the *Green Paper*, which talked about doubling of the damages and contains no counterpart to the treble damages feature of the US private antitrust enforcement.⁷⁹ It only uses the right to compensation as the sole means to tackle anticompetitive behaviour which is also subjected to the limitations of overcompensation through punitive, multiple or other types of damages.⁸⁰ This in no way conforms to the actual reason for which the Directive was brought to the effect, which was deterrence through more damages claims of the victims.⁸¹ Even the ECJ had clarified that damages actions would increase deterrence.⁸² A major concern arises here as to what is the major purpose of the Directive, which needs further clarification. The Directive also aims to enhance coordination regarding private enforcement rules pertaining to damages among the NCAs,⁸³ though it leaves several procedural aspects to the Member States to decide. Hence, these issues require more analysis for which it is of foremost importance to consider the provisions of the Directive.

ii. Features of the Directive

Firstly, the Directive contains the right to full compensation which though needs to be implemented by all the Member States, could be improved by the latter for achieving consistent results.⁸⁴ It also gives importance to the principles of ‘effectiveness’ and ‘equivalence’. While the principle of effectiveness expects the Member States to ensure that their own rules and procedures pertaining to damages claims are in consonance with the Union's rules on the same, the principle of equivalence demands that national laws and procedures must be favourable and equal towards damages claims.⁸⁵

A very important feature of the Directive is its take on the issue of disclosure of evidence. It seems to have taken a composite approach of making way for the victims to access the required evidence to substantiate their claims and

⁷⁹ *Green Paper* (n 52) 7.

⁸⁰ Directive (n 1), art 3(3).

⁸¹ Commission Staff Working Document Accompanying Document to the White Paper on Damages Actions for Breach of the EC Antitrust Rules Impact Assessment SEC [2008] 405.

⁸² *Courage* (n 5) para 27.

⁸³ Directive (n 1), recital 6.

⁸⁴ *ibid* art 3.

⁸⁵ *ibid* art 4.

restricting disclosure to only certain categories of evidence. The NCs are expected to interpret such categories in a very narrow way and subject to the satisfaction of a 'proportionality test'.^{86 87} Such proportionality is generally determined by the Member States through the facts of the claims, cost of such disclosure and by checking whether such disclosure contains any confidential information.⁸⁸

Further, the Directive takes cognizance of the fact that evidence or documents which form a part of the leniency and the settlement programmes cannot be made available anytime as per the convenience of the courts. Such evidence would only be made available under situations where there is a strong plausible case in favour of the claimants.⁸⁹ An important analysis should however be made here, i.e., whether with widespread encouragement of private enforcement in the future, the Directive takes a definite stand as to the extent to which claimants including other undertakings can access the leniency or settlement documents.⁹⁰

The Directive obligates the courts of the Member States to consider the final decisions of the NCAs regarding an infringement of competition law while dealing with damages actions themselves.⁹¹ This is to ensure that in follow-on damages action there is no rearguing of the decided facts relating to the competition law infringement.

A rather controversial feature of the Directive is its approach towards the passing-on defence. While it provides the right to an infringer or a defendant in a damages action to invoke this defence, whenever the resulting overcharge caused due to the anticompetitive infringement is passed onto the others in the supply chain, no further guidance has been provided to deal with other issues.⁹² This includes the need for clarification on the position of the indirect consumers who, apart from facing the difficulty of proving the damages,

⁸⁶ *ibid* art. 16.

⁸⁷ *ibid* art. 5.

⁸⁸ *ibid*.

⁸⁹ *ibid* recitals 16 and 17.

⁹⁰ *Pfleiderer* (n 10) para 32.

⁹¹ Directive (n 1), art 9.

⁹² *ibid* art 13.

needs to counter this defence to establish their actual loss and additional damages suffered.⁹³

It is also important to witness that the Directive bestows the responsibility of estimating the amount of harm where there is limited evidence to qualify it for proper quantification of damages.⁹⁴ In other cases there is a ‘legal presumption’ of the presence of such harm in cases of cartel activities.⁹⁵ Given that the Directive holds a proper definition for ‘cartels’,⁹⁶ any other anticompetitive behaviour outside the scope of this definition cannot benefit from the above presumption. This means that there is no safe haven for the victims claiming damages in infringement cases outside the scope of cartels. Moreover, the fact that the calculation of the damages is left on the NCs to determine in consultation with the respective NCAs, does not actually endorse the motto of bringing in a unified system of private enforcement through this Directive.⁹⁷

After having a fair idea about the key features of the new Directive along with its objectives, it will be interesting to analyse the varied concerns that it has raised or is expected to raise in the near future.

IV. The Major Concerns Encircling the Directive

The Directive supports the perspective that optimal enforcement of competition law is a product of the combined forces of public and private enforcement systems.⁹⁸ While this approach may sound interesting to many, it comes with several complications like legislating proper legal procedures dealing with evidence, and balancing the different objectives of these two enforcement mechanisms. In such a situation, this article points out to two very important issues that require resolution. First about the primary objective of private enforcement in a *hybrid* kind of a structure, i.e., whether it wants to bring in deterrence or provide compensation to the victims of the infringement. Secondly, it is important to determine its impact on the existing public enforcement tools like leniency programmes as well as its intention towards protecting the rights of the indirect consumers in such a composite

⁹³ *ibid* art 14.

⁹⁴ *ibid* art 17 (1).

⁹⁵ *ibid* art 17(2).

⁹⁶ *ibid* art 2 (14).

⁹⁷ *ibid* art 17(3).

⁹⁸ Directive (n 1), recital 6.

environment. This part will essentially scrutinise these issues and give a brief insight on the other deficiencies of the Directive.

1. The real objective of the Directive

The EU competition policy has always promoted two prevailing objectives. The first objective is implementing adequate measures to prohibit anticompetitive behaviours in order to ensure the wellbeing of the whole EU,⁹⁹ and the second is *deterrence* and heavy punishment towards anticompetitive acts.¹⁰⁰ These objectives were transported to the new private enforcement regime through the *Green Paper* as it projected that private actions would have the same deterrence objective as that of the existing public one.¹⁰¹ In fact the *Green Paper* represents a lot of influence of the US based approach where it considers features like doubling of damages (similar to treble damages),¹⁰² or the exclusion of the passing-on defence in favour of direct purchasers.¹⁰³

The ECJ stated in the case of *Courage* that “the full effectiveness of Article 101 of TFEU (then Article 81) would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition”.¹⁰⁴ This showed that while considering private enforcement, even the EU courts expected it to provide a broader framework to increase the effectiveness of anticompetitive provisions of the treaties apart from providing corrective justice through compensation to the victims.

On the other hand, the *White Paper* took a narrow stance by considering compensatory justice delivery to be the prime objective for private enforcement with deterrence as its by-product.¹⁰⁵ While the *White Paper* still mentions deterrence, the Directive (latest version dealing with private

⁹⁹ Morais (n 8) 13.

¹⁰⁰ See on this wide characterization of competitive harm that seems to go beyond what the Commission had been considering over the latest decade in the context of its new-orthodoxy of economic and efficiency based analysis (frequently understood in a rather narrow manner); C-52/09, *Konkurrensverket v. TeliaSonera Sverige AB*, [2011] ECR I-527 paras 23-24.

¹⁰¹ *Green Paper* (n 52) 3.

¹⁰² Clayton Act 1914, s 4.

¹⁰³ Neither passing-on defence nor claims of indirect purchasers are permitted under US Federal law; See *Illinois Brick Co v Illinois* 431 US 720 (1977).

¹⁰⁴ *Courage* (n 5) para 27.

¹⁰⁵ Morais (n 8) 6.

enforcement in the EU) does not mention anything about it. The Directive seems to only value the right to full compensation, the only means by which it attacks anticompetitive behaviour.¹⁰⁶ Although it clearly mentions that public and private enforcement must function optimally and in a harmonised manner,¹⁰⁷ it does little to enhance the public enforcement policy and strengthen the competition enforcement regime holistically. The question that arises here is whether after so many years of consultation and discussion,¹⁰⁸ the legislator's motive of adopting this Directive was only to serve the purpose of compensatory justice or it was meant to play a bigger role.

Private claims for damages depend both upon the offender's illegal gain, which actually causes the social loss, as well as on the losses that the claimants who bring in the suites are able to prove.¹⁰⁹ The damages suites bringing in the loss of profits by the non-consumers like the dealers or the competitors bear no relationship with the offender's gain or the social harm.¹¹⁰ The Directive, having considered the importance of loss of profit being compensated, establishes its inclination to take an individualistic approach against a generic social welfare one.¹¹¹ Moreover, individual damage awards do not contain the necessary multiplier that inversely reflects the potential to detect or punish antitrust infringements.¹¹² Even if it is argued that the plaintiffs to the suites indirectly bring in some important antitrust infringements to the limelight, the Directive does not provide incentives to them to detect and litigate such meritorious claims.¹¹³ Comparatively in the US, the features of trebling of damages and class action system solve these problems effectively.

¹⁰⁶ Directive (n 1), art 1(1).

¹⁰⁷ *ibid* recital 6.

¹⁰⁸ Sebastian Peyser, 'Compensation and the Damages Directive' Centre for Competition Policy Working Paper 15-10 <<http://competitionpolicy.ac.uk/documents/8158338/8368036/15-10+CCP+Working+Paper/78f92b0e-6f92-4538-bca7-4f45e8de7b2b>> accessed 10 April 2017.

¹⁰⁹ Wouter P. J. Wils, 'The Relationship between Public Antitrust Enforcement and Private Actions for Damages', (March 2009) 32/No. 1 *World Competition* 3 at 11.

¹¹⁰ Frank H. Easterbokk, 'Detrebling Antitrust Damages' (1985) 28 *Journal of Law & Economics* 445 at 462-463.

¹¹¹ Directive (n 1), recital 12.

¹¹² Easterbrook (n 110) 454-457.

¹¹³ Steven Shavell, 'The Fundamental Divergence between the Private and the Social Motive to Use the Legal System' (1997) 26 *Journal of Legal Studies* 575.

The Directive's narrow approach to corrective justice will make it difficult to integrate into the existing public enforcement framework, if the new goal of compensation is independent of the enforcement intention of the public bodies with no coordination or cooperation with the later.¹¹⁴ Even the very wording of the Directive does not encourage such a separatist approach.¹¹⁵ Hence, it is very important that further clarification be made on the issue of the real objective of the Directive either from the Commission or by the EU courts.

2. Balancing the implications of the Directive on Leniency Programmes

It cannot be denied that although the new Directive gives sufficient importance to harmonisation and coordination with the existing enforcement framework,¹¹⁶ its objective on the right to full compensation creates tension towards its impact on the effectiveness of the leniency programmes. This is because time and again litigants in the EU have sought to access an NCA's file containing leniency evidence by claiming under the transparency rules.¹¹⁷ A leniency programme is an initiative of the Commission where using its Notice on immunity from and reduction of fines, it encourages cartel participants to reveal such anticompetitive infringements and bring them to an end.¹¹⁸ Although it has been clearly mentioned by some NCAs as well as Advocate General Mazak that access to the documents that are voluntarily provided by the leniency applicants must be restricted, the ECJ took a different stand on this subject.¹¹⁹ In the case of *Pfleiderer*, the ECJ held that leniency documents can be accessed if the NCs order such disclosure after balancing the interests of the leniency applicants and the claimants.¹²⁰ Following this case, the ECJ took a similar approach in the case of *Donau*

¹¹⁴ Morais (n 8) 15.

¹¹⁵ Directive (n 1), recital 6.

¹¹⁶ *ibid.*

¹¹⁷ See Regulation 1094/2001 regarding public access to European Parliament, Council and Commission Documents (Transparency Regulation) [2001] OJ L145/43 and eg. Case T-437/08 *CDC Hydrogen Peroxide v Commission* [2011] ECR II-8251.

¹¹⁸ Commission Notice on the Non-Imposition or Reduction of Fines in Cartel Cases [1996] OJ C207/4 (1996 Notice).

¹¹⁹ *Pfleiderer* (n 10) Opinion of AG Mazak, para 38-42. In his view an interference with the injured parties' right to an effective remedy and a fair trial was justified by the legitimate aim of ensuring the effective enforcement of Article 101 by NCAs and ultimately private litigants' possibility of obtaining an effective remedy.

¹²⁰ *Pfleiderer* (n 10) paras 23-26.

Chemie,¹²¹ where it stated that any strict approach to cause an absolute refusal to access the leniency documents would lead to ineffective application of Article 101.¹²² Such an encouragement for increasing accessibility to the leniency evidence can create more issues especially in follow-on actions for damages where leniency applicants can still be held liable by the NCs despite being fined or getting some sort of immunity from the Commission.

The Directive seems to value the leniency programmes and the settlement procedures by limiting undue disclosure of self-incriminating leniency and settlement documents.¹²³ It clearly mentions that such non-disclosure extends to literal quotations of the leniency or the settlement submissions in other documents.¹²⁴ However, at the same time the Directive also considers that the right to full compensation of the injured parties do not suffer unduly and thus limits disclosure to only the voluntary and self-incriminating leniency statements and settlement submissions.¹²⁵ At this point of time it is very difficult to perceive how these two objectives would be aligned together, i.e., balance the need to protect the leniency evidence as well as look into the effective functioning of the private enforcement mechanisms.¹²⁶

Article 6 of the Directive is very clear on its attempt to restrict the jurisdiction of the NCs to ask for leniency documents and other related evidences. Given that this runs contrary to the observations held by the ECJ in the previous judgements, it enhances divergences at several fronts specifically on the aspects of interplay between public and private enforcement. Instead of clarifying this issue further, the Directive leaves the responsibility upon the Member States and their NCs to determine the facts of a damages claims along with the available evidence, before ordering access to any kind of leniency documents or statements if that seems necessary.¹²⁷ The ECJ also follows a similar logic in most of its judgements when deciding on the fate of accessibility of documents voluntarily submitted to the NCAs by the infringers.¹²⁸ This takes us back to the same problem that existed before the

¹²¹ Case C-536/11 *Bundeswettbewerbsbehörde v Donau Chemie* [2013] 5 CMLR 19.

¹²² *ibid*, para 31.

¹²³ Directive (n 1), recital 22.

¹²⁴ *ibid*, recital 24.

¹²⁵ *ibid*, recital 26.

¹²⁶ *ibid*, art 6.

¹²⁷ *ibid*.

¹²⁸ *Pleiderer* (n 20) paras 23-26. A point that exist in many cases especially given the ECN and the obligations of national competition authorities under Regulation 1/2003.

adoption of this new Directive, which is the existing disparity in national procedural and substantive rules of evidence in the Member States.¹²⁹ The situation worsens when access to evidence becomes subjected to the irregular norms of the Member States, rendering the right to compensation from the Directive useless.¹³⁰ This would not only undermine the prospect of an effective and unified private enforcement system in the EU but would also discourage the victims from risking their time and costs to enforce their rights.

The fact that access to leniency documents and other related evidence is not a part of any common EU rules including the Directive, raises a further concern about transparency and certainty. From the perspective of the leniency applicants, although the Directive provides protection to their voluntary declarations or submissions at the Union level, differing standards of evidence code at the national level may lead to information leakage through private actions.¹³¹

When referring to the blanket restriction pertaining to the non-disclosure of the leniency and settlement documents, all items relating to these programmes are not always out of a NC's control. Only the documents containing the description of the cartel and how it functions is protected while other hard evidence relating to such voluntary leniency submissions could be accessed.¹³² This along with the fact that the Directive does not provide for any provision that would acquit the infringing undertakings from all liabilities, based upon absence of fault, weakens the position of such an undertaking. In the judgment of *Schenker*, the ECJ gave wider powers to the Member States to establish new grounds for imposition of fines like 'intention' and 'negligence'.¹³³ It further held that a previous NCA decision in favour of an undertaking is not sufficient to protect it from the contention that the infringement was not done intentionally by it. An undertaking may be presumed to hold such intent at a national level where a private action suit has been brought against it apart from the fact that it had participated in a leniency programme, irrespective of the outcome or creditability of these

¹²⁹ John S. Kortmann, Christopher R. A. Swaak, 'The EC White Paper on Antitrust Damages Actions: Why the Member States are (right to be) less than enthusiastic' (2009) 30 *European Competition Law Review* 340.

¹³⁰ Groussot (n 22) 157.

¹³¹ *ibid* 158.

¹³² Directive (n 1), recital 26.

¹³³ Case C-681/11 *Schenker Co. & Others* [2013] 5 CMLR 831.

suits.¹³⁴ Under such circumstances it becomes riskier for the undertakings to participate in such public enforcement programmes.

There are many grey areas regarding the implications of the Directive on the leniency and settlement programmes which still lack a unified approach. Moreover, the blanket restrictions provided by the Directive against the accessibility of the evidence questions how successful it will be in helping the victims of cartel infringements get full compensation against the loss suffered by them.

3. The future of the Indirect Purchasers

Indirect purchasers sometimes form an important part of the whole discussion on private enforcement. They get exposed to the adverse effects of increased prices, caused due to cartel activities or abuse of a dominant position, being a part of the distribution chain of the products. Before a final product reaches its end consumers it crosses several levels of indirect purchasers. Due to this, indirect purchasers suffer the same damages as the end consumers as increased cartel prices are trickled down the supply chain. This was the reason why the ECJ gave the rights of compensation to all the individuals who have suffered due to anticompetitive practices in the cases of *Courage*¹³⁵ and *Manfredi*.¹³⁶ Some of the Member States like Germany have recognised the rights of these indirect purchasers in the present times.¹³⁷

In the US the federal law does not recognise any standing of the indirect purchasers in private actions pertaining to the antitrust infringements owing to the judgements of *Hanover Shoe*¹³⁸ and *Illinois Brick*,¹³⁹ while most of the states have made provision for the same under their state laws.¹⁴⁰ Article 16 of the Directive clearly explains that it is the responsibility of the Commission to issue more guidelines to the NCs to help them estimate the overcharge that was incurred by the indirect purchasers due to the anticompetitive

¹³⁴ Groussot (n 22) 159.

¹³⁵ *Courage* (n 5) para 26.

¹³⁶ *Manfredi* (n 6) para 26.

¹³⁷ Stephen Wisking, Kim Dietzel and Molly Herron, 'European Commission Finally Publishes Measures to facilitate Competition Law Private Actions in the European Union' (2014) 35 *European Competition Law Review* 185.

¹³⁸ *Hanover Shoe* 392 US 481 (1968).

¹³⁹ *Illinois Brick* (n 103).

¹⁴⁰ Andrea Hamilton and David Henry, 'Bricks, Beer and Shoes: Indirect Purchaser Standing in the European Union and the United States' (2012) 5 *Global Competition Litigation Review* 111, 115.

infringement. So far, no such guidelines have been issued by the Commission. As per the Directive, an indirect purchaser in a damages suit needs to prove the following points in order to establish that an overcharge has been passed onto him:

- a. That the defendant has committed an infringement of competition law.
- b. That the overcharge for the direct purchaser of the defendant has been caused due to the competition law infringement.
- c. That the goods or services purchased by the indirect purchaser were an object of such infringement.¹⁴¹

Establishing such infringement becomes very complicated when these purchasers buy products that are incorporated in other products which are directly related to the competition law infringement.¹⁴² An example can be that of the purchasers of car manufacturers. In this case, if cartel activities exist among the manufacturers delivering the spare parts of the car and not among the car manufacturers, it would be a great difficulty for the indirect purchasers to determine competition law infringement in this case as well as estimate the amount of damages that such a cartel causes.¹⁴³

In another scenario, the indirect purchasers would be more affected than the direct consumers where the whole overcharge or excessive price caused due to any anticompetitive activities have been passed on to them completely. Such a situation took place in a Swedish private enforcement case, where the owners of the Stockholm Airport along with the contractor of the Airport parking space decided to put a fee on taxi companies which operate at the parking space.¹⁴⁴ These taxi companies generally picked up pre-booked consumers from the entrance of the Airport. The taxi companies passed on this additional fee to their customers, who had to pay this extra amount as part of the full charges that they owed for taking the ride with their taxis. In such a situation, a judgment was given that found the anticompetitive infringement in the policy of the Airport officials and the contractor. Despite this, neither

¹⁴¹ Directive (n 1), art 14.

¹⁴² Elisabeth Eklund, 'Indirect Purchasers-Is There Anything New in the Directive? An Introductory Overview of the Current and Future Status of Indirect Purchasers in the EU' in Maria Bergstrom, Marios Iacovides and Magnus Strand (eds), *Harmonising EU Competition Litigation: The New Directive and Beyond* (Swedish Studies in European Law, 8, Hart 2016) 272-273.

¹⁴³ *ibid.*

¹⁴⁴ MD 2011:28, *Uppsala Taxi 100 000 AB v EuroPark Svenska Aktiebolag and Swedavia AB*.

the pre-booked customers of the taxis (on whom the whole overcharge was technically passed on), nor the taxi companies (as they faced loss of passengers and had to incur additional costs for the fee) filed any damages claim. Even after the infringement was established they lacked the interest to file for damages suits as the awards of these claims was minimal compared to the pain that they had to bear to establish their claims.

The situation of the indirect purchasers becomes more vulnerable in the absence of any collective consumer redress methods within the Directive. A collective system would have given a better opportunity to the individual victims to not only collaborate with the claims of other similar victims but also coordinate more with the direct purchasers (who have a better standing in damages claims than the indirect purchasers).¹⁴⁵ It would have also ensured group support to collect evidence against the infringers or approach the NCAs for access to other documents related to leniency or settlement procedures.¹⁴⁶

The Directive does not make it easier for the indirect purchasers except for simply recognising them as rightful claimants for damages in cases of infringement of competition rules. Although the EU courts are in favour of these purchasers, in the absence of further guidance to calculation of the overcharge and a collective system of private actions, the future of the indirect purchasers looks very unsettled. Moreover, the high burden of proof on them to establish the anticompetitive infringement and quantify their damages in complex situations gives little incentive for such purchasers to file suits.

V. Building a pathway towards better Private Enforcement

The Directive makes an ambitious attempt to build an integrated enforcement mechanism through optimal coordination of public and private enforcement methods. In order to ensure that it turns out to be a successful endeavour, this article will make an attempt to provide certain suggestions to resolve the existing uncertainties related to it.

¹⁴⁵ Eklund (n 142) 274.

¹⁴⁶ Roger Van den Bergh, 'Private Enforcement of European Competition Law and The Persisting Collective Action Problem' [2013] Maastricht Journal 12 <http://www.maastrichtjournal.eu/pdf_file/ITS/MJ_20_01_0012.pdf> accessed 10 April 2017.

1. Deciding on the purpose of the Directive

The first concern that demands resolution is regarding the real purpose of the Directive. There is a gap between the statements of the Directive and its approach. An example can be taken of its objective to provide full compensation to the victims of anticompetitive infringement cases,¹⁴⁷ although it does not create any incentives for them to bring in such claims. Under such circumstances, this article suggests that the Directive may assume a complementary role to the existing public enforcement system to gain a clearer purpose and avoid confusion.

Being complementary to the public enforcement framework will help the Directive to firstly take charge of the individual claims, an area that has been clearly neglected by the public authorities so far and secondly to build a unified approach across the Member States with regard to it. Statistics show that presently a very small fraction of disputes manages to reach the final stage of judgement delivery where it gets decided by a judge or a bench.¹⁴⁸ The motivation to bring a damages suit will depend not only upon the expected probability to settle or win the case but also on the expected size of the reward and the legal costs required to sustain a legal action.¹⁴⁹ Hence, a proper mechanism must be provided to help the claimants carry out a cost benefit analysis.¹⁵⁰ Moreover, none of the provisions of the Directive provide for any economic based approach to apprehend the amount of damages. It also does not clarify about which party, the victim or the infringer, will have to bear the burden of the costs of such disclosure of evidence.

In terms of strengthening the enforcement framework of the EU, the Directive leaves what some renowned scholars have called, a ‘deterrence gap’ in the absence of provisions dealing with treble damages amount for anticompetitive infringement.¹⁵¹ This was something that the *Green Paper* tried to resolve through the introduction of the doubling of damages clause.

¹⁴⁷ Directive (n 1), art 1(1).

¹⁴⁸ George L. Priest and Benjamin Klein, ‘The Selection of Disputes for Litigation’ (1984) 13 *Journal of Legal Studies* 1–55.

¹⁴⁹ William M. Landes, ‘An Economic Analysis of the Courts’ (1971) 14 *Journal of Law & Economics* 61-107.

¹⁵⁰ Richard A. Posner, ‘An Economic Approach to Legal Procedure and Judicial Administration’ (1973) 2 *Journal of Legal Studies* 399–458; Steven Shavell, ‘Suit, Settlement, and Trial: A Theoretical Analysis Under Alternative Methods for the Allocation of Legal Costs’ (1982) 11 *Journal of Legal Studies* 55–82.

¹⁵¹ Wils (n 109) 33.

The Directive's approach to redress anticompetitive infringement through compensatory justice leaves the part of deterrence completely on the public authorities. On this point, the author of this article would like to suggest that the Directive must take some responsibility on this front and increase its cap for damages in order to substantiate the public enforcement framework.

2. Resolving the possible adverse implications on the current enforcement tools

In the US, public enforcement actions have a facilitating effect on the private enforcement ones. There a Commission decision revealing an infringement could be relied upon by the parties to establish their claims or is used to prove causation and harm caused to them.¹⁵² Similarly, the private enforcement increases the resources available to the public authorities in cases of prosecuting the competition law infringements and increases the likelihood of detection. However, such an ideal interaction between the two systems seems less probable given that the new Directive does not address some concerns properly.

If it is assumed that the Directive only seeks to establish a compensatory justice framework, then an obvious concern arises as to its impact on the leniency and settlement programmes.¹⁵³ The objective of full compensation will only succeed if the private actions succeed in the courts. For this the claimants need a strong case due to which they might demand evidence that is available against the infringers with the NCAs. If such evidence is part of a voluntary submission of a leniency or settlement programme then disclosing such proof could hamper the functioning of these public enforcement tools. This is because cartelists would lose the incentive of assisting the Commission or the NCAs due to fear of follow-on suits.¹⁵⁴ In contrast, the case of *Kone Oyj*¹⁵⁵ as well as Recital 18 of the Directive clearly state that leniency programmes must not deprive victims of antitrust infringement from claiming compensation.¹⁵⁶ Further, it has been stated that protection of business secrets and other confidential information must not supersede the

¹⁵² Jones (n 33) 31.

¹⁵³ Directive (n 1), art 1(1).

¹⁵⁴ Groussot (n 22) 160.

¹⁵⁵ Case C-510/11 *Kone Oyj and Others v European Commission* [2013] All ER (D) 363 (Oct); Case T-151/07 *Kone and Others v European Commission* [2011] ECR II-5313.

¹⁵⁶ *ibid* paras 32-33.

right to compensation.¹⁵⁷ This clearly represents the conflict that may arise between the Directive and the public enforcement tools in future.

In order to resolve this conflict of interests between the two enforcement regimes and ensure coexistence, this article suggests following a moderate application of the ‘balancing test’ upheld in the *Pfleiderer* case.¹⁵⁸ This is achievable if more insight is gained into the disclosure provisions of the Directive. Article 6 of the Directive provides for three types of documents in terms of access to the competition file. The first type relates to those documents that cannot be disclosed at all like corporate statements and settlement submissions in order to protect leniency applicants.¹⁵⁹ The second type relates to a grey list where certain criteria of documents could be accessed through court order, only after the authority in possession of those documents closes the relevant file or takes a final decision.¹⁶⁰ The third type of documents include pre-existing materials like emails, agreements or texts that are connected to the anticompetitive investigation and have no restriction of disclosure upon them.¹⁶¹ In this regard, by following the balancing test, the second and the third type of documents could be made accessible to the claimants while blanket cover could be provided to the first type in order to protect leniency programmes. An expressive list with proper categories of documents can also add a clearer picture for the courts to help them decide on which kinds of evidence disclosure can be ordered from the Commission or the NCAs. Such a list can also be in the form of guidelines. These guidelines will facilitate the Directive in establishing a unified and balanced approach towards disclosure of evidence for the benefit of the claimants and the leniency applicants. Thus, the balancing test along with express guidelines on disclosure for distinct kinds of evidence can solve the tension and ensure harmonisation in the working of both the private and the public enforcement regimes.

3. Finding a solution for the other problems

An effective private enforcement mechanism also requires a firm position of direct and indirect consumers.¹⁶² The vulnerable condition of the indirect

¹⁵⁷ Directive (n 1), recital 18.

¹⁵⁸ *Pfleiderer* (n 10) para 29.

¹⁵⁹ Directive (n 1), art 6(3).

¹⁶⁰ *ibid* art 6(4).

¹⁶¹ *ibid* art 6(5).

¹⁶² *Courage* (n 5) and *Manfredi* (n 6).

purchasers demands more facilitation from the Directive, which it fails to provide. The struggle for damages for these purchasers would only be eased if the public enforcement authorities decide to cooperate more with the courts in providing the required evidence that they possess. It will help to build a culture of follow-on damages suits. This is necessary for both direct consumers and indirect purchasers as difficulties like high burden of proof and restrictive access to the evidences call for added assistance. In the United Kingdom (UK) for example, ‘follow-on’ claims can be brought before the Competition Appeal Tribunal (CAT) in anticompetitive infringement cases where through public enforcement such breach has been established.¹⁶³

Development of an active collective actions programme is also necessary. It will help small industries or individual consumers with low amount of losses to bring a consolidated single damages suit.¹⁶⁴ Such a process will not only help the consumers to gain a stronger position against the infringers but will also make it easier for the courts to adjudicate one major suit instead of many smaller claims.

Procedural measures are required to allow increased consumer participation to enhance consumer interests in the EU competition law regime.¹⁶⁵ It was rightly stated in the Commission’s Consumer Policy Strategy 2007-2013 that collective redress actions will be considered in both the fields of competition and consumer law without differentiating between them.¹⁶⁶ However, the *Green Paper* absolutely excluded these initiatives while the *White Paper* gave way to two procedures which can actually prove to be useful in instilling an effective collective redress system. The first pertains to bringing in damages claims through representative or consumer organisations on behalf of the

¹⁶³ Competition Act 1998 (UK), s 47A.

¹⁶⁴ Van den Bergh (n 146) 14.

¹⁶⁵ Eugene Buttigieg, ‘Consumer Interests under the EC’s Competition Rules on Collusive Practices’ [2005] EBLR 643, 664.

¹⁶⁶ Commission (EEC), ‘Three Year Action Plan of Consumer Policy in the EEC (1990-1992)’ COM(90) 98

final; ‘Internal Market After 2002: Meeting the Challenge’ (Sutherland Report) SEC(92) 2044, 10;

Commission (EC), ‘Consumer Policy Strategy 2002-2006’ (Communication) COM(2002) 208 final [3.2.3];

Commission (EC), ‘Consumer Policy Strategy 2007-2013’ (Communication) COM(2007) 99 final (Consumer Policy Strategy 2007-2013).

probable victims while the second relates to opt in collective actions.¹⁶⁷ While opt in actions are relatively inexpensive means to represent individual claims, the Commission needs to find ways to gather enough funds to support private actions through representative organisations.¹⁶⁸ Development of a regulatory mechanism to collect and maintain funds for the consumer organisations seems to be a solution here.¹⁶⁹ In this regard, the Commission as well as the Member States can create such funds through private and public resources. To sustain these funds, the membership base of these consumer organisations must be limited to only identifiable victims whose losses are indisputable.¹⁷⁰

Remedial steps are also important in order to address the issue of the quantification of harm in damages suits. According to the Directive, the Commission is to issue guidelines for the NCs to estimate the aspects of the quantification of harm and the overcharge that is passed on to the indirect purchasers.¹⁷¹ In the absence of such guidelines, this article recommends the use of a relevant document that carries instructions to deal with these issues. This can be the ‘Practical Guide’ to the quantifying of harm in actions for damages when there is an infringement of Articles 101 and 102 TFEU.¹⁷²

The Practical Guide gives an overview of three methods namely comparator based methods, simulation methods and cost based methods.¹⁷³ It also takes a more careful approach in evaluating the extent of passing-on by considering other substantive criterion and factors.¹⁷⁴ It explains certain scenarios where

¹⁶⁷ WP 4.

¹⁶⁸ The European Consumer Organisation (BEUC), ‘Damages Actions for Breach of EC Antitrust Rules – BEUC Response to the White Paper’ (*BEUC*, 14 July 2008). <http://ec.europa.eu/competition/antitrust/actionsdamages/white_paper_comments/beuc_en.pdf> accessed 10 April 2017 11 (accepting that ‘... financing legal action is also a problem for consumer organisations themselves).

¹⁶⁹ In support of a contingency legal aid fund (and ways to collect initial start-up capital) as well as the situation in Quebec and Ontario. See Alan Riley and John Peysner, ‘Damages in EC antitrust actions: who pays the piper?’ [2006] *European Law Review* 748, 756-757, 760-761.

¹⁷⁰ Maria Ioannidou, ‘Enhancing the Consumers’ Role in EU Private Competition Law Enforcement: A normative and practical approach’ [2011] *December 8/1 The Competition Law Review* 59, 81.

¹⁷¹ Directive (n 1), art 16.

¹⁷² Commission Staff Working Document-Practical Guide: Quantifying Harm in Actions for Damages Based on Breaches of Articles 101 and 102 of the TFEU’ [2013] SWD 205 (Strasbourg, 11 June 2013) (Practical Guide).

¹⁷³ *ibid* para 6.

¹⁷⁴ *ibid* paras 168 and 171.

direct consumers are not able to pass on the increase in cost due to anticompetitive infringement to the next in the supply chain.¹⁷⁵ Hence the guide can be considered as an active supplementary document to facilitate the provisions of the Directive and develop a concrete private enforcement framework.

Although the above mentioned remedial suggestions are not exhaustive, they try to find convenient resolutions to some of the issues that can prove to be troublesome for the Directive in future.

VI. Concluding Remarks

The US experience relating to the private actions in antitrust infringement cases demonstrated that these actions proved to be very effective in deterring violations and compensating victims at the same time.¹⁷⁶ Some of the established studies revealed that these actions not only helped the victims earn back significant amounts of money but also lead to revelation of antitrust violations that would have been difficult to discover otherwise.¹⁷⁷ A reference here with regard to this must be made to the stand-alone action for damages suit heard by the CAT in the case of *Sainsbury's v MasterCard*.¹⁷⁸ In this case, Sainsbury's claim for damages against MasterCard was superseded only by a previous private action precedent, in which MasterCard was involved in a similar Article 101 TFEU infringement relating to the cross border transactions of multilateral interchange fee among European Economic Area countries.¹⁷⁹ The fact that penalties of competition infringements can be successfully determined through private enforcement and without any dependence upon public enforcement findings, provides an ideal reference point for the Directive of the EU to build upon. However, it is yet to be seen how successful it will finally be in its endeavours.

¹⁷⁵ *ibid* para 169.

¹⁷⁶ Robert H. Lande and Joshua P. Davis, 'Benefits from Private Antitrust Enforcement: An Analysis of Forty Cases' (2008) 42 *University of San Francisco Law Review* 879, and Joshua P. Davis and Robert H. Lande 'Towards an Empirical and Theoretical Assessment of Private Antitrust Enforcement' (2013) 36 *Seattle University Law Review* 1269.

¹⁷⁷ Joshua P. Davis and Robert H. Lande, 'Defying Conventional Wisdom: The Case for Private Enforcement' (2013) 48 *Georgia Law Review* 1.

¹⁷⁸ *Sainsbury's v MasterCard*, [2016] CAT 11.

¹⁷⁹ Case C-382/12 P *MasterCard and Others v European Commission* [2014] ECR I-0000.

The Directive being the most watered-down version of all the previous initiatives, namely the *Green Paper*, the *White Paper* and the previous public consultation documents, clearly lacks a definite purpose.¹⁸⁰ In some of the provisions it gives an impression that its major goal is compensatory justice through private actions.¹⁸¹ While at other places it reiterates this objective by being too restrictive on issues of accessibility to evidence by the claimant of the damages suits.¹⁸² It also defaults in bringing in a unified approach to the private enforcement system at the Union level. It gives the Member States a lot of discretion on issues like the quantification of harm, determination of damages and deciding upon the fate of indirect purchasers.¹⁸³ It also does not help in establishing a binding collective actions redress mechanism to strengthen its objective of full compensation or instigate representation of small industries and individual consumers.¹⁸⁴

The Directive also does little to avoid conflict of interests between both the private and the public enforcement regimes. It does not guarantee any absolute security to the applicants of the leniency or settlement programmes against leakage of evidence that they provide to the Commission and the NCAs.¹⁸⁵ The NCs of different Member States are required to take the call on the issue of disclosure of evidence from the Commission or the NCAs. Differing national procedures and codes put the future of the leniency evidence at risk.¹⁸⁶ Moreover, the judgements in the cases of *Donau Chemie* and *Pfleiderer* give more support to the rights of the claimants over protection of leniency programmes.¹⁸⁷ Hence, a lot of clarification is still required with regard to the status of immunity recipients of these programmes and their fate for being charged with damages in case such information is passed on to the victims of competition infringement bringing in damages claims.¹⁸⁸ This

¹⁸⁰ Jones (n 33) 26-27.

¹⁸¹ Directive (n 1), art 1.

¹⁸² *ibid* arts 6(3), 6(4).

¹⁸³ Emmanuela Truli, 'Will Its Provisions Serve Its Goals? Directive 2014/104/EU on Certain Rules Governing Actions for Damages for Competition' [2016] 7 (5) *Journal of European Competition Law & Practice* 299, 306-308.

¹⁸⁴ Bernitz (n 46) 7.

¹⁸⁵ Groussot (n 22) 159.

¹⁸⁶ Truli (n 183) 307.

¹⁸⁷ *Pfleiderer* (n 10) para 32; *Donau Chemie* (n 121) para 43.

¹⁸⁸ Ruth Flaherty 'International Competition Law: The Antitrust Damages Directive Feb 2016' [2017] January 5/1 *Legal Issues Journal*

certainly makes the future of these programmes uncertain and subject to how the Directive shapes up the private enforcement regime in the EU.

Although the Directive lacks in various ways, it brings alive a possibility of an integrated enforcement system (public and private enforcement systems) in the competition law regime of the EU. The conventional administrative system under the EU's public enforcement regime has many deficiencies and needs support of a parallel enforcement framework.¹⁸⁹ It has been evaluated that the success rate of private damages actions is low in the whole of EU, showing a state of underdevelopment. Most of the Member States have no trace of these actions in their regime.¹⁹⁰ Some of the Member States that have a culture of private enforcement show discouraging results of the rates of success of these actions at the courts.¹⁹¹

An example can be taken of Sweden which spearheaded in introducing statutory provisions on private damages actions through its Competition Act 1993. After two decades of bringing in necessary amendments to these provisions, there is just one completed case where the Swedish court has awarded damages for anticompetitive infringement.¹⁹² The majority of the cases brought to the court have failed due to procedural difficulties in establishing these claims against competition infringements.¹⁹³ This shows that the diluted approach which the Directive currently holds towards both compensatory justice¹⁹⁴ and deterrence goals, may not be sufficient in developing an effective private enforcement framework in the near future.

<https://ueaeprints.uea.ac.uk/62430/1/Legal_Issues_Vol5Issue1_R_Flaherty.pdf> accessed 10 April 2017 29-30.

¹⁸⁹ Editorial Comments 'Public enforcement of EU competition law: Why the European antitrust family needs a therapy' [2015] 52 Common Market Law Review 1191-1200.

¹⁹⁰ Ashurst Study (n 50) 1.

¹⁹¹ Report for the European Commission, 'Making antitrust damages actions more effective in the EU: Welfare Impact and Potential Scenarios-Final Report' [2007] Contract DC COMP /2006/A3/012

<http://ec.europa.eu/competition/antitrust/actionsdamages/files_white_paper/impact_study.pdf> accessed 10 April 2017.

¹⁹² *Svea Hovratt* (Svea Court of Appeals), judgement of 19 January 2011 in case T 10012-08, *Euroclear Sweden v Europe Invest Direct et al.*

¹⁹³ Bernitz (n 46) 12.

¹⁹⁴ Maria Ioannidou, *Consumer Involvement in Private EU Competition Law Enforcement* (Oxford University Press 2015) 1-3.

Additionally, the existing ambiguities in its relation to the public enforcement can create greater opposition in its path.

The Directive is a much-needed legislation to help the EU counter the increasing pace of anticompetitive practices worldwide. The Commission after a long struggle finally took a necessary step towards a more harmonised enforcement system through this Directive in the EU. But its numerous lacunae may render it counter-productive for which necessary precaution needs to be taken. However, the Commission has kept an eminent caveat within the Directive as a safety measure against these contemplations. This is the provision which states that the Directive will be reviewed and a subsequent report will be presented on its functioning in 2020.¹⁹⁵ The report may also be accompanied by another legislative proposal.¹⁹⁶ From this, it can be inferred that this Directive may not be the final piece of legislation that will shape the future of private enforcement in the EU ahead. However, at this point of time it may be recognised as an initial step towards an important sector of competition law in the EU. Thus, for now the Directive is an imperative for the competition law regime of the EU with differing consequences.

¹⁹⁵ Directive (n 1), art 20.

¹⁹⁶ Bernitz (n 46) 13.

‘VALUE-OF-TRANSACTION’ THRESHOLD IN EU MERGER
CONTROL: FILING AN ENFORCEMENT GAP OR
OVERCOMPLICATING ALREADY COMPLEX PROCEEDINGS?

Thomas Servières*

‘Useless laws weaken the necessary laws’¹

For some time, competition lawyers and competition law academics are preoccupied by the question of whether competition law should apply to the so-called digital economy. These concerns seem to be mainly directed towards the application of Articles 101 and 102 TFEU to the digital economy, especially in light of the recent Google shopping case. This article seeks to answer a different – although slightly related – question: whether merger control rules should apply to the digital economy and more specifically whether certain types of concentrations in the digital sector create an ‘enforcement gap’ in the EU that would necessitate modifications to the current jurisdictional thresholds. If it is submitted that the general answer to this question be yes, amendments to current merger control provisions should be carefully considered and not be put into effect at all costs.

I. Introduction

The main objective of merger control law is to capture and assess, before their consummation, transactions that may impede competition.² Although most mergers are assumed to be beneficial for consumers and the competitive process,³ some mergers may give rise to competition concerns, especially when the outcome of a transaction is such as to give too much market power in the hands of one company.⁴ Competition authorities are therefore

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¹ Charles de Secondat Baron de Montesquieu *The Spirit of the Laws*.

² Ioannis Kokkoris and Howard Shelanski, *EU Merger Control a Legal and Economic Analysis* (1st edition, Oxford University Press), p. 10.

³ Council Regulation 4064/89/EEC, OJ [1990] L 257/13, recital 3.

⁴ European Commission, ‘Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings’ OJ [2004] C 31/5 (hereafter ‘Horizontal Guidelines’), para 8.

empowered to prevent certain deals to be put into effect in order to protect consumers and the competitive process.

Putting the economic assessment of mergers aside, an important question when it comes to merger control is the question of jurisdiction. As stressed above, most mergers have pro-competitive effects and operations between minor economic actors only have little impact on the markets. Therefore, reporting all potential acquisitions to competition authorities would be too burdensome for both administrative bodies and economic actors. Moreover, according to the ‘local-nexus’ approach, competition authorities should only be able to review transactions having an ‘appreciable effect on [their] jurisdiction.’⁵ Therefore, only potentially problematic transactions having economic effects within their jurisdiction should be notified to the relevant competition authorities. Accordingly, most jurisdictions having merger control provisions put into effect so-called notification procedures obliging (or encouraging) merging parties to notify their operation in jurisdictions where the transaction may have an appreciable impact on competition, for review.

As far as European Union (‘EU’) merger control is concerned, Article 1 of Regulation 139/2004⁶ (‘EUMR’) specifies that all mergers with a ‘Community dimension’ shall be notified to the European Commission (‘Commission’) for review; in other words, the Community dimension test is a matter of jurisdiction that aims at delimitating the scope of the EUMR. Therefore, acquisitions triggering the turnover-based thresholds set out in Article 1 of the EUMR must be notified to the Commission for review in virtue of the ‘one-stop-shop’ principle. Transactions falling short of the turnover-based thresholds of Article 1 should, on the contrary, be notified to National Competition Authorities (‘NCAs’) provided they trigger the notification thresholds set out in the relevant Member States. This system, which is often referred to as the system of double exclusivity, relies on the principles of subsidiarity and proportionality according to which, where competences are shared between the EU and Member States, EU institutions

⁵ International Competition Network, ‘Recommended Practices for Merger Notification and Review Procedures’ (2002) available at: <<http://www.internationalcompetitionnetwork.org/uploads/library/doc588.pdf>> accessed October 14, 2017 (hereafter ‘ICN Recommended Practices’).

⁶ Council Regulation 139/2004 on the control of concentrations between undertakings OJ [2004] L 24/1 (hereafter ‘EUMR’).

shall be empowered to take appropriate actions insofar as the objectives set out in the Treaties cannot be sufficiently achieved by the Member States.⁷

Turnover-based thresholds have the advantage of bringing legal certainty for both competition law enforcers and economic entities. They were introduced at EU-level because they are easily quantifiable, verifiable and they constitute a good proxy for estimating the economic weight of the merging parties in a given territory as well as the cross-border character of this transaction.⁸ In sum, they constitute a convenient way for the Commission to capture most of the potentially problematic mergers having an impact within the EU. Nevertheless, whether turnover thresholds provide a precise reflection of the Community dimension of a transaction has been highly debated since the adoption of the first merger Regulation in 1989. Perhaps the assumed inadequacy of the turnover thresholds is to be found in the fact that they are the product of a political compromise rather than based on economically sound criteria.⁹ As Sir Leon Brittan pointed out, the turnover thresholds constitute nothing less than ‘a blunt and even arbitrary instrument’,¹⁰ which led Bourgeois to conclude that ‘[t]he thresholds criterion could thus be explained as merely serving to identify (...) a class of mergers, which (...) were deemed to be important enough to be subjected to Community control.’¹¹

The fact that the turnover thresholds have been arbitrarily set may therefore entail the Commission to investigate transactions triggering the application of Regulation 139/2004 while failing to factually have a Union dimension or, on the contrary, may allow certain types of transactions to escape the Commission’s scrutiny while arguably having an appreciable cross-border impact on competition in the Community.¹² These two issues heavily rely on the nature of turnover-based thresholds, which face important shortcomings.

⁷ Consolidated Version of the Treaty on European Union [2010] OJ C83/01, Article 5.

⁸ ICN Recommended Practices (n 5).

⁹ See R. Kovar, ‘The EEC Merger Control Regulation’ (1990) 10(1) Yearbook of European Law 71.

¹⁰ Sir Leon Brittan, *Competition Policy and Merger Control in the Single European Market* (1st edition, Grotius Publications LTD., Cambridge 1991), p. 53.

¹¹ J. Bourgeois, ‘EEC Control over International Mergers’ (1990) 10(1) Yearbook of European Law p.103.

¹² See Morten P. Broberg, *Broberg on the European Commission’s Jurisdiction to Scrutinise Mergers* (4th edn, Kluwer Law International 2013), p. 240.

First, they do not constitute a good ‘market power’ proxy,¹³ so that a lot of resources are allocated to review unproblematic mergers or even concentrations not having a ‘Community dimension’.¹⁴ Second, turnover-based threshold might not be well suited to capture certain problematic transactions in the era of the fast-moving-digital economy. This second identified drawback recently came into the spotlight when Commissioner Vestager stated that:

‘The issue seems to be that it's not always turnover that makes a company an attractive merger partner. Sometimes, what matters are its assets. That could be a customer base or even a set of data. In the pharmaceutical sector, it might be a new drug that's been developed but not yet approved for sale. Or a company might be valuable simply because of its ability to innovate. A merger that involves this sort of company could clearly affect competition, even though the company's turnover might not be high enough to meet our thresholds. So by looking only at turnover, we might be missing some important deals that we ought to review.’¹⁵

It can be understood from the above statement that the Commission is concerned that big data-related mergers or certain mergers in the pharmaceutical industry may escape its scrutiny. Although the emergence of digital companies has mainly been beneficial to economic growth and consumers, it has also been identified that big data-related companies may also cause important issues, especially from an antitrust point of view.¹⁶ Competition law enforcers are aware of the new antitrust issues big data-related companies may create. In fact, big data-related companies received a lot of attention from competition law enforcers over the last decade and the very least one can say is that this increasing consideration gave – and still

¹³ European Commission, ‘Green Paper on the review of the Merger Regulation’ COM(96) 19 final [1996] OJ C59 (hereafter ‘1996 Green Paper’), para 31.

¹⁴ For instance, out of the 699 notifications received by the Commission in 2015 and 2016, 626 (89.56%) were cleared unconditionally. See EU Merger Control statistics, available at <<http://ec.europa.eu/competition/mergers/statistics.pdf>> accessed October 14, 2017.

¹⁵ Margarethe Vestager, ‘European Commission, Refining the EU Merger Control System’ (March 2016), available at <https://ec.europa.eu/commission/2014-2019/vestager/announcements/refining-eu-merger-control-system_en> accessed October 14, 2017.

¹⁶ See for instance Maurice E. Stucke and Allen P. Grunes *Big Data and Competition Policy* (1st edn, Oxford University Press 2016).

gives – rise to fierce debates and contestations. Among the three competition law pillars in Europe, merger control is perhaps the one that had to deal the most with big data-related issues as illustrated by a study conducted by the Organisation for Economic Co-operation and Development (‘OECD’) that showed that the number of big data-driven mergers and acquisitions increased from 55 in 2008 to 134 in 2012.¹⁷

In response to these concerns, the European Commission opened in October 2016 a public consultation aiming at improving the EU merger control process and especially its procedural and jurisdictional aspects.¹⁸ Among other considerations, the Commission questioned the need of introducing a ‘size-of-transaction’ threshold in order to capture and therefore have jurisdiction over transactions that would not meet the Community dimension test following the pure turnover-based thresholds as set out in Article 1 of the EUMR. This does not constitute a groundbreaking proposition as some jurisdictions already have value-of-transaction tests as part of their notification system. For instance, since 1976 and the implementation of the Hart-Scott-Rodino Antitrust Improvement Act¹⁹ (‘HSR Act’), the United-States of America have a pre-merger notification process combining both a size-of-person and size-of-transaction tests. More recently, Germany amended its Act against Restraints of Competition (‘ARC’) by introducing a threshold aiming at capturing certain transactions exceeding €400 million in value.²⁰ A similar reform should soon come into force in Austria.²¹

The Commission already questioned the need to insert a value-of-transaction threshold in EU merger control. At that time, less than 10% of the respondents – mostly practitioners and businesses – were in favour of introducing such a new criterion.²² It seems like this sceptical point of view is still shared

¹⁷ OECD, ‘Data-driven Innovation for Growth and Well-Being’ (2014) available at <<https://www.oecd.org/sti/inno/data-driven-innovation-interim-synthesis.pdf>> (hereafter ‘OECD study on data-driven mergers’) accessed October 14, 2017, p. 11.

¹⁸ Commission (EC), ‘Consultation on Evaluation of procedural and jurisdictional aspects of EU merger control’ <http://ec.europa.eu/competition/consultations/2016_merger_control/index_en.html> accessed October 14, 2017 (hereafter ‘Public Consultation’).

¹⁹ Clayton Antitrust Act, 15 U.S.C. § 18 a (2012) (hereafter ‘HSR Act’).

²⁰ Section 35(2) ARC.

²¹ See e.g. Natalie Harsdorf, ‘Digital Economy: New Test in Austrian Merger Control’ (2017) 8(6) *Journal of European Competition Law & Practice*.

²² European Commission, ‘Green Paper on the Review of Council Regulation 4064/89’ COM(2001) 745 [2001], Annex 1 (hereafter ‘Annex 1 to the 2001 Green Paper’), para 23.

nowadays. Indeed, the Commission has recently published the answers to the public consultation provided by third parties and acknowledged that ‘the majority of respondents do not see any need for introducing complementary jurisdictional thresholds’ mainly because there would be no sufficient empirical evidence of the existence of an enforcement gap.²³

This article, however, adopts a different stance. It is submitted, in Section II, that there indeed exists an enforcement gap and more importantly that this enforcement gap is likely to expand over the coming years so that appropriate regulatory answer is needed. Section III, on the other hand, discusses the design a new ‘size-of-transaction’ test could take should it be introduced at EU-level. Finally, section IV concludes.

For the sake of clarity, it is also worth mentioning that, although much emphasis will be placed on data-driven mergers, this article does not intend to take part to the on-going debate as to whether antitrust instruments are well suited to substantially assess issues arising from the new fast-moving digital economy and thus tackle them. Rather, the recent increase in the number of data-driven mergers constitutes an appropriate economic context to ascertain whether there indeed exist empirical evidences of an enforcement gap.

II. An Enforcement Gap to Fill?

The Commission explains the rationale behind the public consultation as follows:

‘[P]layers in the digital economy may have considerable actual or potential market impact that may be reflected in high acquisition values, although they may not yet generate any or only little turnover. Acquisitions of such companies with no substantial turnover are likely not captured under the current turnover-based thresholds triggering a notification under the EU Merger Regulation, even in cases where the acquired company already plays a competitive role, holds commercially valuable data, or has a considerable market potential for other reasons. It has been suggested to complement the existing turnover-based

²³ European Commission, ‘Summary of replies to the Public Consultation on Evaluation of procedural and jurisdictional aspects of EU merger control’ available at <http://ec.europa.eu/competition/consultations/2016_merger_control/summary_of_replies_en.pdf> accessed October 14, 2017, p. 5.

jurisdictional thresholds of the EU Merger Regulation by additional notification requirements based on alternative criteria, such as the transaction value.²⁴

The Commission came to such a conclusion after it identified several cases escaping its scrutiny and over which it would have liked to have jurisdiction. Nonetheless, in the absence of statistical analysis estimating the number of new concentrations that would be notified to the Commission in case the institution introduces a size-of-transaction threshold, it is unclear whether there indeed exists a real need for intervention. For instance, if the new threshold sets out by the Commission is such as to capture only a limited number of new transactions – let’s say, for the sake of illustration, less than ten per year – not giving rise to competition concerns for the most part, would the intervention still be justified? The Commission indeed should take into account the concerns expressed by businesses and practitioners. Although in the less than ten new cases scenario a new threshold may capture new transactions previously escaping the Commission’s scrutiny, it would have to be considered by every company envisaging to merge and would therefore constitute a new burden on them, thus increasing legal costs and decreasing legal certainty. Concerning practitioners, assessing the exact value of the transaction may turn out to be extremely complex and time consuming under certain circumstances. Would this new burden worth having jurisdiction over only a limited number of new transactions?

Therefore, after the consultation process, the Commission will have to strike a balance between a real need for intervention and the necessity not to impede companies’ freedom to do business to a disproportionate extent. But before discussing these issues, it is worth reminding the current state of play in EU merger control as far as the jurisdictional provisions are concerned.

1. The Current Means of Exerting Jurisdiction Over Mergers for the Commission

Not only has the Commission jurisdiction over mergers and acquisitions triggering the notification thresholds set out in Article 1 of the EUMR,

²⁴ Questionnaire for public consultation available at http://ec.europa.eu/competition/consultations/2016_merger_control/index_en.html accessed October 9, 2017 (hereafter ‘Consultation questionnaire’), Section IV.

transactions falling short of the jurisdictional thresholds may also be referred from NCAs to the Commission thanks to the so-called referral procedure.

1.1 . The Current Jurisdictional Thresholds in EU Merger Control

Regulation 139/2004 makes perfectly clear that the European Commission has sole jurisdiction to review concentrations falling within its scope.²⁵ Therefore, concentrations having a Community dimension are assessed by the Commission on the behalf of the 28 EU Member States – plus Iceland, Lichtenstein and Norway where the concentration has a European Economic Area ('EEA') dimension.²⁶ The Commission's exclusive jurisdiction has the double advantage of bringing legal certainty to merging parties since the assessment can only lead to one final outcome, while reducing their legal costs by only reporting their transaction to one competition authority within the EU (or the EEA). Therefore, Article 1 of the EUMR acts as a 'cases allocator'. Concentrations falling foul the Merger Regulation are reviewed by the Commission, while transactions falling short of the EUMR have to be notified to the relevant NCAs.

The criterion for a concentration to be assessed by the Commission is to have an 'appreciable economic impact on the Community',²⁷ this is the so-called Community dimension test. Another way to put this is to say that merging parties should benefit from the one-stop-shop principle where their transaction have cross-border or involve so-called 'spill-over' effects.²⁸ One way to screen the economic presence of economic agents and the potential economic impact of a concentration in a jurisdiction is to look at the turnovers the merging parties generate in this jurisdiction. According Article 5 of the EUMR and to the Jurisdictional Notice, the thresholds set out in Article 1 of the EUMR 'require turnover to be allocated geographically to the Community and to individual Member States.'²⁹ Therefore, both the General Court and the Commission have recognised the application of Regulation 139/2004 to

²⁵ EUMR (n 6), Article 21.

²⁶ Agreement on the European Economic Area [2004] OJ L130/3.

²⁷ See Kokkoris and Shelanski (n 2), p. 156.

²⁸ Richard Burnley, 'An Appropriate Jurisdictional Trigger for the EC Merger Regulation and the Question of Decentralisation', 25(3) World Competition (2002) 263.

²⁹ Commission Consolidated Jurisdictional Notice under Council Regulation (EC) 139/2004 on the control of concentrations between undertakings [2008] OJ C 95/01, para 195.

mergers involving companies established outside of the Community,³⁰ this is the so-called doctrine of effect. Therefore, Article 1 of the EUMR designs the Community dimension test based on both Community-wide and worldwide turnovers. However, purely turnover-based thresholds are used for reasons of practicality and legal certainty since ‘the Community dimension of a concentration should ideally be defined on the basis of its effects on the market.’³¹ Yet, the effectiveness of the turnover thresholds over the last 28 years has been widely appreciated by both competition law enforcers and businesses. As *Kadar* pointed out:

‘Turnover figures are generally clear and relatively easily accessible, and the system has been tested for more than 25 years. Moreover, the system today is generally recognised to be workable and effective in identifying in most of the cases the transactions that are capable of producing cross-border anticompetitive effects.’³²

The Community dimension test, giving sole jurisdiction to the European Commission over transactions having cross-border impact within the EU, is passed where the criteria displayed in Articles 1(2) and 1(3) of the EUMR are met. According to Article 1(2) EUMR, a concentration is assumed to have a Community dimension when the combined aggregate worldwide turnover of all the undertakings concerned is more than €5 billion and the aggregate Community-wide turnover of each of at least two of the merging entities is more than €250 million; unless each of the merging parties achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State. In a 2009 document, the Commission acknowledged that Article 1(2) of the EUMR constitutes the legal basis for the clear majority of cases reported to the institution and that it operates in a satisfactory manner.³³

Article 1(3) of the EUMR was introduced in 1998 and was aiming at capturing concentrations falling short of Article 1(2) thresholds.³⁴ Prior to 1998,

³⁰ Case T-102/96 *Gencor v Commission* [1998] ECR II-0753. *Boeing/McDonnell Douglas* (Case No. IV/M.877) Commission Decision (97/816/EC) [1997] OJ L 336/0047.

³¹ 1996 Green Paper para 31.

³² Massimiliano Kadar, ‘European Union competition law in the digital era’ (2015) 4 *Zeitschrift für Wettbewerbsrecht* 342, 358.

³³ European Commission, ‘Communication from the Commission to the Council - Report on the functioning of Regulation No 139/2004’ COM(2009) 0281 final [2009], Staff Working Document (hereafter ‘SWD accompanying the 2009 Communication’).

³⁴ Council Regulation (EC) No 1310/97 of 30 June 1997 amending Regulation (EEC) No 4064/89 on the control of concentrations between undertakings [1997] OJ L180/1, Article 1.

transactions not meeting the turnovers requirements of Article 1(2) had to be notified in several Member States, the consequence of which was to deprive merging parties from benefiting of the ‘one-stop-shop’ principle. Therefore, Article 1(3) was introduced to avoid multiple filing and to make EU merger control more effective and more coherent. According to Article 1(3) of the EUMR, a concentration that does not meet Article 1(2) criteria will still be deemed as having Community dimension if the combined aggregate worldwide turnover of the economic entities involved is more than €2.5 billion; in each of at least three Member States, the combined aggregate turnover of all the merging parties is more than €100 million; in each of the three Member States concerned, the aggregate turnover of each of at least two of the undertakings concerned is more than €25 million and the EU-wide turnover of at least two of the undertakings concerned exceeds €100 million; unless each of the merging entities obtains more than two-thirds of its Community-wide turnover within one of the same Member State. Nevertheless, the effectiveness of Article 1(3) of the EUMR is questionable. Although the Commission acknowledged that it indeed ‘significantly contributed to a proper allocation of cases’³⁵ by avoiding ‘multiple filings in a large number of cases’,³⁶ Article 1(3) of the EUMR constitutes the legal basis for only a limited number of cases reported to the Commission.³⁷

In sum, Articles 1(2) and 1(3) of the EUMR provides three thresholds. The first threshold concerns the worldwide turnover, which reflects the importance of the undertakings involved in the transaction but does not show anything about the potential effects of the operation within the Community. The second threshold relates to the Community-wide turnover, which aims at ensuring that the concentration has a connection to the Community territory, this is the so-called local nexus requirement. This second threshold is the only one that possesses ‘a (somewhat vague) qualitative element’³⁸ since it reflects the economic importance of the merging parties in the Community. Finally, the third threshold (i.e. the two-third rule) aims at drawing a line between concentrations having a Community dimension and concentrations having a

³⁵ SWD accompanying the 2009 Communication (n 33).

³⁶ *Ibid.*

³⁷ *Ibid.*

³⁸ Broberg (n 12), p. 287.

merely National dimension despite the importance of the companies involved in the transaction.

In light of the above, it also appears that the turnover thresholds set out in Article 1 of the EUMR are in accordance with the International Competition Network ('ICN') recommendations.³⁹ The organisation recommends notification thresholds to be 'clear and understandable' and to be 'based on objectively quantifiable criteria'.⁴⁰ The turnover-based thresholds of the EUMR undeniably satisfy these criteria. Moreover, the Jurisdictional Notice previously mentioned, read concomitantly with Article 5 of the EUMR, constitutes a comprehensive guide helping practitioners at accurately calculating turnover figures, so that assessing whether a transaction falls foul Regulation 139/2004 has become a common and easy practice for competition law practitioners. Finally, turnover thresholds constitute a convenient tool enabling competition authorities to assess most of the potentially problematic mergers. However, there exists a risk that potentially harmful mergers could escape the Commission's scrutiny, especially in the fast-moving digital economy and the pharmaceutical sector. Therefore, the EUMR already contains safety net mechanisms that allow the Commission to review concentrations falling short of the turnover thresholds.

1.2. Referral Mechanisms

The Merger Regulation contains some mechanisms allowing concentrations that do not possess a Community dimension but may involve significant cross-border effects to be referred from Member States to the Commission, thus reducing the rigid division of competencies established by Articles 1 and 21 of the EUMR.⁴¹ On the contrary, concentrations possessing a Community dimension but only producing substantial effects within one jurisdiction can be referred from the Commission to the relevant Member States. The referral procedures do not constitute a right for competition authorities, like in voluntary notification jurisdictions, to review on-going mergers failing to be notified like, for instance, the UK Enterprise Act enabling the CMA to open an investigation on its own initiative where a transaction fails to be notified

³⁹ ICN Recommended Practices (n 5).

⁴⁰ Ibid, p. 3.

⁴¹ A. Soares, "'National Champions' Rhetoric in European Law Or the many face of protectionism' (2008) 31(3) World Competition 353.

but can give rise to competition concerns.⁴² Rather, the referral procedure constitutes a voluntary mechanism enabling the merging parties, NCAs or the Commission to request the operation being investigated by a particular competition authority.

For the purpose of this article, it is only worth describing the procedures that allow the Commission to review operations that fell short of the turnover thresholds set out in Article 1 of the EUMR.

Article 4(5) of the EUMR, on the one hand, allows merging parties to request their operation being investigated by the Commission where this concentration is capable of being reviewed by at least three NCAs. This request – which must take place during the pre-notification phase – must take the form of a reasoned submission that is transmitted to the Commission. Member States that are in principle competent to review the merger in question can disagree with the request within 15 working days but, if none of them express disagreement, the operation is deemed as having a Community dimension. Accordingly, Article 4(5) referral procedure is a jurisdictional tool that aims at making merging parties benefiting from the one-stop-shop principle where their operation may be subject to multiple filings and thus exposed to contradictory regulatory outcomes.

Article 22 of the EUMR procedure, on the other hand, takes place during the post-notification phase and allows Member States to request the Commission to investigate mergers not having a Community dimension but which may ‘affect trade between Member States and threaten to significantly affect competition within the territory of the Member State or States making the request.’ In sum, Article 22 of the EUMR allows Member States to request the Commission to investigate potentially harmful mergers despite the absence of Community dimension where there exists a belief that DG Comp services are better placed and better equipped to tackle potential competitive harm that may arise from such concentrations.

Overall, the Articles 4(5) and 22 of the EUMR constitute a safety net tool that allows the Commission to extend its jurisdiction prerogatives under certain circumstances. However, as will be demonstrated in the next part, turnover thresholds coupled with referral mechanisms are not totally hermetic and

⁴² Enterprise Act 2002, Section 23.

certain cross-border operations have escaped the Commission's scrutiny over the last decade.

2. A Real Need for Intervention?

As demonstrated so far, turnover thresholds coupled with referral mechanisms seem to constitute appropriate instruments to capture the vast majority of concentrations having a Community dimension. Moreover, as regards turnover thresholds, their practicality and their faculty to bring legal certainty are widely appreciated by competition law enforcers and practitioners. Nonetheless, the Commission identified that they may not anymore constitute appropriate tools and that certain high-profile concentrations may escape the Commission's scrutiny. This is especially the case in the digital and pharmaceutical industries whereby big industry players buy highly innovative start-ups before they can even monetise their new products or services, i.e. before they can generate turnover.⁴³ However, as explained in the previous section, turnovers do not constitute a good proxy for estimating the potential effects of a transaction on the market. Therefore, concentrations not having a Community Dimension according to Article 1 of the EUMR may still have an impact within the EU and be harmful for both customers and consumers, especially when the concentration eliminates a fast-growing new competitor, impedes innovation or is such a to grant too much market power to one undertaking.⁴⁴

The Commission decided to open the public consultation after it identified several high-profile cases that have – or might have – escaped its scrutiny. These cases not meeting the Article 1 of the EUMR thresholds, while undeniably having a Community dimension from an economic perspective, can be divided into three categories. First, there are concentrations not meeting the turnover thresholds but over which the Commission ultimately had jurisdiction thanks to the referral procedure. Second, some cases fell short of the Commission's jurisdiction but were assessed by national competition

⁴³ Consultation questionnaire (n 24), section IV.

⁴⁴ Johannes Laitenberg, CRA Annual Brussels Conference: Competition and Innovation (December 9 2015), available at <http://ec.europa.eu/competition/speeches/text/sp2015_04_en.pdf> accessed October 14, 2017.

authorities. Finally, some high-profile transactions escaped both the Commission and NCAs scrutiny.

2.1. Concentrations Falling Short of the Turnover Thresholds but Ultimately Investigated by the Commission

Under certain circumstances, Regulation 139/2004 allows the Commission the review mergers not having a Community dimension thanks to the referral procedure described above. For this section, it is worth noting that the Commission assessed high-profile concentrations escaping its scrutiny in the first place. As far as the digital sector is concerned, two highly discussed cases need to be mentioned.

The first operation that needs to be mentioned is the €2.3 billion acquisition of DoubleClick by Google.⁴⁵ The concentration failed to pass the Community dimension test but was capable of being assessed by the NCAs of five Member States, namely Germany, Greece, Portugal, Spain and the United Kingdom, so that the merging parties decided to refer the case to the Commission.⁴⁶ Although the Commission cleared the concentration unconditionally, the very least one can say is that the operation received a lot of public attention and that the outcome of the decision has been widely discussed.⁴⁷ Google is famously known for its Internet search engine, its mobile operating system Android or its video-sharing website YouTube. Google was – and is still – also active on the online advertising market, from which it derives most of its income,⁴⁸ by providing online advertising space on its own websites and those of its partners.⁴⁹ Back in 2007, DoubleClick was also active on the online advertising market but was one of the major providers of advertising technology, rather than ad space.⁵⁰ The Commission concluded that suppliers of ad space and ad serving technologies sell

⁴⁵ *Google/DoubleClick* (Case COMP/M.4731) Commission decision C(2008) 927 [2008] OJ C184/10 (hereafter ‘Google/DoubleClick’).

⁴⁶ *Ibid.*, para 7.

⁴⁷ See e.g. Stephen Lewis and Andrea Lofaro, ‘Google/DoubleClick: the search for a theory of harm’ (2008) 29(12) *European Competition Law Review* 717.

⁴⁸ For an extensive discussion see Anca D Chirita, ‘Google’s Anti-Competitive and Unfair Practices in Digital Leisure Markets’ (2015) 11(1) *Competition Law Review* 109.

⁴⁹ *Ibid.*

⁵⁰ *Google/DoubleClick*, para 5.

complementary rather than overlapping products, so that Commission carried out an analysis of the potential competitive effects of a vertical merger.⁵¹

Vertical mergers are assumed to be less problematic than horizontal mergers.⁵² However, vertical mergers may give rise to competition concerns, especially if they can give rise to anticompetitive foreclosure.⁵³ The Commission adopted an interesting reasoning and was not only concerned about the possible anticompetitive foreclosure arising from the merger, as it usually does, but also considered horizontal effects and especially the merged entity ability to raise prices.⁵⁴ This is because complainants expressed the concern that, under certain circumstances, services provided by the merging parties could be seen as substitutes, which brought some authors to identify a ‘diagonal merger’ rather than a purely vertical one.⁵⁵ The Commission heard these concerns and after conducting an extensive economic analysis for the two theories of harm – the decision is almost 100 pages long – came to the conclusion that both anticompetitive foreclosure and price increase were unlikely to arise after the merger because of the competitive constraints faced by the merging parties and switching costs of customers.⁵⁶ The concentration was finally cleared unconditionally.

Another operation that needs to be discussed is the \$19 billion acquisition of WhatsApp by Facebook.⁵⁷ This operation is most certainly the one that incentivised the Commission to start the 2016 public consultation.⁵⁸ As for the Google/DoubleClick merger, the operation fell short of the EUMR but was ultimately referred to the Commission since it was capable of being reviewed by the competition authorities of three undisclosed Member States. Facebook is famously known for running the social network of the same name and also provides a consumer communication app *Facebook Messenger* or simply *Messenger*. WhatsApp, on the other hand, is a provider of consumer communications services via the mobile app *WhatsApp*. Similarly to Google,

⁵¹ Ibid, para 55.

⁵² European Commission, ‘Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings’ [2008] OJ C265 (hereafter ‘Non-horizontal Merger Guidelines’), para 11.

⁵³ Ibid, para 18.

⁵⁴ *Google/DoubleClick*, para 359 and 366.

⁵⁵ Lewis and Lofaro (n 47), p. 720.

⁵⁶ *Google/DoubleClick*, para 295.

⁵⁷ *Facebook/WhatsApp* (Case COMP/M.7217) Commission Decision C (2014)7239 [2014] OJ C417/4 (hereafter ‘Facebook/WhatsApp’).

⁵⁸ See e.g. Consultation questionnaire (n 24), question 14.

Facebook sells online advertising space, while at the time of the concentration, WhatsApp was not active on such a market. Accordingly, the merger mainly had a horizontal dimension.

Although the merger was cleared unconditionally, the Commission identified several theories of harm that, under certain circumstances, could have raised serious doubts as to its compatibility with the internal market. Among them, one received a lot of attention lately. Back in 2014, the Commission indeed identified that:

‘[T]he Transaction could nevertheless have the effect of strengthening Facebook's position in the online advertising market, thereby raising serious doubts as to its compatibility with the market. (...) According to this possible theory of harm, post-transaction, the merged entity could introduce targeted advertising on WhatsApp by analysing user data collected from WhatsApp's users (and/or from Facebook users who are also WhatsApp users). This would have the effect of reinforcing Facebook's position in the online advertising market or sub-segments thereof.’⁵⁹

Against this background, the notifying parties argued that WhatsApp data was of negligible utility for Facebook and that they did not intend to modify the way WhatsApp was collecting users data.⁶⁰ The Commission finally came to the conclusion that, given the important amount of Internet user data valuable for advertising purposes that is not under Facebook's control, the merger was unlikely to give rise to competition concerns.⁶¹ However, on May 2017, the Commission fined Facebook €110 million on the basis that the US-based company delivered misleading information to the Commission, especially regarding the use and collection of WhatsApp users' data.⁶² A statement of objection was sent in the end of 2016, soon after WhatsApp changed its privacy policy, allowing its users to link their WhatsApp phone number with their Facebook account. Although this fine does not impact the outcome of the Commission's clearance decision, it sends a clear signal that competition

⁵⁹ *Facebook/WhatsApp*, para 168.

⁶⁰ *Ibid*, para 169 and 170.

⁶¹ *Ibid*, para 179.

⁶² *Facebook/WhatsApp* (Case COMP/M.8228) Commission Decision C (2017) 3192 final [2017] OJ C417/4 not yet reported.

authorities should be more concerned about potential competition issues and especially about interlinks that may exist or may be developed between the acquirer and the target company.⁶³

What has been demonstrated in this section is that the EUMR already contains mechanisms allowing the Commission to have jurisdiction over concentrations not having a EU dimension. It is also worth noting that the two mergers described above were involving digital companies and raised new, or at least uncommon, competition concerns. Among them, the junction between data protection and competition law is of particular relevance. Although the Court of Justice of the European Union ('CJEU') and the Commission ruled that personal data-related issues are not as such a matter of competition law,⁶⁴ some authors are calling for data protection law to have 'a material influence on competition law'.⁶⁵ As far as EU merger control is concerned, the same authors argue that data protection law could be used as a yardstick to identify and tackle factors that may impede, post-merger, non-price conditions on the market such as quality or incentives to innovate.⁶⁶ In addition, the European Data Protection Supervisor ('EDPS') argued that competition and data protection law could work conjointly to assess the long-term impact of digital mergers on consumers.⁶⁷ Data protection considerations could thus have an important role to play in the assessment of certain types of concentrations in the future provided the Commission has jurisdiction over such transactions.

Therefore, although those two mergers have been cleared unconditionally, they might have led to a substantial impediment to effective competition and could have been blocked under certain circumstances. Therefore, in the public interest, the Commission must have jurisdiction over this kind of cases. As demonstrated above, the referral procedure allows the Commission to review

⁶³ It should nevertheless be noted that in *Microsoft/LinkedIn* (Case COMP/M.8124) Commission Decision C(2016) 8404 [2016] OJ C388/4, the Commission took due account of the possible interlinks that may have existed between the merging parties *post* merger.

⁶⁴ Case C-238/05, *Asnef-Equifax* [2006] ECR I-11125, para 63. *Facebook/WhatsApp*, para 164.

⁶⁵ Francisco Costa-Cabral and Orla Lynksey, 'Family ties: the Intersection between Data Protection and Competition in EU Law' (2017) 54 *Common Market Law Review* 11, p.49.

⁶⁶ *Ibid*, p. 37.

⁶⁷ European Data Protection Supervisor, 'Opinion 8/2016 On the coherent enforcement of fundamental rights in the age of big data world' 2016 p. 11 available at <https://edps.europa.eu/sites/edp/files/publication/16-09-23_bigdata_opinion_en.pdf> accessed October 14, 2017.

certain concentrations not having a Community dimension. However, certain high-profile mergers escaped the Commission's scrutiny and had to be assessed by NCAs.

2.2. Concentrations Involving Cross-Border Effects but Investigated by NCAs

Concentrations not passing the Community dimension test may still be reviewed by NCAs provided they trigger their own notification thresholds. This is the natural order of things since Article 1 of the EUMR acts as a cases allocator, granting the Commission sole jurisdiction over cases impacting the Community but letting Member States applying their own merger control provisions over cases only having a limited effect within the EU or having a particular influence within one Member State jurisdiction.⁶⁸ For instance, Articles 1(2) and 1(3) of the EUMR contains a 'two-thirds rule' allowing a particular NCA to review a concentration having a Community Dimension but only having a major impact within its own jurisdiction.

However, there might be instances where a transaction indeed involves cross-border effects in the Community but fails to trigger the notification thresholds set out in the EUMR. But escaping review by the Commission does not necessarily mean that a concentration will not ultimately be referred to the Commission as shown in the previous section. Indeed, the conditions for a referral to the Commission are not always met, especially where the concentration is only capable of being reviewed in only one Member State. Such a scenario is likely to happen in jurisdictions operating alternative jurisdictional thresholds, such as the United-Kingdom for instance. In the United-Kingdom, a concentration can be notified to the Competition and Market Authority ('CMA') if a relevant merger situation is created. Besides exceeding a certain turnover-based threshold, a merger situation may alternatively be created if the transaction results in a merging entity supplying more than 25% of goods or services of a description within the UK or a substantial part of it.⁶⁹ This notification threshold, not based on turnover considerations, allowed the Office of Fair Trading ('OFT'), that became the

⁶⁸ EUMR, recital 12.

⁶⁹ Enterprise Act 2002 Sections 23(3)(a) and (b); and 24(4)(a)(b).

CMA in 2013, to review cross-border mergers escaping the Commission's scrutiny.

The first concentration that needs to be mentioned is the \$1 billion acquisition of Instagram by Facebook in 2012.⁷⁰ The OFT launched an own-initiative merger investigation and concluded that a merger situation was indeed created in the UK following the share-of-supply test.⁷¹ The OFT identified both horizontal and vertical theories of harm and mainly discussed whether the concentration could lead to a substantial lessening of competition in the supply of photos apps and whether the merging entity could have the ability and incentives to foreclose rival social networking platforms. However, considering the important competitive constraints faced by the merging parties and the lack of incentives to foreclose competitors, the concentration was allowed to proceed without any extensive assessment.⁷²

Another cross-border merger escaping the Commission jurisdiction but reviewed by the OFT is the acquisition of the Israeli mapping services supplier Waze by Google in 2013 for \$1.3 billion.⁷³ Similarly to the previous transaction, the OFT launched an own-initiative merger investigation and came to the conclusion that a relevant merger situation was created following the share-of-supply test.⁷⁴ Once again, the OFT identified several theories of harm that could have led to a substantial lessening of competition but decided to not challenge the merger because Waze was not constituting a strong competitive constraint on Google Maps.⁷⁵

The two transactions mentioned above undeniable had a cross-border impact within the EU. They were both involving an Internet giant as the acquirer and a fast-growing challenger that had already built-up an important customer base as the target. Although these two transactions did not fully escape antitrust scrutiny in Europe, it is submitted that, from a regulatory point of view, a cross-border concentration investigated by only one NCA in the EU is totally unsatisfactory. The obvious reason behind this assertion is because the scope of control is much narrower than for an investigation conducted by

⁷⁰ Case ME/5525/12, *Facebook/Instagram*, OFT decision of 14 August 2012.

⁷¹ *Ibid*, para 4.

⁷² *Ibid*, para 47.

⁷³ Case ME/6167/13, *Motorola Mobility Holding/Waze Mobile*, OFT decision of 11 November 2013.

⁷⁴ *Ibid*, para 11.

⁷⁵ *Ibid*, para 89.

the Commission. National law provisions only apply within one Member State and investigations conducted by NCAs only focus on their own market.⁷⁶ Moreover, with due respect to the CMA which has always been ranked as one of the top competition authorities in the world in terms of competition law enforcement,⁷⁷ it is respectfully submitted that the Commission services are better equipped to investigate transactions of this size, what is more, especially when they are likely to involve cross-border effects.

In conclusion, it is argued that there indeed exists an enforcement gap to be filled as far as EU merger control is concerned. The turnover-based thresholds used in combination with the referral procedure may, under certain circumstances, not constitute an appropriate tool to identify and tackle all data-driven mergers or mergers in the pharmaceutical industry.

2.3. Concentrations That Escaped Antitrust Scrutiny in Europe

There are also transactions escaping both the Commission and NCAs' scrutiny. This category of cases is most certainly the one that would justify a change in the jurisdictional thresholds the most. By escaping any regulatory review in Europe, these concentrations may indeed turn out to impede effective competition and ultimately harm consumers. It would be quasi-impossible to identify every transaction having a cross-border impact within the Community but failing to be notified to the Commission. Nonetheless, characterising certain of these transactions can constitute a good indication that there indeed exists an enforcement gap needing to be filled.

In the public consultation, the Commission identified the \$21 billion acquisition of Pharmacyclics by AbbVie⁷⁸ as a transaction 'which had a cross-border effect in the EEA but were not captured by the current turnover thresholds set out in Article 1 of the Merger Regulation and thus fell outside the Commission's jurisdiction'.⁷⁹ After a carefully conducted research, the author has not been able to identify any notification within a Member State jurisdiction, despite the important value of the transaction. AbbVie is a US-

⁷⁶ Case T-411/07, *Aer Lingus v Commission* [2010] ECR II-03691, para 90. See also EUMR, Article 21.

⁷⁷ See e.g. Global Competition Review, 'Rating Enforcement 2016'.

⁷⁸ Consultation questionnaire (n 24), question 15.

⁷⁹ *Ibid.*

based pharmaceutical company generating billions of dollars of revenue, while Pharmacyclics is an US-based biopharmaceutical company that only started to generate significant turnover in Europe after it received the regulatory authorisations to market its blockbuster product named *Imbruvica*, a drug used in the treatment of rare forms of blood cancer.

The Commission did not explain why the transaction fell short of its jurisdiction, neither why the transaction has not been assessed by any NCA. Nevertheless, it seems like the transaction fell short of the EUMR because it was not having a sufficient local nexus. The timing of the transaction is important because this might explain why the transaction was not having a sufficient local nexus back in 2015. The transaction has been closed in March 2015, only five months after Pharmacyclics received the marketing authorisation to supply *Imbruvica* within the European Union. Therefore, it seems very unlikely that in such a short period of time the company was able to achieve the Community-wide turnover requirements set out in Articles 1(2) and 1(3) of the EUMR. Nowadays, according to AbbVie latest financial results, *Imbruvica* generated almost \$2 billion of revenues for the company, including \$252 million generated outside of the United-States.⁸⁰ These figures constitute a good example that the market value of a target company is not always the money it generates at the time the merger occurred, but sometimes the intellectual property rights ('IPRs') it holds or its highly innovative characteristics.

Another and perhaps more appealing – in the sense that the transaction involves two internationally famous tech companies – example of transactions that escaped merger review in Europe is the acquisition of YouTube by Google in 2006.⁸¹ The merger escaped antitrust scrutiny in Europe simply because YouTube was not generating any turnover at that time. The reasons why the merger did not give rise to important concerns back in 2006 are totally understandable. First, the Internet was not as it is now and, to put things in perspective, Facebook social network was for instance not even publicly available to anyone at the time of the merger. Second, video-sharing platforms were still in their infancies. For instance, YouTube 'only'

⁸⁰ Available at <<https://news.abbvie.com/news/abbvie-reports-full-year-and-fourth-quarter-2016-financial-results.htm>> accessed October 14, 2017.

⁸¹ A. Ross Sorkin and J. Peters, 'Google to Acquire YouTube for \$1.65 Billion' (2006) New-York Times, available at <<http://www.nytimes.com/2006/10/09/business/09cnd-deal.html>> accessed October 9, 2017.

had 50 million users worldwide when it has been taken over by Google.⁸² Third, as far as the Internet and high-tech markets are concerned, the focus of competition authorities was much more directed towards high-tech companies already holding substantial market power but having business-models much closer to traditional manufacturing companies such as Microsoft⁸³ or Intel.⁸⁴

However, it is submitted that competition concerns could have been identified in 2006, provided the Commission was entitled to investigate the transaction. The main concern that could have been identified is that the transaction not only eliminated the fastest growing website across the globe,⁸⁵ it also eliminated a nascent competitive constraint to the Google Videos service that could have competed with Google on the selling of ad space within the following years of its development. Nevertheless, the purpose of this article is not to predict whether this transaction was compatible with the internal market at the time of its completion. It is however worth noting that, in light of the recent huge fine imposed on Google by the Commission⁸⁶ – the biggest fine ever imposed on an individual company in Europe – it is certain that retroactively thinking, the Commission would have had liked to investigate this transaction.

The purpose of this section was not to identify every transaction that escaped merger review in Europe while having an undeniable economic impact within the Community but rather to identify types of transactions that attest of the existence of an enforcement gap in EU Merger Control. Considering the above, it has been identified that there indeed exist cases undeniably having a cross-border effects but escaping the Commission's scrutiny and put into effect without any review within the European Union.

⁸² Ibid.

⁸³ Case T-201/04 *Microsoft v Commission* [2007] ECR II-3601.

⁸⁴ Case T-286/09 *Intel Corp v European Commission* [2014] ECR O

⁸⁵ See e.g. Pete Cashmore, 'Youtube is the World's Fastest Growing Website' available at <<http://mashable.com/2006/07/22/youtube-is-worlds-fastest-growing-website/#3YAu3hxVNZqX>>.

⁸⁶ Although it should be mentioned that this fine is not related to Youtube at all. See European Commission – Press Release, 'Antitrust: Commission fines Google €2.42 billion for abusing dominance as search engine by giving illegal advantage to own comparison shopping service' (2017) available at <http://europa.eu/rapid/press-release_IP-17-1784_en.htm>.

As for the previous category of transactions, the two transactions described above were involving a giant in their respective industry as the acquirer and a fast growing competitor either holding a substantive customer-base or holding an intellectual property right capable of generating substantive turnover within the following years as the target. There is no big difference between this category of transactions and the one described in the previous section but the fact that the merging parties were not active enough in the UK to satisfy the share of supply test. Moreover, considering the characteristics of the digital and pharmaceutical industries, similar transactions are likely to surge over the coming years⁸⁷ so that an appropriate regulatory answer is needed to fill the enforcement gap, especially when the risks of incomplete merger control enforcement are taken into consideration.

3. Risks of an Incomplete Merger Control Enforcement

‘[T]he basic objective of competition policy is to protect competition as the most appropriate means of ensuring the efficient allocation of resources – and thus efficient market outcomes – in free market economies.’⁸⁸ Accordingly, as part of competition policy pillars, merger control is not simply about preventing anticompetitive concentrations that may lead to future abuses on the market from arising, it is also about maintaining competitive markets that lead to better outcomes for consumers.⁸⁹ In other words, merger control can be seen as a tool that aims at protecting competition on the market, thus enhancing consumer welfare in the EU.

As far as notified deals are concerned, the EUMR acts as a corrective mechanism that aims at tackling the competition concerns the Commission may identify. This can be done through the imposition of remedies or, in the worst scenario, by simply blocking the notified concentration. In the majority of these problematic cases, the Commission is concerned that, post-merger, the merging entity may have the ability and incentives to raise prices thanks to its enhanced market power or by affecting the structure of the market.⁹⁰ It is therefore possible to estimate consumers’ benefits from merger policy by

⁸⁷ OECD study on data-driven mergers (n 17).

⁸⁸ OECD, ‘Competition Policy and Efficiency Claims in Horizontal Agreements’ (1996) available at < <http://www.oecd.org/competition/mergers/2379526.pdf> > accessed October 14, 2017, p. 5.

⁸⁹ Case T-102/96 *Gencor v Commission* [1998] ECR II-0753, para 106.

⁹⁰ Horizontal guidelines (n 4), para 8.

comparing the current level of prices with a hypothetical increase in prices that might have occurred following an anticompetitive merger. In that regard, ‘[i]n 2010, (...) the estimated (observable) benefits derived from horizontal merger decisions were in the range of €4.2 billion to €6.3 billion’ in the EU.⁹¹ *Nelson* and *Sun* even go a step further by asserting that non-price benefits, i.e. ‘benefits that result to consumers because competition promotes quality competition and the development of improved products’, need to be taken into account when assessing the effectiveness of merger policy.⁹²

Another feature of the EUMR that is often unnoticed is that it also acts as a deterrent mechanism. The deterrent effect intervenes upstream when companies envisage merging but have internalised merger control rules as part of their decision-making process. If it is anticipated that the merger will give rise to significant and unsolvable competition concerns, the merging parties will not even consider notifying so that a lot of operations are abandoned even before they get to go on the Commission’s desk. As *Nelson* and *Sun* pointed out, ‘failure to consider these [deterrent] effects can lead to serious mistakes when assessing the overall benefits of the agencies’ merger policies.’⁹³ In the same vein, Joskow argues that ‘the test of a good legal rule is not primarily whether it leads to the correct decision in a particular case, but rather whether it does a good job deterring anticompetitive behaviour.’⁹⁴

When anticompetitive transactions escape antitrust scrutiny, none of the above benefits are likely to arise. First, by escaping merger review, anticompetitive effects resulting from an anticompetitive concentration cannot be tackled by Competition Authorities since they are unable to exert jurisdiction over it. Consequently, incomplete merger control enforcement may lead to higher prices and reduced product quality on the markets concerned. Second, if firms internalise that certain categories of transaction fall outside the scope of the EUMR, its deterrent effect would be null over this kind of operations. Accordingly, anticompetitive mergers escaping antitrust scrutiny may surge once firms have identified an enforcement gap.

⁹¹ DG Competition, ‘Management Plan for 2011’ (2011) available at <http://ec.europa.eu/competition/publications/annual_management_plan/amp_2011_en.pdf> accessed October 14, 2017, p. 7.

⁹² Philip Nelson and Su Sun, ‘Consumer Savings from Merger Enforcement: A Review of the Antitrust Agencies’ Estimates’ (2001) 69 *Antitrust Law Journal* 921, p.947.

⁹³ *Ibid*, p.941.

⁹⁴ P. Joskow, ‘Transaction Cost Economics, Antitrust Rules and Remedies’ (2002) 18(1) *JLEO* 95, p.100.

Overall, incomplete merger control enforcement may deprive consumers from benefiting of efficiencies commonly assumed to be inherent in competitive markets, i.e. low prices and good product quality, both sustainable over time.

Some commentators argue that both the corrective and deterrent effects of the EUMR could be substituted by an *ex post* application of Articles 101 and 102 TFEU to these transactions falling below the thresholds.⁹⁵ The CJEU has indeed recognised in *Philip Morris*⁹⁶ and *Continental Can*⁹⁷ that Articles 101 and 102 TFEU can apply to concentrations that do not possess a Community dimension but may ultimately affect trade between Member States. It is nevertheless submitted that such an approach face important shortcomings mainly because anticompetitive practices provisions are not designed to deal with competition concerns that may arise *ex ante*. A good illustration is to be found in that fact that antitrust procedures are lengthy and complex while merger control laws require procedures to be clear and fast in order to bring legal certainty to merging parties.⁹⁸

III. Designing A Size-Of-Transaction Threshold

The previous section concluded that there indeed exists an enforcement gap in EU merger control and that transactions escaping the Commission's scrutiny while having undeniable cross-border effects may surge over the coming years. This does not mean these mergers may turn out to be anticompetitive, but for the sake of ensuring a hermetic merger control at EU level, it is desirable to find means of filling the enforcement gap. The Commission seems to believe that an efficient way of addressing this issue would be to introduce a 'size-of-transaction' threshold – used in accordance

⁹⁵ See e.g. M. Davilla, 'Is Big Data a Different Kind of Animal? The Treatment of Big Data Under the EU Competition Rules' (2017) 8(6) *Journal of European Competition Law & Practice* 370, 379.

⁹⁶ Cases 142/85, 156/84, *British American Tobacco Company and R. J. Reynolds Industries v. Commission* [1987], ECR 4487.

⁹⁷ Case 6/72 *Europemballage Corp and Continental Can Co Inc v Commission*, [1973] ECR 215

⁹⁸ Richard Whish and David Bailey, *Competition Law* (8th edn, Oxford University Press 2015), p 817.

with turnover thresholds – that would not depend on the turnover generated by the merging parties but rather on the price paid by the acquirer.

However, introducing a transaction value threshold is not as clear-cut as it seems. In order to be in line with the ICN and OECD recommendations,⁹⁹ it is necessary for the Commission to fulfil certain requirements. First, a precise definition of the ‘value of the transaction’ is needed to ensure the effectiveness of the new threshold and bring clarity as well as legal certainty to merging parties. Second, since in the category of transactions that were identified as escaping antitrust scrutiny in Europe domestic turnover figures cannot be used to screen the economic presence of the target in a certain geographic area, the Commission will have to introduce another test to screen the economic presence of the target within the EU to justify the existence of a sufficient local nexus. In addition, the Commission will have to meaningfully set the transaction value capable of triggering the application of the EUMR. But before discussing these issues, it is worth assessing whether transaction value thresholds constitute an appropriate mean of filling the legal gap and briefly introduce jurisdictions already operating such thresholds.

1. Is the Size-Of-Transaction Threshold the Appropriate Answer to the Enforcement Gap?

So far, this article has concluded that there indeed exists an enforcement gap at EU-level as far as merger control is concerned and that size-of-transaction thresholds might constitute an appropriate mean to fill it since several jurisdictions across the globe already (or soon will) operate such thresholds. However, the question of the efficiency of value of transaction thresholds, used in combination with turnover criteria, to fill the legal gap has not yet been addressed.

Ideally speaking, notification thresholds should be qualitative rather than quantitative since qualitative thresholds, such as market share thresholds, are more closely related to market power and market structure than purely quantitative thresholds. Consequently, qualitative thresholds could, in principle, constitute a better jurisdictional trigger mechanism to capture

⁹⁹ ICN Recommended Practices (n 5). OECD, ‘Recommendation of the Council on Merger Review’ (2005) available at <<http://www.oecd.org/daf/competition/mergers/40537528.pdf>> (hereafter ‘OECD Recommendations’) accessed October 14, 2017.

transactions that may give rise to competition concerns as well as eliminating a large amount of unnecessary notifications.¹⁰⁰ However, there appears to exist a widely shared consensus that qualitative thresholds, and more particularly market share thresholds, do not constitute an appropriate jurisdictional trigger mechanism because of their ambiguous concept as well as the substantial difficulties their computation gives rise to.¹⁰¹ Moreover, introducing market share thresholds would be contrary to the ICN recommendations, which require notification thresholds to be clear, understandable and based on objectively quantifiable criteria. Furthermore, operating market share thresholds does not necessarily mean that all potentially harmful concentrations are captured. For instance, both Spain and Portugal operate market share thresholds as part of their merger control laws but both jurisdictions have been unable to capture neither the *Facebook/Instagram* transaction, nor the *Google/Waze* merger while the ‘share of supply’ test allowed the OFT to capture those transactions. Introducing a ‘share of supply test’ at EU-level could also be considered as being an appropriate mean of filling the enforcement gap. It is however suggested that such a test implies an element of arbitrariness¹⁰² so that the clear definition of competencies between the Commission and Member States would be impeded. Moreover, it would be more difficult for firms to identify gun-jumping situations so that concentrations could be consummated without prior notification, which is undesirable for both firms and the Commission.¹⁰³

Accordingly, quantitative thresholds and especially transaction value thresholds seem to be the appropriate way of achieving a second best outcome, i.e. capturing most of the potentially harmful transactions that have the potential of escaping antitrust scrutiny in Europe. The American Bar Association has long assumed that ‘[a] size of transaction test (or combined size of transaction/size of parties’ test) generally is more appropriate than a size of parties test’ mainly because it is ‘far more relevant to an assessment

¹⁰⁰ Alexis Jacquemin, ‘Horizontal Concentration and European Merger Policy’ (1990) 34 *European Economics Review*, 539.

¹⁰¹ See for instance CJ Cook and CS Kerse, *EC Merger Control* (5th edn, Sweet & Maxwell 2009), p 82.

¹⁰² Jonathan Paret and Adrian Majumdar, *UK Merger Control* (Second edn, Hart Publishing 2016), p. 188.

¹⁰³ See e.g. *BSkyB and Virgin Media v. Competition Commission and BERR* [2010] EWCA Civ 2.

of the competitive effects of a merger than the size of the parties.’¹⁰⁴ This is because size of transaction thresholds give an estimate of a firm’s market valuation. In other words, contrary to turnover thresholds which constitute an objective measurement, size-of-transaction thresholds are somewhat subjective in the sense that the value attributed to a firm may vary from one acquirer to the other. Moreover, the price paid by the acquirer often takes into consideration the market potential of the target company as well as assets or patterns that are not necessarily reflected in the turnover this company generates. In sum, the subjectivity inherent in value of transaction thresholds makes them a more appropriate tool to screen market power because the more a firm is valued on financial markets, the more it is likely to impact – either positively or negatively – competition in a near future.

To ensure the appropriateness of value of transaction thresholds to fill the legal gap at EU-level, it is also worth analysing the types of transactions that may escape antitrust scrutiny. In that regard, one could easily conclude that transactions that may escape antitrust scrutiny in Europe share common features. All the operations that have been discussed in Section II were involving a big industry player generating substantial turnover as the acquirer and a highly innovative target holding highly valuable assets and for which the price paid was very far above market standards. Accordingly, these transactions involve economic significance on the one hand – that is better screened by turnover thresholds – and substantial market value on the other hand – better captured by value of transaction thresholds. It seems therefore pretty obvious that the second-best solution to capture this kind of transaction is not to introduce an independent size-of-transaction threshold but rather to use a combined size of parties/price paid test.

However, value of transaction thresholds also face shortcomings. First, determining the value of a transaction is a highly tricky task and figures may considerably vary from one valuation method to another. Second, ‘such values are difficult, if not impossible, to allocate to different geographic regions’¹⁰⁵ so that size-of-transaction thresholds need to be coupled with alternative local-nexus requirements to ensure that authorities review concentrations having economic effects within their jurisdictions. It is

¹⁰⁴ American Bar Association, ‘Comments of the American Bar Association Section of Antitrust Law with Respect to the Amended Proposal for a Council Regulation (EEC) on the Control of Concentrations Between Undertakings’ (1990) 59 Antitrust Law Journal.

¹⁰⁵ Annex 1 to the 2001 Green Paper (n 22), para 22.

nevertheless not impossible to address these shortcomings since several jurisdictions across the globe already operate such notification thresholds.

2. Jurisdictions Already Operating Size-Of-Transaction Thresholds

Very few jurisdictions have value-of-transaction thresholds as part of their merger control system. Among them, the most prominent one is most certainly the United-States of America, which uses a size-of-transaction threshold at Federal-level since 1976. Two other jurisdictions that recently introduced price paid thresholds as part of their merger control instruments are also particularly relevant to discuss for this article, namely Germany and Austria, since they may have paved the way for the introduction of such a threshold at EU-level.

2.1. United States of America

Antitrust agencies in the USA, namely the Federal Trade Commission ('FTC') and the Antitrust Division of the Department of Justice ('DOJ'), have the power, under Section 7 of the Clayton Act, to prohibit mergers where 'the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.'¹⁰⁶ The Hart-Scott-Rodino Improvement Act of 1976 ('HSR') amended the Clayton Act to include section 7A, which introduced the 'premerger notification program'¹⁰⁷ that makes the antitrust agencies responsible for reviewing the antitrust implications of certain mergers and acquisitions of voting securities and assets before those acquisitions are consummated. Accordingly, '[t]he HSR Act serves as a procedural aid to Section 7 of the Clayton Act, establishing substantive standards to govern when mergers and acquisitions are permissible.'¹⁰⁸

The HSR Act requires pre-merger notification of certain types of transactions that trigger the notification thresholds and imposes a waiting period of 30 to 60 days before consummation to give the agencies the opportunity of reviewing possible antitrust implications.¹⁰⁹ The HSR Act provide for three threshold criteria:

¹⁰⁶ Clayton Antitrust Act, 15 U.S.C. § 18 (2012).

¹⁰⁷ HSR Act (n 19).

¹⁰⁸ Barry Hawk et al, 'United States of America' in M. Dabbah and K. Lasok (eds) *Merger Control Worldwide* (2nd edn, Cambridge University Press 2012), 1477.

¹⁰⁹ HSR Act (n 19).

- The acquiring person or the target must be ‘engaged in commerce or in any activity affecting commerce’ in the USA; this is the local nexus requirement;
- As a result of the acquisition, the acquirer would hold an amount of assets, voting securities and non-corporate interests having an aggregate total value in excess of \$80.8 million (as adjusted);¹¹⁰ this is the size-of-the-transaction test;
- If the transaction does not exceed \$323 million (as adjusted), one party – that can either be the acquirer or the acquired person – has worldwide sales or assets of \$16.2 million or more (as adjusted) and the other has worldwide sales or assets of \$161.5 or more (as adjusted); this is the size-of-person test that follows the same goal as the turnover thresholds set out in the EUMR – i.e. screening the economic importance of an economic actor – even though, legally speaking, ‘sales or assets’ cannot be deemed as being similar to ‘turnover’.¹¹¹ If the transaction exceeds \$323 million, this size-of-person test is not applicable and an HSR filing becomes necessary.

Since the third threshold is somewhat like the worldwide turnover criterion set out in the EUMR, only the two first thresholds described above necessitate comments for the purpose of this article. As far as the local nexus requirement is concerned, the commerce test is satisfied ‘if either of the parties to a transaction is engaged in commerce or in any activity affecting commerce’¹¹² in the USA. Compared to the Community-turnover requirement displayed in the EUMR, the affecting commerce test grants the antitrust agencies with a much greater margin of discretion to ascertain whether a certain operation has a sufficient US-nexus to be reportable and then reviewed.

¹¹⁰ The dollar thresholds are adjusted annually to reflect changes in the GNP. Adjusted thresholds for 2017 are available at <https://www.ftc.gov/system/files/documents/federal_register_notices/2017/01/clayton_7a_publicis_1-26-17.pdf>, accessed July 20th 2017.

¹¹¹ See 16 C.F.R. § 801.11 whereby the size of person test is defined as measuring a company based on the person’s last regularly prepared annual statement of income and expenses and its last regularly prepared balance sheet.

¹¹² Federal Trade Commission, ‘Introductory Guide II – To File or not to File, When You Must File a Premerger Notification Report Form’ (2008) available at <<https://www.ftc.gov/sites/default/files/attachments/premerger-introductory-guides/guide2.pdf>> accessed October 14, 2017 (hereafter ‘FTC Guide II’), p. 2.

Concerning the value of the transaction test, this threshold was introduced to capture those transactions that are deemed to be important enough to affect the US market since the size of the transaction is believed to correctly reflect the market importance (or potential) of the acquired party. Nevertheless, to ensure an efficient and not too burdensome practice surrounding this threshold, two important considerations need to be clarified, namely: what is meant by ‘held as a result of the acquisition’ and how to correctly value it. As regards what is being acquired, the transaction encompasses all assets, voting securities and non-controlling interests as well as the financial liabilities that are held following the acquisition.¹¹³ Moreover, the terms ‘held as a result of the acquisition’ signify that previous acquisitions that didn’t trigger an HSR notification may need to be aggregated with what is currently being acquired to determine whether an HSR filing is now required. As regards the second question, the valuation depends on the nature of the assets being acquired. For instance, publicly traded voting securities are valued at ‘market price’ or ‘acquisition price’, while untraded voting securities are valued at their ‘fair market value’. In order to help antitrust law practitioners to better estimate the transaction value and thus increase legal certainty, the FTC issued a practical guide summing up the valuation process.¹¹⁴

Another advantage the USA has over Europe, in terms of exerting jurisdiction, is that Clayton Act Section 7 grants the federal agencies with powers to challenge, before or after consummation, mergers potentially raising antitrust concerns even if they fall below the HSR notification thresholds.¹¹⁵ The USA is the only jurisdiction across the globe where antitrust agencies can investigate consummated mergers falling short of the HSR notification thresholds without time limits.¹¹⁶ These powers for instance allowed the DOJ to challenge the Bazaarvoice’s acquisition of PowerReviews, a concentration involving two firms active in the digital industry that fell short of the HSR thresholds and had already been consummated, on the basis that the acquisition eliminated Bazaarvoice’s only credible competitor.¹¹⁷ Finally, in January 2014 the Court found that

¹¹³ See 16 C.F.R. § 801.13.

¹¹⁴ FTC Guide II (n 112).

¹¹⁵ HSR Act (n 19).

¹¹⁶ OECD, ‘Investigations of Consummated and Non-Notifiable Mergers’ (2015) DAF/COMP/WP3 available at <[http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP3\(2014\)1&doclanguage=en](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP3(2014)1&doclanguage=en)> accessed October 14, 2017, para 17.

¹¹⁷ *United States v. Bazaarvoice, Inc.*, C13-0133 (N.D. Cal. Jan. 8, 2013).

Bazaarvoice violated Section 7 and in April 2014 Bazaarvoice agreed to divest all of the PowerReviews assets to a third party.

However, despite the apparent effectiveness of such discretionary powers, introducing similar procedures in the EU would be highly controversial. Since merger control in Europe is based on the principle of double exclusivity ‘it is important to ensure that the rules dividing competencies are clear and predictable.’¹¹⁸ Accordingly, it seems very unlikely that similar discretionary powers could be granted to the Commission since this could impede Member States remaining sovereignty.

Overall, it comes with no surprise to conclude that antitrust agencies in the USA are better equipped than the European Commission to exert jurisdiction over problematic mergers. The FTC is therefore right to ascertain that the HSR Act assures that ‘virtually all significant mergers or acquisitions occurring in the United States [are] reviewed by the antitrust agencies prior to the consummation of the transaction.’¹¹⁹ Proof of this is that out of the 6 mergers that escaped (or might have escaped) Commission’s scrutiny discussed in the previous section, all were investigated by one of the agencies so that the US merger control system seems to be an appropriate benchmark for the Commission to determine whether introducing new jurisdictional rules would be desirable and efficient at EU-level.

2.2. Germany and Austria

Until recently, jurisdictional thresholds in Germany were quite like those displayed in the EUMR. In order to trigger an ARC notification, the undertakings concerned needed to have, in the last business year preceding the concentration, a combined worldwide turnover of more than €500 million and the German turnover of at least one of the undertakings concerned had to exceed €25 million while that of another undertaking concerned had to be more than €5 million.¹²⁰ Notification was (and is still) however not required where the target is an independent undertaking that generated between €5

¹¹⁸ Annex 1 to the 2001 Green Paper (n 22), para 19.

¹¹⁹ 6 FTC Annual Report to Congress concerning HSR Act 11 (1983).

¹²⁰ Section 35(1) ARC.

million and €10 million in the last business year or where the market affected is a so-called *de minimis* market.¹²¹

Following a recommendation from the Monopolies Commission (‘MC’)¹²² – an advisory body that is on the statutory duty to deliver an expert opinion on relevant competition law matters every two years¹²³ – the Federal Ministry of Economics proposed the 9th amendment to the ARC that has been voted on 31 March 2017 by the German Federal Council and should soon come into force.¹²⁴ The MC considered ‘the current legal framework for merger control not to be sufficiently effective’¹²⁵ to capture and assess mergers in the digital, pharmaceutical and technology industries so that it has believed necessary to suggest a refinement of German and European merger control law.

Therefore, the 9th amendment to the ARC introduces, *inter alia*, a size-of-transaction test in Germany. From now on, where the target company has generated less than €5 million in the last business year, an acquisition may still be reportable if the price paid in return for the transaction exceeds €400 million and the target company is significantly active in Germany.¹²⁶ Accordingly, to tackle the enforcement gap that has been identified at both European and German-level, Germany has taken the view that turnover-based thresholds implemented in concordance with transaction value thresholds is the appropriate way to fill the enforcement gap, as the US experience shows. This new criterion could allow the FCO to receive from 3 to 15 additional filings per year. Concerns were raised that this new threshold would constitute an important burden on businesses and would thus impede the development of digital companies in Germany. Nevertheless, Juliane Scholl, Managing Director of the MC quite convincingly refuted this argument by replying that:

¹²¹ Section 35(2) ARC.

¹²² Monopolkommission, ‘Competition policy: The Challenge of digital markets – Special Report No 68’ (2015) available at <http://www.monopolkommission.de/images/PDF/SG/s68_fulltext_eng.pdf> (hereafter ‘Monopolkommission Report’) accessed October 14, 2017.

¹²³ Section 44(1) ARC.

¹²⁴ For a summary of the procedure see Werner Berg and Lisa Weinert, ‘Transaction-value merger threshold soon to be in force in Germany – update on the 9th ARC revision’ available at <<http://kluwercompetitionlawblog.com/2017/04/07/transaction-value-merger-threshold-soon-force-germany-update-9th-arc-revision/>> accessed October 14, 2017.

¹²⁵ Monopolkommission Report (n 123), p. 10.

¹²⁶ See new Section 35(1) ARC.

‘Other legal systems like the USA, however, foresee similar thresholds, which are even lower than the currently proposed thresholds. There is no indication that the existing thresholds in other jurisdictions have compromised start-up activities to date. Further, as the transaction threshold is proposed to be set at €400 million, most of the takeovers of start-up undertakings will stay out of the reach of merger control in Germany. Moreover, the new threshold will only enable the competition authorities to review a merger. In the light of experience, one may assume that merger prohibitions or even clearances with conditions and obligations will remain an exception.’¹²⁷

In sum, the new ARC provides four criteria in order to trigger a merger notification. The first criterion concerns the worldwide turnover, which reflects the importance of the undertakings involved in the transaction but does not show anything about the potential effects of the operation in Germany. The second criterion relates to the German-wide turnover, which aims at ensuring that the concentration has a connection to Germany. The two additional criteria will now aim at filling the enforcement gap identified in the EU and within several Member States by capturing those transactions whereby the buyer is an important industry player, while the target has not generated sufficient turnover in Germany – despite the low €5 million turnover requirement – to trigger an ARC notification but is significantly active in the country and has an important market potential that is reflected by the price paid by the acquirer.

Further guidance on how the Federal Cartel Office (‘FCO’) will apply the additional notification threshold would however be very welcomed to reduce legal uncertainty. It is nonetheless possible to deduce, from the motivation of the law, that the term ‘transaction’ will entail all assets and other considerations that are transferred from the buyer to the acquirer because of the merger – including financial liabilities – and that any commonly used method of valuation will be accepted by the FCO.¹²⁸ As far as the local nexus requirement is concerned, a lot of interrogations remain on what ‘significantly

¹²⁷ Juliane Scholl, ‘Why the New Merger Control Thresholds in Germany?’ (2017) 8(4) *Journal of European Competition Law & Practice* 219.

¹²⁸ Werner Berg and Lisa Weinert, ‘New merger control threshold in Germany – beware of ongoing transactions’ available at <<http://kluwercompetitionlawblog.com/2017/06/07/new-merger-control-threshold-germany-beware-ongoing-transactions/>> accessed October 14, 2017.

active in Germany’ legally means. *Berg* and *Weinert* seem to believe that a distinction should be drawn between mature and non-mature markets to ascertain whether an economic actor has sufficiently developed its business to be declared significantly active in the country while falling short of the €5 million threshold.¹²⁹ R&D expenditures undertaken in Germany could also constitute an appropriate indication that innovative companies are willing to enter and thus substantially impact the German market.¹³⁰ Nevertheless, absent proper guidance from the FCO and subsequent case law, those assumptions remain pure speculation.

As regards Austria, a concentration needs to be notified to the Federal Competition Authority (‘FCA’) where the aggregate worldwide turnover of the undertakings concerned exceeded €300 million in the last business year, the undertakings concerned generated €30 million in Austria and the worldwide turnover of at least two of the merging parties exceeded €5 million respectively.¹³¹ A similar enforcement gap than the German one has been identified so that, as of November 1st 2017, where the domestic turnover requirement is not met, operations involving a target company significantly active in Austria and for which the price paid in return for the acquisition exceeds €200 million will trigger merger mandatory notification.¹³²

3. Foreseeing the Introducing of a Size-Of-Transaction Threshold at EU-Level

‘Effective and efficient competition policy requires appropriate and well-designed means to tackle all sources of harm to competition and thus consumers.’¹³³ Introducing a value of transaction threshold is unquestionably in line with this approach.

In that regard, the terms ‘well-designed’ deserve further comments, especially as far as merger control is concerned. More specifically, should a value of transaction threshold be introduced at EU-level, the Commission will have to determine whether it is more desirable to introduce a size of transaction test

¹²⁹ *Ibid.*

¹³⁰ *Ibid.*

¹³¹ See e.g. Harsdorf (n 21).

¹³² *Ibid.*

¹³³ Commission, White Paper Towards More Effective EU Merger Control, COM (2014) 449 final, para 24.

that predominates over turnover thresholds, like in the US regime, or whether the new value of transaction threshold should be used as a safety net to capture transactions that escape the long-lasting operated turnover thresholds, like in Germany and Austria. As suggested in the public consultation,¹³⁴ it is respectfully submitted that it is more appropriate to introduce a safety net threshold that would only be triggered if the individual Community-wide turnover requirements of Article 1(3) are not met because the target company has not generated sufficient turnover yet. Such a scenario would have the double advantage of partly relying on the workable and effective turnover-based thresholds that have been operated over the last decades, while reinforcing the overall effectiveness of Article 1(3) which constitutes the legal basis for only a limited number of notifications under the EUMR.¹³⁵ Article 1(2), on the other hand, should stay identical in order to remain the jurisdictional trigger mechanism in the vast majority of cases, thus maintaining merger control workability as well as legal certainty at EU-level.

The terms ‘effective and efficient competition policy’, on the other hand, mean that competition authorities should only intervene in necessary circumstances in order not to constitute an unnecessary burden on economic actors. Consequently, ‘effective and efficient’ merger control means that notification thresholds must be clear, understandable and based on objectively quantifiable criteria in order to bring legal certainty to the economic actors.¹³⁶ However, concerns have been voiced, especially by competition law practitioners, that introducing a size-of-transaction test in the EU ‘would add an additional – and unnecessary – layer of complexity.’¹³⁷ This is mainly because ‘transaction value’ does not necessarily mean ‘purchase price’ and often involve other metrics such as the amount of the target’s debt or performance-based parameters. Moreover, the deal value may significantly vary depending on when the transaction value is computed and may, for instance, only trigger mandatory notification during the negotiating phase but

¹³⁴ Public Consultation (n 19).

¹³⁵ SWD accompanying the 2009 Communication (n 33), para 37.

¹³⁶ ICN Recommended Practices (n 5).

¹³⁷ Linklaters, ‘Response by Linklaters LLP to the European Commission’s Evaluation of procedural and jurisdictional aspects of EU Merger Control’ available at http://ec.europa.eu/competition/consultations/2016_merger_control/linklaters_en.pdf accessed October 14, 2017.

not at the date of closing so that appropriate guidance as to when the deal value must be measured will be highly expected.¹³⁸

Yet, although they may not be the most widespread notification thresholds across jurisdictions operating merger control laws, value of transaction thresholds are considered to be in line with the previously mentioned principles.¹³⁹ Furthermore as demonstrated by the US experience and, to a lesser extent, by the recent amendment to the German ARC, it is not impossible to overcome the difficulties mentioned above provided competition authorities deliver businesses and practitioners with precise guidance as to how and when assess a deal value. Accordingly, should a size-of-transaction test be introduced in the EU, substantive amendments to the Jurisdictional Notice are indispensable to maintain a high-level of legal certainty for businesses.

Moreover, ‘effective and efficient’ merger control means that only transactions with a sufficient local nexus are notified for review. In light of the stratification of competencies between the EU and Member States, this is most certainly the most controversial issue the Commission will have to deal with. Back in 2001, when the Commission already considered introducing a deal value threshold in the EU, it noted that:

‘A jurisdictional test based on transaction value could in principle have the opposite bias to that of turnover and asset value. However, for the purposes of the Merger Regulation, a major inconvenience with a test based on the value of transaction would be that such values are difficult, if not impossible, to allocate to different geographic regions. It therefore appears that transaction value would not be a particularly suitable test for the Merger Regulation, as it would be unlikely to provide reliable information about the cross-border effects of a transaction.’¹⁴⁰

¹³⁸ Freshfields Bruckhaus Deringer, ‘Response to The European Commission’s Public Consultation of 7 October 2016’ available at http://ec.europa.eu/competition/consultations/2016_merger_control/freshfields_bruckhaus_deringer_contribution_en.pdf > accessed October 14, 2017, para 47.

¹³⁹ OECD, ‘Local Nexus and Jurisdictional Thresholds in Merger Control’ (2016) DAF/COMP/WP3 available at [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP3\(2016\)4&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP3(2016)4&docLanguage=En) > accessed October 14, 2017, para 54.

¹⁴⁰ Annex 1 to the 2001 Green Paper (n 22), para 22.

As previously discussed, this article takes a different stance and it is respectfully submitted that, coupled with the existing turnover thresholds, value of transaction thresholds may constitute an appropriate jurisdictional trigger to fill the enforcement gap provided an additional local nexus criterion is added to the law. A first obvious candidate to replace the domestic turnover requirements of Article 1(3) that are not met despite the important deal value would be for the Commission to rely on the ‘interstate trade criterion’. Similarly to the ‘Community dimension’ test, the interstate trade criterion delimitates ‘the boundary between the areas respectively covered by [EU] law and the law of the Member States’¹⁴¹ in the area of anticompetitive practices. Introducing such a requirement would ensure that transactions triggering the new thresholds indeed have a connection to the Community. Nevertheless, over the years, both the Commission and EU Courts have enlarged the scope of Articles 101 and 102 TFEU by doing an extensive interpretation of the interstate trade clause.¹⁴²

Accordingly, a merger control-related interstate trade criterion would severely increase the number of notifications at EU-level while reducing legal certainty for businesses and is thus not desirable.¹⁴³ In fact, as suggested in this article, arbitrariness is the enemy of a clear division of competencies between Member States and the Commission and it is consequently submitted that any change to the jurisdictional thresholds of the EUMR must rely on objective criteria as much as possible, thereby not giving room – to either the Commission nor merging parties – for any misguided interpretation. A possible solution to this local nexus issue could thus be, similarly to Germany, to ensure that the target company is substantially active in at least three Member States. Considerable guidance would then be necessary to define what is meant by ‘substantially active’ for the purpose of applying the EUMR. As stressed above, this guidance, which is likely to be introduced in the Jurisdictional Notice should the new threshold be implemented, will have to rely on objectively quantifiable criteria such as the number of active users in a certain perimeter, the number of employees or the amount of R&D expenditures a company consented in respective Member States.

¹⁴¹ Case 22/78 *Hugin Kassaregister AB v Commission* [1979] ECR 1869.

¹⁴² Whish and Bailey (n 98), p. 144.

¹⁴³ Burnley (n 28), p. 270.

Finally, ‘effective and efficient’ merger control means that only mergers and acquisitions of certain dimension should be notified for review.¹⁴⁴ Therefore, the final important question the Commission needs to answer is at which level should the new threshold be set. Setting a too low notification threshold would allow the EUMR to capture a larger number of transactions that would not require notification otherwise, which leads to two immediate consequences. First, considering the low rate of prohibition and clearance subject to remedies decisions,¹⁴⁵ a lot of these newly notified cases are likely not to raise competition concerns at all so that they would constitute unnecessary notifications. Second, and more importantly, a too low notification threshold would impede the division of competences between Member States and the Commission by capturing a lot of transactions that would be captured by NCAs otherwise. It is for instance unconceivable that the value of transaction triggering an EUMR notification is set at a level that is such as to overlap with the recently introduced deal value threshold in Germany.

On the other hand, setting a too high notification threshold would only give the Commission jurisdiction over a limited number of cases so that the efficiency of such a reform would be questionable. In the absence of empirical evidence, it is impossible to foresee at which level a size of transaction triggering EUMR notification should be set. Furthermore, as for turnover thresholds, the Commission will have to deal with political reluctance on that matter and it is more than likely that Member States will push to set a threshold level as high as possible in order not to see their sovereignty impeded to a disproportionate extent. The purpose of this article is not to postulate a number but it is however acknowledged that the price paid in all the transactions that have been discussed in the second section were above \$1 billion so that this number could constitute an appropriate departure point in the legislative discussions.

In light of the above considerations, it is therefore suggested that, should a size of transaction threshold be introduced in the EU, Article 1(3) could read as follows:

¹⁴⁴ See OECD Recommendations (n 99), p. 2.

¹⁴⁵ EU Merger Control statistics, available at <http://ec.europa.eu/competition/mergers/statistics.pdf> > accessed October 14, 2017

Article 1(3) of the EUMR

A concentration that does not meet the thresholds laid down in paragraph 2 has a Community dimension where:

- (a) the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 2 500 million;
- (b) in each of at least three Member States, the combined aggregate turnover of all the undertakings concerned is more than EUR 100 million;
- (c) in each of at least three Member States included for the purpose of point (b), the aggregate turnover of each of at least two of the undertakings concerned is more than EUR 25 million;
- (d) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 100 million;
- (e) where the conditions laid down in points (c) and (d) are not met, the value of the consideration paid in return for the transaction is more than EUR 1 000 million; and
- (f) at least two of the undertakings concerned are substantially active in each of at least three Member States included for the purpose of point (b),

unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State.

IV. Conclusion

Is there any evidence of an enforcement gap as far as EU merger control is concerned? This article takes the view that there indeed exist an enforcement

gap and, more importantly that this gap is likely to expand over the coming years so that appropriate regulatory answer is needed.

As suggested by the Commission in 2016, it is suggested that this regulatory answer could take the form of an additional jurisdictional threshold that would allow to capture transactions involving a big industry player as the acquirer and a target that has not yet monetised the valuable assets it holds. Nevertheless, introducing additional jurisdictional thresholds is not as clear-cut as it seems since merger control laws should also be concerned about not constituting an unnecessary administrative burden on economic actors. In that regard, considerable attention should be put on the concerns voiced by third parties in the consultation process, which highlight the additional layer of complexity a new jurisdiction threshold would put on businesses absent proper guidance from the Commission.

Foreign jurisdiction experience in operating value of transaction thresholds – mainly in the United-States of America – seem however to indicate that it is not possible to overcome the concerns raised by third parties during the consultation process. Taking due account of the recent reform of the jurisdictional thresholds in Germany and Austria, as well as considering the specificities of the European Union and especially the stratification of competencies between Member States and the Commission in the area merger control, this article takes the view that the regulatory answer could take the form of slight modifications to the existing jurisdictional provisions. Particularly, adding supplementary requirements to Article 1(3) of the EUMR may constitute an appropriate way of bridging the gap while maintaining the overall efficiency of EU merger control.

Nevertheless, slight amendments to the hard law necessarily mean substantial amendments to soft law, i.e. the guidance documents in order to maintain a clear division of competencies between Member States and the Commission. In that regard, although this article made several suggestions, especially as regards an additional local nexus requirement, it remains to see, should the proposed reform come into force, how the Commission will address the questions raised in this article.

Finally, the most important question may not be whether there exists an enforcement gap and how it should be filled but whether the Commission is willing to put the proposed reform into effect. A DG Competition official indeed recently stated that such a reform may ‘impose a disproportionate

burden on the Commission'.¹⁴⁶ It therefore remains to see whether the Commission is ready to take appropriate actions or, like for the acquisition of minority shareholdings which seems not to be on the Agenda of the Commission anymore, whether the proposed reform will, like many others, have the effect of a sword cutting through water.

¹⁴⁶ Carles Esteva Mosso, 'Recent developments in EU merger control' (Les Mardis du Droit Européen de la Concurrence conference, Brussels, January 2017).

Online Marketplace Bans: Mapping the Landscape under the Light of the Commission's E-commerce Sector Inquiry

Vyron Anastasiadis*

The recent outburst of Internet selling has led several suppliers to amend their selective distribution agreements, thereby introducing new restrictions that have not yet been evaluated from a competition law perspective by the European Courts. These restrictions include online marketplace bans, a practice that could potentially deprive retailers of up to €26 billion of retail sales, which could be diverted elsewhere. This article analyses and evaluates the debate surrounding the legal treatment of online marketplace bans, in the light of the results of the European Commission's E-Commerce Sector Inquiry. It suggests that such bans should not be looked at as restrictions by object and/or hardcore restrictions. Furthermore, this article shows that Advocate General Wahl's opinion in Coty, where the appraisal of online marketplace bans is sought, is well-reasoned and consistent with previous European Courts' case law.

I. Introduction

On 6 May 2015, the European Commission (Commission) initiated the E-commerce sector inquiry (Inquiry) in order to investigate whether competition is restricted, in accordance with article 17 of Regulation 1/2003.¹ This initiative formed part of the Commission's aim to create a digital single market, the Digital Single Market Strategy, which has the potential to boost

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¹ 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.

the European economy by €415 billion per year.² Two years later, on 10 May 2017, the Commission published the Inquiry's final report (Final Report) and the staff working document accompanying the Final Report (Staff Working Document) which set out the Inquiry's findings regarding the E-commerce related to goods as well as to digital content.³

Insofar as the E-commerce of consumer goods is concerned, the Final Report presents the Commission's views regarding restrictions limiting the retailers' ability to sell via online marketplaces such as Amazon or Ebay (online marketplace bans or third-party platform bans) primarily found in selective distribution agreements. The question of the online marketplace bans' legal treatment under the European Union (EU) competition law rules has attracted notable attention over the last few years. It has not yet received a clear answer and is currently pending before the EU Courts. It has been estimated that a generalisation of this practice could heavily impact on the retailers selling on third-party platforms, as up to €26 billions of online retail sales could be diverted elsewhere.⁴

In this context, the present article will first outline the legal framework surrounding selective distribution systems and online marketplace bans. It will then examine the conformity of third-party platform bans with EU competition law and afterwards offer a brief overview of the online marketplaces' key characteristics. The assessment of the arguments articulated by the German Competition Authority as well as legal theory shall be conducted, followed by the presentation of the key legal aspects of Advocate General's (AG) Opinion in *Coty*.⁵ Finally, the Inquiry and its

² 'Digital Single Market' (European Commission, 2017) <https://ec.europa.eu/commission/priorities/digital-single-market_en - background> accessed 14 August 2017.

³ European Commission, 'Report from the Commission to the Council and the European Parliament; Final Report on the Ecommerce Sector Inquiry' SWD (2017) 154 final. <http://ec.europa.eu/competition/antitrust/sector_inquiry_final_report_en.pdf> accessed 14 August 2017; European Commission, 'Commission Staff Working Document accompanying the document: Report from the Commission to the Council and the European Parliament; Final Report on the E-Commerce Sector Inquiry' SWD (2017) 154 final <http://ec.europa.eu/competition/antitrust/sector_inquiry_swd_en.pdf> accessed 14 August 2017.

⁴ Copenhagen Economics, 'Economic Effects of Online Marketplace Bans' (2016). <<https://www.copenhageneconomics.com/dyn/resources/Publication/publicationPDF/0/380/1479805000/copenhagen-economics-2016-economic-effects-of-online-marketplace-bans.pdf>> accessed 14 August 2017, 8.

⁵ Case C-230/16, *Coty Germany* (case pending).

results' future impact will be contextually evaluated. This research shall denote that (i) online marketplaces offer a competitive environment whereby efficiencies for consumers, enterprises and competition as a process can be pinpointed, (ii) the current framework, if interpreted correctly, can sufficiently cope with online marketplace bans, (iii) online marketplace bans should not at present be regarded as restrictions by object or hardcore restrictions, (iv) AG Wahl's Opinion in *Coty* should be welcomed as a step in the right direction, and (v) despite the existing criticism, the Inquiry has been fruitful and has already been producing results on multiple fronts.

II. Online Marketplaces: Raison d'être

The analysis of online marketplace bans is intrinsically based on understanding the online marketplaces' nature and *modus operandi*. This chapter (1.) analyses the nature of online marketplaces, and (2.-4.) presents their efficiencies for consumers, micro, small, and medium enterprises and competition.

1. Nature of Online Marketplaces

The dawn of the 21st century has witnessed an outbreak of digital intermediaries, among which a general distinction should be drawn. Professors Strowel and Vergote highlight the difference between 'global platforms' (e.g. Amazon, Facebook and Airbnb) and 'local community exchanges' (e.g. Couchsurfing).⁶ Platforms have constructed their business models aiming at profit maximisation, whereas community exchanges also utilise the online environment and smartphones' technological breakthrough to match supply and demand, albeit in a cooperative manner; they provide services free of charge. Therefore, platforms and exchanges differ in terms of (i) monetisation of the provided service; (ii) purpose and ability to raise funds;

⁶ Alain Strowel. and Wouter Vergote, 'Digital Platforms: To Regulate or Not to Regulate? Message to Regulators: Fix the Economics First, Then Focus on the Right Regulation' (2016) <http://ec.europa.eu/information_society/newsroom/image/document/2016-7/uclouvain_et_universit_saint_louis_14044.pdf> accessed 14 August 2017, 3.

and (iii) the investment required by the supplier, which in case of platforms is relatively significant.⁷

An online marketplace is a platform acting as an intermediary that connects different user groups (the different ‘sides’ of the market, as essentially online marketplaces are two-sided markets)⁸ and enables them to engage in economic transactions.⁹ Sellers may list their products on the marketplace and buyers can purchase the listed products;¹⁰ essentially, online marketplaces operate as online sales hubs.¹¹

If the marketplace merely provides the virtual *locus* where the transactions take place without acting as seller as well, then it is a pure intermediary.¹² In case it also acts as a retailer, thus directly competing with other retailers operating on the platform, the marketplace is of hybrid nature.¹³ The Commission’s Preliminary Report on the E-commerce Sector Inquiry (Preliminary Report) indicates that 25 out of the 37 marketplaces that responded to the questionnaire, i.e. 68%, operate as pure marketplaces.¹⁴

Furthermore, the platform may be accessible either to all retailers which fulfil certain basic requirements, such as the provision of a tax ID or of the articles of association (open marketplaces) or only to a limited number of retailers (closed marketplaces). The latter business model is usually preferred by hybrid marketplaces which accept on their platform retailers that offer complementary products to the ones offered by the marketplace or retailers that also supply the marketplace operator.¹⁵ Finally, the marketplaces may

⁷ Ibid 3-4. The authors note that the criterion pertaining to the level of the investment required, does not adequately apply on online marketplaces due to the multitude of the products that are thereby offered.

⁸ Thomas Hoppner, ‘Defining Markets for Multi-Sided Platforms: The Case of Search Engines’ (2015) 38(3) World Competition 349, 349-350.

⁹ For the purposes of this research, the terms “platform” and “marketplace” will be hereinafter used interchangeably unless otherwise indicated.

¹⁰ European Commission, ‘Preliminary Report on the E-commerce Sector Inquiry’ SWD (2016) 312 final
<http://ec.europa.eu/competition/antitrust/sector_inquiry_preliminary_report_en.pdf> accessed 14 August 2017, 36.

¹¹ Ariel Ezrachi, ‘The Ripple Effects of Online Marketplace Bans’ (2017) 40 World Competition 47 (also available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2868347>), 2.

¹² Preliminary Report (n 10) 36.

¹³ Ibid. See also Ezrachi (n 11) 2.

¹⁴ Preliminary Report (n 10) 37.

¹⁵ Ibid.

present differences concerning the contractual arrangement with customers, the identity of the sellers (professional or individual sellers), the services offered by the interface, as well as remuneration models.¹⁶

The concept of online platforms is embedded with significant efficiencies and advantages which can also explain their appeal both to consumers and enterprises. Finally, online marketplaces offer an environment whereby intra-brand and inter-brand competition thrive.

2. Efficiencies for Consumers

When searching for a product listed on an online marketplace, the consumer can explore different offers from various suppliers, as well as the products' prices, technical characteristics and their delivery options.¹⁷ Thus, the information the consumer needs is more easily accessible, limiting the search costs. The reduction of the search costs, which are a form of transaction costs, is recognised as a potential efficiency gain by the Commission as well.¹⁸ The convenience offered is decisive in comparison with the offline retail channel, because when all the other parameters remain equal (e.g. price, quality, type of good sold and brand *ceteris paribus*), it creates a higher consumer surplus (i.e. the difference between the price the consumer is willing to pay and the price he/she actually pays) and consequently, higher social welfare.¹⁹ The increased price transparency also sharpens price competition, which translates into lower prices as the consumers are better informed about the competing products and become sensitive to price increases. Due to better information, they will purchase more of a product only if they deem that the increase in price corresponds to an improvement in quality or service (marginal consumers).²⁰ Therefore, online marketplaces also contribute in

¹⁶ Ibid 37-38.

¹⁷ Stefan Wartinger. and Lukas Solek, 'Restrictions of Third Party Platforms within Selective Distribution Systems' (2016) 39 World Competition 291, 294.

¹⁸ Pablo Ibanez Colomo, 'Market Failures, Transaction Costs and Article 101(1) TFEU Case Law' (2012) 37 European Law Review 541, 545; Robert Cooter. and Thomas Ulen, Law & Economics (6th edn, Berkeley Law Books 2012), 87-88.

¹⁹ Copenhagen Economics (n 4) 31.

²⁰ For the impact of vertical restrictions on marginal consumers see William S. Comanor, 'Vertical Price Fixing, Vertical Market Restrictions, and the New Antitrust Policy' (1984-1985) 98 Harvard Law Review 983, 992-999.

quality and services' improvements to justify price increases, hence incentivising innovation.

These arguments are confirmed by consumers as well. A Compass Lexecon survey among consumers of electronics demonstrates that in the end-users' eyes, online marketplaces offer products at more attractive prices than the retailers' websites as well as more choice than any other channel.²¹

3. Efficiencies for SMEs

Micro, Small and Medium Enterprises (SMEs) are entities engaged in economic activity, irrespective of their legal form, which employ less than 250 employees and whose annual turnover does not exceed €50 million and/or annual balance sheet does not exceed €43 million.²² SMEs' importance for the EU economy cannot be overstated; they constitute 52% of EU retail turnover²³ and 99% of the businesses in the EU.²⁴

A key challenge for SMEs is to compete on an equal footing with large retailers, especially in a multi-channel economy where each channel has its own idiosyncrasies. Considering that the online environment is highly competitive, online marketplaces are essential to SMEs' efforts to establish an active online presence due to the advantages they offer. Indicatively, while shopping online the consumers have at least twice as much choice compared to a situation whereby they shop offline in their own country.²⁵ Therefore, SMEs largely depend on online platforms to stand out and reach more buyers; on Ebay alone there are more than 165 million potential buyers.²⁶ Evidently, SMEs can benefit from online marketplaces in four core ways.²⁷

²¹ Copenhagen Economics (n 4) 30.

²² European Commission Recommendation [2003] OJ L 124/36, articles 1-2.1.

²³ Copenhagen Economics (n 4) 13.

²⁴ European Commission, 'What is an SME?' (2017) <http://ec.europa.eu/growth/smes/business-friendly-environment/sme-definition_el> accessed 14 August 2017.

²⁵ European Commission (2017) 'E-Commerce Market Study' <http://ec.europa.eu/consumers/consumer_evidence/market_studies/e_commerce/index_en.htm> accessed 14 August 2017.

²⁶ Ebay, 'Ebay's Comments on the Preliminary Report of the E-Commerce Sector Inquiry' (2016) <http://ec.europa.eu/competition/antitrust/e_commerce_files/ebay_en.pdf> accessed 14 August 2017, 5.

²⁷ See generally Copenhagen Economics (n 4) 12-22.

First, the retailer can access the platform at a portion of the IT costs it would need to set up its own website. This should be seen in conjunction with the investment in online promotion and advertising required while constructing the website, as well as with that these costs must be borne irrespective of the conversion rate, i.e. the percentage of the page's visitors that purchase products or services. Therefore, the risk is significantly lower when relying on the marketplace to make the relevant investments.²⁸

Second, marketplace websites and applications generate more traffic than SMEs' individual website shops.²⁹ Thus, the retailers gain access to a large clientele through the platform and at the same time they are able to sell cross-border and to remote places by utilising the marketplace's network and delivery system. It is indicative that 73% of the SMEs cross-border turnover derives from online marketplaces.³⁰

Third, the mobile shopping era has reshaped the way in which online shopping is conducted. It has been estimated that mobile commerce spending in Europe represented 20% of total e-commerce spending in 2015.³¹ A growing number of consumers selects to shop via their mobile devices; 75% of Europeans have used their mobile device to make an online purchase.³² To that end, various shopping applications have been developed, yet the most popular ones concentrate the various choices, thereby allowing consumers to easily find the product of their preference. Thus, consumers tend to select only a few applications from large providers, and online marketplace applications tend to be among the most popular shopping applications. Namely, Ebay and Amazon applications are currently the two most popular free shopping applications on Apple's App Store.³³ Given the above developments, SMEs are not otherwise able to have access to the mobile

²⁸ Ezrachi (n 11) 3.

²⁹ Staff Working Document (n 3) para 442.

³⁰ Copenhagen Economics (n 4) 15, 19.

³¹ Ibid 20.

³² Ecommerce Europe (2017) 'European Ecommerce Report (light)' <<http://ecommercefoundation.org/download-free-reports>> accessed 14 August 2017, 48.

³³ 'Shopping - App Store Downloads on iTunes' <<https://itunes.apple.com/us/genre/ios-shopping/id6024?mt=8>> accessed 14 August 2017.

consumers (e.g. by developing an application), but only via the use of online marketplaces.³⁴

Finally, online marketplaces have developed technology to optimise the consumers' shopping process, such as shopping assistants or artificial intelligence in general, from which the SMEs can benefit.³⁵ Indicatively, Ebay's Shopping Bot is compatible with Facebook's Messenger application and utilises artificial intelligence to aid consumers by providing the optimal offers from Ebay's one billion listings.³⁶

However, the need between platforms and SMEs is bidirectional. First, online platforms need the suppliers (hence, they need SMEs) due to direct network effects, i.e. the platform's services become more valuable the more users it has.³⁷ Intrinsically, the very success of an online marketplace depends on the trust built between the different sides of the market which the third-party platform tries to create by various mechanisms, such as the design of review systems.³⁸ It should also be taken into account that the buyer and the seller can anytime opt to make the transaction directly (e.g. on the latter's website), without the involvement of any third parties. Bearing that in mind, marketplaces are motivated to provide the best service possible to prevent such transactions from happening outside their platforms.

4. Efficiencies for Competition

Online platforms offer an environment whereby both competition between distributors of the same brand (intra-brand competition), and competition between suppliers of different brands (inter-brand competition) are fierce.³⁹ The former is stimulated by the market transparency which allows consumers as well as distributors themselves to compare prices. The various handlers of the brand do not therefore have an incentive to exaggerate their pricing because the consumers can turn to another distributor providing a lower price.

³⁴ Copenhagen Economics (n 4) 20.

³⁵ Ibid 22.

³⁶ Ebay (n 26) 2.

³⁷ Alison Jones and Brenda Sufirin, *EU Competition Law* (6th edn, Oxford University Press 2016), 47.

³⁸ Michael Luca, 'Designing Online Marketplaces: Trust and Reputation Mechanisms' (2017) 17(1) *Innovation Policy and the Economy* 77.

³⁹ Waringer and Solek (n 17) 300.

Furthermore, consumers normally use third party platforms to search for products and not for brands,⁴⁰ which in conjunction with the aggregated sharpening of intra-brand competition leads to lower prices across brands and therefore intense inter-brand competition as well.

Moreover, online marketplaces' nature (two-sided new economy markets) incentivises them to continually improve the level of their services. In the new economy markets, competition is rather on innovation than on price, while it may be not '*in* markets but *for* markets'.⁴¹ Therefore, undertakings fear the presence of potential maverick competitors which may tip the market in the latter's favour. This is corroborated by Moore's law, which prescribes that:

[T]he computing power of processors doubles approximately every two years. This means that if Google would fail to innovate, its search engine will easily be contested within a few years by an alternative search engine with an inferior algorithm, but running on hardware with double the computing power.⁴²

This danger is more eminent in the digital markets,⁴³ due to their inherent competitive pressure as well as their particularity; therefore, online platforms have an additional incentive to improve the level of services offered both to consumers and retailers.

Nevertheless, the stakeholders' approach towards online marketplaces is multi-faceted, despite their aforementioned efficiencies. Namely, manufacturers who operate selective distribution systems increasingly impose restrictions on the distributors of their products to use online marketplaces as a sales channel.

⁴⁰ Ibid 294.

⁴¹ Jones and Sufrin (n 37) 48-49 (emphasis added).

⁴² Olga Batura, Nicolai van Gorp and Pierre Larouche, 'Online Platforms and the EU Digital Single Market' (2015) <http://ec.europa.eu/information_society/newsroom/image/document/2016-7/nikolai_van_gorp_-_response_economics_to_the_uk_house_of_lords_call_for_evidence_14020.pdf> accessed 14 August 2017, 6.

⁴³ Ibid.

III. Online Marketplace Bans within Selective Distribution Systems

The Vertical Block Exemption Regulation (VBER)⁴⁴ in article 1.1(e) defines selective distribution systems for the purposes of EU Competition Law; essentially, to be accepted in a selective distribution system, distributors need to fulfil certain criteria set by the supplier. It is generally accepted that this distribution model can create efficiencies (although limiting price competition), which are recognised by the Commission in its Guidelines on Vertical Restraints (Guidelines) (e.g. incentivise retailers to make investments to distribute new products to consumers).⁴⁵ However, the Commission also acknowledges that selective distribution bears certain competition risks as it can produce negative effects such as (i) anti-competitive foreclosure of actual or potential competitors; (ii) reduction of intra-brand competition; (iii) softening of inter-brand competition; and (iv) impediments to market integration.⁴⁶

The use of selective distribution agreements is extensive in the E-commerce sector. The Staff Working Document indicates that more than half of the manufacturers in four product categories utilise selective distribution systems.⁴⁷ The manufacturers contend that their preference to this distribution method is attributed to their will to protect the high quality of their products, their brand image, the consumers' overall shopping experience (e.g. by protecting them from counterfeit products), to deter the "free-riding" effect, as well as to ensure the quality of pre- and post-sales services.⁴⁸

The growth of E-commerce has sparked manufacturers' tendencies to incorporate new criteria in their selective distribution agreements. Indicatively, 67% of the manufacturers responding to the Inquiry declare to have incorporated new criteria in their agreements that largely concern online

⁴⁴ Commission Regulation (EU) No. 330/2010 of 20 Apr. 2010 on the application of Art. 101(3) TFEU to categories of vertical agreements and concerted practices, OJ 2010 L 102 1.

⁴⁵ European Commission, 'Guidelines on Vertical Restraints' (2010) OJ C130/10, para 107. See also Jones and Sufrin, (n 37), 762-763; See generally Paolo Buccirossi, 'Vertical Restraints on E-commerce and Selective Distribution' (2015) 11(3) Journal of Competition Law & Economics 747.

⁴⁶ Guidelines para 100.

⁴⁷ Staff Working Document (n 3) 73.

⁴⁸ Ibid 75-76.

retailers.⁴⁹ Among these criteria, the use of third-party platform bans has created a controversy regarding its conformity with EU Competition law rules. As it has been estimated that the spread of this practice could deprive online retailers of up to €26 billion in retail sales,⁵⁰ the assessment of online marketplace bans is exceedingly significant from a financial viewpoint. The following sections present the EU framework concerning selective distribution systems, along with the general characteristics of online marketplace bans put forward by the Inquiry's results.

1. Selective Distribution and EU Competition Law

From an EU competition law perspective, it has been settled that vertical restraints such as selective distribution systems can infringe article 101 of the Treaty on the Functioning of the EU (TFEU).⁵¹ The term 'agreement' contained in article 101(1) TFEU has been interpreted broadly to encompass terms and conditions which are imposed from one party on another (expressly or tacitly acquiesced by the latter).⁵² If, on the other hand, it is concluded that the practice at hand amounts to purely unilateral conduct by one of the parties, due to lack of concurrence of wills between them, the 101(1) TFEU prohibition is escaped.⁵³ This approach, although contentious, allows the simultaneous application of both articles 101 and 102 TFEU, if dominance is established.⁵⁴ In light of the above, restraints contained in selective distribution agreements can infringe article 101(1) TFEU insofar as there is concurrence of wills between the parties.

In case that a selective distribution agreement does infringe article 101(1) TFEU, it is important to ascertain whether it restricts competition by object or by effect. This distinction -warranted by the wording of article 101(1) TFEU- is of great significance, because EU competition law treats restrictions

⁴⁹ Ibid 71.

⁵⁰ Copenhagen Economics (n 4) 8.

⁵¹ C-56/64 *Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v Commission of the European Economic Community* [1966] EU:C:1966:41.

⁵² Case C-32/78 *BMW Belgium SA and others v Commission of the European Communities* [1979] ECR 2435. See also generally Jones and Sufrin (n 37) 146-152.

⁵³ Case T-41/96 *Bayer AG v Commission of the European Communities* [2000] ECR II-3383, *aff'd* Cases C-2 and 3/01 P, [2004] ECR I-23; Case T-208/01 *Volkswagen AG v Commission of the European Communities* [2003] ECR II-5141, *aff'd* Case C-74/04 P, [2006] ECR I-6585.

⁵⁴ Cases C-2 and 3/01 P (n 53) para 42.

by object in a stricter manner. An agreement is restrictive by object when it is considered to have such likely negative effects on competition (price, quantity, quality) that it is redundant to show actual or probable effects on the market.⁵⁵ Therefore, in the case of a restriction by object, the negative effects of the agreement as well as the unlikelihood of net positive effects are presumed. Furthermore, the agreement is assumed to appreciably restrict competition and, therefore, the market need not be defined for that purpose.⁵⁶ As anti-competitive effects do not have to be actually shown, the onus shifts to the undertakings which have to demonstrate that the four cumulative conditions of article 101(3) TFEU are fulfilled.⁵⁷ However, this has been proven to be a very difficult task in practice, as the Commission explains that severe restrictions will normally fail to fulfil at least the two first criteria of article 101(3) TFEU, i.e. the agreements will not create objective economic benefits and they will not benefit consumers.⁵⁸

The Court of Justice of the European Union (CJEU) in its settled case law, beginning with the seminal judgement *Metro I*,⁵⁹ has clarified that selective distribution systems fall outside the scope of article 101(1) TFEU altogether if the following conditions are satisfied:

- i. the nature of the product necessitates a selective distribution system;
- ii. the members of the network are selected on the basis of objective qualitative criteria set out in a uniform way; and
- iii. the criteria must be proportionate with the product in question.⁶⁰

⁵⁵ Case C-67/13 P, *Groupement des cartes bancaires (CB) v European Commission* [2014] ECLI:EU:C:2014:2204, para 51; Case C-286/13 P *Dole v European Commission* [2015] ECLI:EU:C:2015:184, para 117.

⁵⁶ Case C-226/11, *Expedia Inc. v Autorité de la concurrence* [2012] ECLI:EU:C:2012:795, para 37; See also Jones and Sufrin (n 37) 212-217, 237.

⁵⁷ Josefine Hederstrom and Luc Peepkorn, 'Vertical Restraints in On-line Sales: Comments on Some Recent Developments' 7(1) *Journal of European Competition Law & Practice* 10, 11.

⁵⁸ European Commission, 'Guidelines on the application of article 81(3) of the Treaty' (2004) OJ C101/97, para 46.

⁵⁹ Case 26/76, *Metro SB- Großmärkte GmbH & Co. KG v Commission* [1977] ECR 1875.

⁶⁰ *Ibid* paras 20-21. See also Case 31/80 *NV L'Oréal and SA L'Oréal v PVBA 'De Nieuwe AMCK'* [1980] ECR 3775.

Insofar as the nature of the product is concerned, the CJEU case law has established that normally selective distribution systems should be reserved for products which are either technologically complex⁶¹ or luxury/branded (to protect their brand image).⁶² Jones and Sufrin also suggest that in light of *Leclerc* it may be possible to establish that the nature of certain products not falling within those categories may also justify a selective distribution system (e.g. newspapers).⁶³ Moreover, the criteria are deemed qualitative when they filter the distributors which can handle the product ‘on the basis of their objective suitability’.⁶⁴ Finally, *Metro I* clarified that although price competition in selective distribution systems is not the exclusive or principal factor, it is of such an importance that it must never be eliminated.⁶⁵ Therefore restrictions to that end will struggle to meet the proportionality requirement.

Furthermore, a selective distribution system which does not fulfil the *Metro* criteria can also escape the application of article 101(1) TFEU, if the agreement in question falls within the scope of the VBER.⁶⁶ Namely, the agreement must not fall within the scope of another block exemption regulation, satisfy the 30% market share thresholds and not contain hardcore restrictions, which are considered as restrictions by object.⁶⁷ In case the VBER is not applicable, the agreement may still meet the criteria of article 101(3) TFEU.⁶⁸

⁶¹ Case 75/84, *Metro SB-Großmärkte GmbH & Co. KG v Commission of the European Communities (Metro II)*, [1986] ECR 3021.

⁶² See Jones and Sufrin (n 37) 791 and Case T- 19/92, *Groupement d'achat Edouard Leclerc v Commission of the European Communities* [1996] ECR II-1851, para 116.

⁶³ *Ibid* 792.

⁶⁴ *Ibid*.

⁶⁵ *Metro I* (n 59) para 21.

⁶⁶ Guidelines (n 45) para 176.

⁶⁷ VBER (n 44) articles 2(5), 3 and 4; European Commission, ‘Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (De Minimis Notice)’ (2014) OJ C291/01, para 13; See also *infra* 12.

⁶⁸ *Ibid* paras 174-188.

2. Selective Distribution and the Internet

Adding to the line of case law following *Metro I*, the *Pierre Fabre* judgment⁶⁹ is a point of reference in two ways: First, it reshapes the approach towards selective distribution systems, by suggesting that if an agreement does not meet the *Metro* criteria (which are used as a tool to establish whether a selective distribution system is objectively justified)⁷⁰, it is a restriction by object.⁷¹ Second, it connects selective distribution with Internet sales. It was found that the protection of a prestigious brand image is not a legitimate aim to restrict competition and that the absolute restriction (*de facto* ban) on the online sales of non-medicine cosmetics products, constitutes a restriction by object.⁷²

However, the judgment has been subject to criticism by legal commentators. Jones and Sufrin find the proposition that all selective distribution systems are restrictive by object, absent objective justification, to be ‘surprising’ and ‘not strictly necessary for the ruling in question’.⁷³ Furthermore, Monti notes that the judgment mixes the *Metro I* criteria, namely the criteria pertaining to the nature of the product and proportionality:

However, when the Court holds that the maintenance of a prestigious image is not a legitimate aim, this jars with the previous case law where prestige had appeared to be a factor justifying restrictions.⁷⁴

Evidently, suggesting that maintaining a prestigious brand image is a justification not plausible in general, not just in the case at hand, can be problematic.⁷⁵ In this case, the statement about brand image in *Pierre Fabre* is difficult to reconcile with previous CJEU judgments on trademarks,

⁶⁹ Case C-439/09, *Pierre Fabre Dermo-Cosmétique SAS v Président de l’Autorité de la concurrence and Ministre de l’Économie, de l’Industrie et de l’Emploi* [2011] EU:C:2011:277.

⁷⁰ Jones and Sufrin (n 37) 796.

⁷¹ *Ibid* para 39.

⁷² *Ibid* paras 46-47.

⁷³ Jones and Sufrin (n 37) 796.

⁷⁴ Giorgio Monti, ‘Restraints on Selective Distribution Agreements’ (2013) 36 *World Competition* 489.

⁷⁵ Jorren Knibbe, ‘Selective distribution and the ECJ’s judgment in *Pierre Fabre*’, *Case Comment*, (2012) 33 *European Competition Law Review* 10, 450; Monti (n 74) 502.

whereby it is recognised that ‘the quality of luxury goods [...] is not just the result of their material characteristics, but also of the allure and prestigious image which bestows on them an aura of luxury’ with the result being that ‘an impairment to that aura of luxury is likely to affect the actual quality of those goods’.⁷⁶ Furthermore, it contravenes General Court’s judgment in *Leclerc* whereby it was found that the concept of the characteristics of luxury products also encompasses their ‘aura of luxury’.⁷⁷ Finally, it clashes with Advocate General Mazak’s approach, who acknowledges in his Opinion the protection of the brand image and the aura of the product as a plausible aim and directly cites *Copad* (from the trademark realm) to substantiate his arguments.⁷⁸

On the other hand, it has been suggested that the goal to maintain a prestigious brand image does not justify an absolute ban on the online sales *in abstracto*, but in relation to the cosmetic products examined by *Pierre Fabre*.⁷⁹ This interpretation essentially amounts to a proportionality requirement between the adopted restriction and the nature of the product and is corroborated by the answer to the first part of the question posed by the referring court:

[...] in the context of a selective distribution system, *a contractual clause requiring sales of cosmetics and personal care products to be made in a physical space* [...] amounts to a restriction by object [...] where, following an individual and specific examination of the content and objective of *that contractual clause* and the legal and economic context of which it forms a part, it is apparent that, having regard to *the properties of the products at issue*, that clause is not objectively justified.⁸⁰

⁷⁶ Case C-59/08, *Copad SA v Christian Dior couture SA, Vincent Gladel and Société industrielle lingerie (SIL)* [2009] EU:C:2009:260.

⁷⁷ *Leclerc* (n 62) para 109.

⁷⁸ *Pierre Fabre* (n 69) Opinion of AG Mazak paras 44-45, 54.

⁷⁹ Cristiana De Faveri, ‘The Assessment of Selective Distribution Systems Post- *Pierre Fabre*’ *Global Antitrust Review* (2014).

⁸⁰ *Pierre Fabre* (n 69) para 47 (emphasis added).

Finally, the CJEU examined whether the agreement could fall within the scope of the VBER and concluded that even though the threshold requirements are met, the VBER cannot apply.

It was found that the *de facto* ban of internet sales has the object of at least restricting the passive sales to end users. The prohibition cannot be equated with a prohibition to operate on its place of establishment as per article 4(c) of Regulation 2790/1999 (the predecessor of the VBER),⁸¹ because the latter prohibition applies only to physical stores.⁸² This provision should not be interpreted broadly to apply to internet sales as well, since the applicability of the exception contained in article 4(b)(i) VBER can be asserted under article 101(3) TFEU.⁸³

3. Online Marketplace Bans: Setting the Scene

In the light of the discussion above, the question which arises concerns the legal characterisation of online marketplace bans within selective distribution systems. However, the preliminary question pertaining to the delineation of such bans needs to be addressed first.

Professor Ezrachi illustrates the situation as a spectrum at the two ends of which lie the absolute restriction on Internet Sales dealt with by *Pierre Fabre* and qualitative criteria, respectively.⁸⁴ *Pierre Fabre* established that a *de facto* ban on Internet sales is a restriction by object and a hardcore restriction under article 4(c) of Regulation 2790/1999. On the other hand, the European Commission in the Guidelines' paragraph 54 indicates that the supplier can require quality standards for the use of the Internet. More specifically with regard to online marketplaces:

[A] supplier may require that its distributors use third party platforms to distribute the contract products only in accordance with the standards and conditions agreed between the supplier and its distributors for the

⁸¹ Commission Regulation (EC) No 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices, OJ 1999 L 336 21.

⁸² Ibid paras 54-56.

⁸³ Ibid para 57.

⁸⁴ Ezrachi (n 11) 6.

distributors' use of the internet. For instance, where the distributor's website is hosted by a third-party platform, the supplier may require that customers do not visit the distributor's website through a site carrying the name or logo of the third party platform.⁸⁵

The interpretation of paragraph 54 has been contentious, raising the question of whether the paragraph's second sentence (Logo Clause) can be used to justify online marketplace bans in general.⁸⁶

Third-party marketplace bans constitute a territory between the absolute ban on Internet sales and qualitative criteria, which has not been chartered by the case law of EU Courts. The Commission in the Staff Working Document presents its findings pertaining to the bans' categorisation. First, it is acknowledged that the bans' range may vary. On the one hand, the marketplace ban can be absolute, when it prohibits the retailer from using any online third-party platform. On the other hand, the ban can only restrict access to marketplaces which do not fulfil certain quality criteria.⁸⁷ Furthermore, the bans can take the form of direct prohibitions not to use third party platforms to sell the contract goods,⁸⁸ or they can be indirect or *de facto* when they take the form of qualitative criteria requiring the marketplaces to comply with conditions which cannot be met by any marketplace.⁸⁹ *De facto* bans can have the same effects on retailers as absolute bans and can include the requirements that:

- i. the website is operated by the retailer;
- ii. the website appears under the domain name containing the name of the retailer's business; and
- iii. the prohibition to sell on marketplaces whose logo is visible.⁹⁰

Considering that bans to use third-party platforms are primarily found in selective distribution agreements,⁹¹ it is relevant to appraise whether they

⁸⁵ Guidelines (n 45) para 54.

⁸⁶ See *infra* 26-27.

⁸⁷ Staff Working Document (n 3) para 465.

⁸⁸ *Ibid* 79-80.

⁸⁹ *Ibid* para 467.

⁹⁰ *Ibid*.

⁹¹ *Ibid* para 470.

infringe article 101(1) TFEU. If yes, is there a restriction by object? Can such bans be block exempted under VBER or are they hardcore restrictions under article 4 VBER?

IV. Legal Assessment

The lack of EU Courts' precedent on the matter in juxtaposition with the lack of elaborate guidance by the Commission in its Guidelines have led to contrasting interpretations regarding the conformity of online marketplace bans with EU competition law. The Commission has recently presented its views on the bans' appraisal in the Final Report, thus reigniting the debate. In any case, the CJEU will have the chance to resolve this controversy by deciding on *Coty*,⁹² a preliminary reference by the German Courts.

Considering the above, this section analyses the contrasting opinions articulated by the German Competition Authority, [i.e. the Federal Cartel Office (FCO)], the Commission, as well as legal theory, before concluding with the recent Opinion of AG Wahl in *Coty*.

While engaging with the various responses to the question of whether online marketplace bans should be looked at under the 'object' heading of article 101(1) TFEU, one should bear in mind that restrictions by object and hardcore restrictions, although equated by the Commission, are distinct legal concepts.

Even though the Commission may categorise a certain restriction as hardcore, this does not *ipso facto* mean that the hardcore restriction is a restriction by object as well. AG Mazak notes that the 'hardcore restriction' concept is relevant within the context of the VBER, because it results in the agreement's exclusion from the latter's protective scope. The finding of a hardcore restriction in an agreement can give rise to potential discrepancies with article 101(1) TFEU, which would have to be individually assessed. However, there is no legal presumption that the agreement is a restriction by object under article 101(1) TFEU, just because it is a hardcore restriction.⁹³

⁹² *Coty* (n 5).

⁹³ *Pierre Fabre* (n 69) Opinion of AG Mazak paras 28-29.

1. Views within the European Competition Network

1.1 The *Adidas* Case

On 27 June 2014, the FCO issued a decision concluding the proceedings against Adidas, which agreed to amend its sales conditions infringing competition law, and specifically the ban on the use of online marketplaces.⁹⁴ The restrictions incorporated in the selective distribution systems included both direct bans of open online marketplaces as well as the requirement that the retailers' websites shall not be reached through a third-party platform if the logo of the platform is visible.

The FCO reached the conclusion that an absolute ban on sales via online marketplaces did not fulfil the *Metro* criteria as 'specific distribution channels are excluded per se without any consideration of qualitative criteria'.⁹⁵ Furthermore, the restriction was not proportionate, as sports articles did not necessitate the ban of all open marketplaces across the board and there were more lenient alternatives which could achieve the desired result, i.e. specific qualitative criteria that marketplaces should meet.

Moreover, it was decided that absolute bans on online marketplaces significantly restrict competition (both intra-brand and inter-brand competition due to market concentration), because retailers cannot reach that many customers. The analysis focused on the SMEs' dependence on online marketplaces, which cannot afford costly advertising expenses. It was also pointed out that SMEs' websites do not receive as a prominent placement in the search engine results as Adidas' online shop; instead, marketplaces' websites can receive an equally strong position in the search results. Due to their safe payment methods and the fact that they are essentially 'one-stop shops', online marketplaces appeal to their regular customers, as they have created a relationship based on trust, which cannot be transferred 'to an unfamiliar online shop of a sports specialist'.⁹⁶

⁹⁴ FCO, *Adidas* (case summary), 19 August 2014, B3-137/12 <http://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Kartellverbot/2014/B3-137-12.pdf?__blob=publicationFile&v=2> accessed 14 August 2017.

⁹⁵ *Ibid* 3.

⁹⁶ *Ibid* 4.

The FCO investigated whether such an absolute ban restricting competition can be offset by efficiency gains, by conducting an article 101(3) TFEU analysis. The decision recognises that selective distribution in general can lead to efficiencies, such as better coordination between undertakings along the supply chain, the solution of the free-riding problem and the adherence of the system's retailers to minimum quality standards.⁹⁷ However, the first three requirements of article 101(3) TFEU were not met as the restriction in question did not produce adequate efficiencies and was not indispensable, while the consumers also did not receive a fair share of the benefit.

Even though retailers were shielded against intense price competition, this did not benefit the final consumers. Moreover, the ban did not solve the free-rider problem, the magnitude of which differs with respect to search and time costs for the consumers, which are significantly lower when selling on online marketplaces.⁹⁸ Furthermore, consumer surveys showed that free-riding between online and offline sales is bidirectional.⁹⁹ The FCO accepted that the protection of the brand image can be 'in the justified interest of the manufacturer and [...] of the final consumer',¹⁰⁰ although it concluded that it cannot be used as a general argument to further restrict competition.

In addition, the consumers did not receive a fair share of the benefit, as the argument that the absolute bans aim at maintaining a shopping experience for the consumers which is compatible with the brand image and advisory services was dismissed. Conversely, it was seen that the need for advisory services varies between different products as well as between consumers of the same product. Finally, the ban was not indispensable, because Adidas could have achieved the positive effects it intended to, by setting quality requirements that the marketplaces had to meet, which is a less restrictive measure.

The FCO concluded by stating that the VBER did not apply as it essentially qualified online marketplace bans as hardcore restrictions pursuant article 4(c) VBER, which breach the principle of equivalence (they are a criterion

⁹⁷ Ibid 5.

⁹⁸ See *supra* 4-5.

⁹⁹ *Adidas* (n 94) 6.

¹⁰⁰ Ibid.

which is not overall equivalent to the criteria imposed for brick and mortar sales)¹⁰¹ and do not contribute to improvements in the quality of distribution.

1.2 The *Asics* Case

On 26 August 2015, the FCO issued its decision sanctioning *Asics* for infringing article 101(1) TFEU along with domestic competition law.¹⁰² Among the restraints contained in *Asics*' selective distribution system (all of which were considered as restrictions by object) was the ban on the use of online third party marketplaces for the purposes of advertising or selling *Asics* products.

The relevant market was defined as the market for the sale and manufacture of running shoes in Germany, in which *Asics* held a 25-30% market share during 2011 and 2012. *Adidas*, *Nike* and *Asics* held jointly more than a 75% market share during that time.¹⁰³ As the selective distribution system contained both qualitative and quantitative criteria which, in the FCO's view, were not proportionate, the *Metro* criteria were not fulfilled.

The FCO's approach to online marketplace bans in *Asics* is more acute than in *Adidas*. In *Asics*, it held the view that such restrictions should clearly be considered as restrictions by object and hardcore restrictions, whereas in *Adidas* the approach was milder and more cautious. Namely, in *Adidas* the FCO stipulated that the bans significantly restrict competition without explicitly mentioning whether the restriction is by object or effect.¹⁰⁴ It can be inferred that online marketplace bans are considered as a hardcore restriction (this term is not used in *Adidas*) by the statement that the VBER should not apply as absolute online marketplace bans 'target internet distribution per se and which as serious restraints of competition do not fall under the block exemption regulation of the vertical BER from the outset'.¹⁰⁵

¹⁰¹ Guidelines (n 45) para 56, stipulating that restrictions breaching the principle of equivalence are hardcore restrictions.

¹⁰² FCO, *Asics* (case summary), 26 August 2015, B2-98/11 <https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Kartellverbot/2016/B2-98-11.pdf?__blob=publicationFile&v=2> accessed 14 August 2017.

¹⁰³ *Ibid* 4.

¹⁰⁴ See *Adidas* (n 94) 3 and *Asics* (n 102) 10.

¹⁰⁵ *Adidas* (n 94) 8.

In *Asics*, it is recognised that the German case law is not settled regarding the characterisation of absolute marketplace prohibitions under competition law, as there are both decisions which find this restriction plausible and decisions which consider it as a hardcore restriction under article 4(b) and/or 4(c) VBER.¹⁰⁶

The FCO supported that such a restriction fell within the scope of article 4(c) VBER, because it significantly restricted the authorised retailers', especially SMEs', possibility to make online sales to end customers. The restriction could not be justified by considerations regarding the principle of equivalence, as there is no comparable service for online marketplaces in brick and mortar trading.¹⁰⁷ Furthermore, it was decided that absolute bans on online marketplaces was disproportionate compared to the potential harm to the presentation of the product. Qualitative, less harmful criteria could have achieved the same result. In addition, the absolute ban was not necessary to protect the brand image, because 'the intensified price competition does not necessarily damage brand reputation'.¹⁰⁸

With regard to brand image, the FCO added that the existence of other requirements, pertaining to advisory services and presentation, enabled the manufacturer to protect itself from potential violations of the distribution agreements which damage the brand image. Finally, the restriction could not tackle the free-riding problem, as the FCO could not see how the absolute ban on marketplaces rewards pre- and post- sales services offered by brick-and-mortar shops. It concluded by stating again that the per se ban was disproportionate and the free-riding problem could have been dealt with by a more lenient measure such as the requirement that retailers establish a brick-and-mortar shop in addition to their online store.

Asics appealed to the decision before the Higher Regional Court Dusseldorf, which on 5 April 2017 affirmed the -FCO's decision only insofar as price

¹⁰⁶ *Asics* (n 102) 10, footnote 8. For the treatment of online marketplace bans by the French Courts as restrictions by object, see Paris, pôle 1, ch. 3, 2 février 2016, n°15/01542, SAS eNova Santé / SAS Caudalie, AJCA, avril 2016, 210, obs. Ponsard, RLDC, mai 2016, 10.

¹⁰⁷ *Ibid* 11.

¹⁰⁸ *Ibid*.

comparison engines are concerned. The Court left open the question regarding online marketplace bans.¹⁰⁹

1.3 The Commission's Approach

In contrast to these views, the Commission, both in its Preliminary Report as well as in the Final Report, suggests that the absolute bans on the use of online marketplaces are not hardcore restrictions.

The Commission does not conduct both a VBER and an article 101(1) TFEU analysis. Rather, it addresses the issue only from the hardcore restrictions perspective within the meaning of articles 4(b) and 4(c) VBER.¹¹⁰ It recognises that there is currently a debate regarding the legal characterisation of such per se bans as a restriction of passive sales and acknowledges that the CJEU will have the chance to appraise this question in *Coty*.¹¹¹

Since the adoption of the Guidelines (paragraph 54), the Commission did not consider absolute online marketplace bans as hardcore restrictions.¹¹² Furthermore, it suggests that *Pierre Fabre* could only directly apply to online marketplace bans if they amount to a *de facto* prohibition on the use of the Internet. However, the two restrictions should not be equated, given that insofar as online marketplace bans are concerned, the retailers can still use the online environment.¹¹³

The findings of the Inquiry indicate that in order to conclude whether the use of marketplace bans restricts effectively the use of the Internet, it is vital to look at the affected market, because the bans' impact is not the same on all markets.¹¹⁴ In addition, the Commission contends that the nature of the product is also relevant, especially to appraise the merit of the efficiencies

¹⁰⁹ FCO, 'Düsseldorf Higher Regional Court confirms Bundeskartellamt's decision on prohibition of use of price comparison engines', 6 April 2017, <https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Pressemitteilungen/06_04_2017_Asics.pdf?__blob=publicationFile&v=3> accessed 14 August 2017.

¹¹⁰ See generally Preliminary Report (n 10) paras 465-474; Staff Working Document (n 3) paras 499-514.

¹¹¹ Staff Working Document (n 3) para 499.

¹¹² *Ibid* para 501.

¹¹³ *Ibid* paras 502-503.

¹¹⁴ See *infra* 24-25.

that manufacturers claim, in particular with respect to brand image and free-riding.

In light of the above considerations, this view holds that online marketplace bans are not hardcore restrictions within the meaning of article 4(b) and/or article 4(c) VBER, as it is not their object to restrict neither the territory or the customers to whom ‘a buyer party of the agreement [...] may sell the contract goods or services’¹¹⁵ nor active or passive selling to end users. Essentially, articles 4(b) and 4(c) VBER sanction – as hardcore restrictions – clauses which have the object to restrict *where* or *to whom* distributors can sell. Therefore, the query is whether online marketplace bans fall within this category. The Commission, both in the Guidelines as well as in the Preliminary Report and the Final Report, interprets the bans as restrictions that do not restrict *where* or *to whom* a distributor may sell. Instead, they determine *how* the manufacturers’ products ought to be distributed; hence they can be block exempted by VBER.¹¹⁶

Although the Commission does not consider online marketplace bans as a hardcore restriction in itself, it will investigate agreements incorporating such restrictions that are not covered by the VBER. This would be the case either due to excess of the 30% market share thresholds provided for in article 3 VBER or due to the existence of other hardcore restraints in the agreements pursuant to article 4 VBER. Furthermore, the possibility to withdraw the application of the VBER according to article 29 of Regulation 1/2003 is also acknowledged.¹¹⁷ While scrutinising online marketplace bans, the following factors are particularly relevant:

- i. the importance of marketplaces for the specific product and geographic market;
- ii. the nature of the restriction (absolute ban or qualitative criterion); and
- iii. the merit of arguments pertaining to the brand image and to the maintenance of high level pre- and post-sales services.¹¹⁸

The divergent approaches among Competition Authorities have found support in legal theory as well. The debate does not only concern whether

¹¹⁵ VBER (n 44) art. 4(b).

¹¹⁶ Hedelstrom and Peeperkorn (n 57) 12; Preliminary Report (n 10) 472; Final Report (n 3) 509.

¹¹⁷ VBER (n 44) recital 15.

¹¹⁸ Final Report (n 3) para 513.

online marketplace bans should be treated as a restriction by object and a hardcore restriction; it also extends to the question whether the current European competition law framework can effectively analyse online vertical restraints.

2. Favouring the object analysis

The Commission's approach has not been unquestioned. It has been suggested that the current legal framework provides convincing arguments in favour of an approach similar to *Pierre Fabre*.

It has been articulated that the *Metro* criteria, in conjunction with the CJEU finding that maintaining a prestigious brand image is not a legitimate aim to restrict competition, should bring online marketplace bans within the scope of article 101(1) TFEU.¹¹⁹ It is argued that absolute marketplace bans are not qualitative criteria, but even if they were, they would be disproportionate to the nature of the product, discriminatory and would lack a legitimate aim.¹²⁰ By also examining the economic context of the agreement (its characteristics along with the market dynamics) one could advocate for a *Pierre Fabre* analysis. The aggravation of successful entry for SMEs, the intensification of information asymmetry, the inability to cope with the outburst of mobile e-commerce without online marketplaces in juxtaposition with the dampening of intra-brand and inter-brand competition and the shielding of manufacturers against fierce price competition, are all indicators that an object analysis may be required.¹²¹

Furthermore, it is supported that third-party platform bans should be considered as hardcore restrictions. First, they infringe the principle of equivalence between the criteria imposed on online and brick-and-mortar sales. Hence, paragraph 56 of the Guidelines classifies them as hardcore restrictions. Moreover, it has been maintained that online marketplaces' customers form a distinct customer group for the purposes of article 4(c) VBER, although this is not a necessary requirement for its application.¹²² Influenced by *Adidas*,¹²³ this view points out that the services offered by

¹¹⁹ Ezrachi (n 11) 10.

¹²⁰ Wartinger and Solek (n 17) 300-302.

¹²¹ Ezrachi (n 11) 12-14; Wartinger and Solek (n 17) 300.

¹²² Wartinger and Solek (n 17) 299.

¹²³ See *supra* 12.

online marketplaces cannot be substituted by the retailers' online shops or by search engines, due to marketplaces' characteristics, i.e. '(i) the immediate price and conditions comparison of products from different suppliers and products offered by different distributors, resulting in a ranking, (ii) broader choice, (iii) quick and safe delivery, and (iv) the overall effect of a one-stop shop'.¹²⁴ This interpretation essentially proposes that online marketplace bans restrict the customers *to whom* the distributors can sell and thus infringe article 4(c) VBER. At the same time, the Guidelines' paragraph 54 should not be read as allowing for absolute marketplace bans. On the contrary, its purpose is to avoid confusion between the brands of the supplier and those of the third-party platform which, however, is not likely to occur due to the platforms' popularity.¹²⁵

In addition, it has been questioned whether such bans fulfil the four cumulative conditions of article 101(3) TFEU with sufficient certainty, especially due to lack of efficiency gains and indispensability.¹²⁶ By the same token, the VBER - which is essentially a cumulative application of article 101(3) TFEU - should not apply considering its fifth recital.¹²⁷

3. Online Marketplace Bans Meriting Block Exemption

Against these positions, there has been argumentation that even if online marketplace bans do not fulfil the *Metro* criteria, they should not be considered as a hardcore restriction.

According to this view, the CJEU should re-assess its finding in *Pierre Fabre* that maintaining a prestigious brand image is not a legitimate aim for restricting competition. This is because the commercial value of a luxury good comprises both the value of its materials and a psychological value for the consumers, generated by the brand image of the product. The psychological aspect of a product's value has been confirmed not only by the CJEU, but from various other disciplines as well (e.g. economics, psychology and marketing).¹²⁸ Therefore, if the brand image is damaged, the good's value

¹²⁴ Wartinger and Solek (n 17) 299.

¹²⁵ Ibid 303.

¹²⁶ Ibid 302-303; Ezrachi (n 11) 11-12.

¹²⁷ Ezrachi (n 11) 10-11.

¹²⁸ Anne Witt, 'Restrictions on the use of third-party platforms in selective distribution agreements for luxury goods' (2016) 12(2) European Competition Law Journal 435 (also

diminishes; hence, protecting the brand image should be considered as a legitimate aim shielded by the selective distribution system. However, an absolute ban on online marketplaces would probably fail the *Metro* test on proportionality grounds, as there is the less severe alternative of ‘approving the third-party platform on the basis of the same objective, qualitative and proportionate criteria it requires from the distributor’s online shop’.¹²⁹ Moreover, the analogous application of the CJEU case law on franchising agreements in conjunction with the *Metro* criteria could further legitimise the protection of the brand image for products which are not considered as luxury.¹³⁰ In *Pronuptia*, the CJEU considered that ‘measures necessary for maintaining the identity and reputation of the network bearing [the franchisor’s] business name or symbol’ fall outside the scope of article 101(1) TFEU.¹³¹

However, absolute online marketplace bans should benefit from the VBER. They are not a hardcore restriction under article 4(b) VBER, as this provision aims at preventing the blending of exclusive distribution with selective distribution that compartmentalises the market by territory or customer group.¹³² In line with the Commission’s approach, this take suggests that online marketplace bans restrict only *how* the distributors can sell and do not shield other distributors of the network.

Furthermore, the requirements of article 4(c) VBER are not met either. In particular, it is questioned whether such bans restrict passive sales. Although the Commission indicates in the Guidelines what it perceives as passive selling and as restrictions thereof in the online environment,¹³³ it has been criticised for penalising restrictions without solid economic justification, moving towards a formalistic approach. The presumption of anti-competitive effects related to restraints categorised as a restriction of passive sales necessitates a clear definition within the context of the VBER.¹³⁴ Moreover, it is argued that the classic concept of passive sales restrictions, i.e.

available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2921050>) p 16; See also *supra* 9-10.

¹²⁹ Witt (n 128) 17.

¹³⁰ *Ibid* 17-18.

¹³¹ Case 161/84, *Pronuptia de Paris GmbH v Pronuptia de Paris Irmgard Schillgallis* [1986] ECR 353, para 17.

¹³² Guidelines (n 45) para 50; Witt (n 128) 18.

¹³³ E.g. Guidelines (n 45) para 52.

¹³⁴ Buccirosi (n 45) 763-764.

restrictions on the freedom to respond to unsolicited sales requests by customers, was interpreted very broadly in *Pierre Fabre*. Essentially, it was equated to a restriction whereby the retailer cannot sell the products online and, therefore, reach more potential customers. Thus, the concept was broadened to encompass not only direct prohibitions to respond to unsolicited requests but also prohibitions lowering the sales' likelihood due to channel elimination.¹³⁵ Accepting that online marketplace bans, which are a means of online marketing, constitute restrictions of passive sales would further broaden the concept. Concomitantly, one should bear in mind that hardcore restrictions are perceived by the Commission as restrictions by object; hence, they should be interpreted restrictively.¹³⁶

Finally, even if per se marketplace bans are deemed as hardcore restrictions, it would be worth considering whether they amount to a prohibition from operating out of an unauthorised place of establishment, which is permitted under article 4(c) VBER. Although the CJEU established in *Pierre Fabre* that the above exception should apply only to physical outlets, it is suggested that in case of online marketplaces this finding should be revisited. There is no need to distinguish between virtual and physical sales places, between which comparable parallels can be found.¹³⁷

4. Critical Analysis

This section analyses the aforementioned views, considering whether (i) online marketplace bans fall within the ambit of article 101(1) TFEU, and (ii) they can be block exempted under the VBER.

4.1 101(1) TFEU: The *Metro* Criteria

There seems to be a consensus among the contrasting legal theory views that (absolute) online marketplace bans would fail the *Metro* test, at least on proportionality grounds. As a result, this would mean that competition is restricted within the meaning of article 101(1) TFEU. Nevertheless, there is no convergence regarding to whether this is a restriction by object or by effect. Although it has been explicitly supported that absolute online

¹³⁵ Witt (n 128) 18-19.

¹³⁶ *Cartes Bancaires* (n 55) para 58.

¹³⁷ Witt (n 128) 20.

marketplace bans could amount to a restriction by object, this is not the case concerning the effects analysis. The Commission implies that online marketplace bans may be considered as a restriction by effect, by not regarding them as hardcore restriction.¹³⁸

Insofar as the *Metro* criteria are concerned, it has been maintained that absolute online marketplace bans (apart from being disproportionate) are not qualitative, do not pursue a legitimate aim, and are discriminatory.¹³⁹ This kind of bans seems not to set quality criteria that marketplaces should meet; it rather bans sales on all, or types of, marketplaces across the board. However, in that case, it is difficult to perceive why such bans are discriminatory if all retailers are prohibited from using the marketplace and the supplier itself does not sell on the marketplace. The scenario would seem more problematic on discrimination grounds if the manufacturer or some retailers can use third-party platforms while others are prohibited from selling thereon, i.e. when the restriction is not laid down uniformly for all the members of the network. The Commission refers to the latter case in the Staff Working Document, stating that justifications pertaining to pre- and post-sales services as well as brand image will be more difficult to succeed.¹⁴⁰

Furthermore, it is submitted that it is not safe to rely on *Pierre Fabre* to conclude that protecting the brand image is not a legitimate aim to restrict competition. Considering the criticism the judgment has received as well as this passage's possible interpretations,¹⁴¹ the following should be noted: A literal interpretation of the finding would contrast with previous case law of the CJEU regarding selective distribution. It would also contrast with the fact that certain products require a particular way of handling, which is one of the very purposes of setting up a selective distribution system. On the other hand, if the alternative interpretation is accepted, the result would be that this finding amounts to a proportionality requirement between the nature of the product and the imposed restriction for the products at hand in *Pierre Fabre*. Hence, in that case this holding should not be generalised irrespective of the nature of the product. Moreover, the psychological aspect of a product's value which is directly related to the brand image has been shown by various

¹³⁸ Ezrachi (n 11) 16.

¹³⁹ See n 120.

¹⁴⁰ Staff Working Document (n 3) para 514.

¹⁴¹ See *supra* 9-10.

disciplines.¹⁴² Therefore, a blow to the brand image could equal a decrease of the product's overall value, thus rendering the protection of the brand image a plausible goal.

Both the position considering absolute online marketplace bans as a hardcore restriction and the one suggesting that such bans should be block exempted, accept that per se third-party platform bans are disproportionate.¹⁴³ From the outset, it should be stated that this is a pragmatic approach, recognising that qualitative requirements are a less pervasive way of achieving the desired result. Furthermore, it takes note of the marketplaces' evolution to address quality concerns.¹⁴⁴ While ultimately this assertion may be correct, it should be borne in mind that the *Metro* criteria, hence the proportionality test contained therein, are designed for a case-by-case analysis which depends on the characteristics of the product in question and which should not be pre-empted. Moreover, it is an approach which should be treated with caution, because accepting *a priori* the disproportionality of the restriction would mean that the restriction would normally fail the article 101(3) TFEU test on indispensability grounds, which would in turn raise doubts as to the application of the VBER.¹⁴⁵

4.2 Object or Effect?

Accepting that the *Metro* criteria are not met brings absolute online marketplace bans within the scope of article 101(1) TFEU. It is crucial to ascertain whether these bans are a restriction by object in light of the consequences that this characterisation bears.¹⁴⁶

First, *Pierre Fabre* seems to establish that a selective distribution system not meeting the *Metro* criteria (absent other objective justification) is a restriction by object.¹⁴⁷ If this statement is adhered to in the next CJEU judgments, supporting that online marketplace bans should be block exempted will be a rather arduous task. Although in principle it is possible for a restriction by object to meet the requirements of article 101(3) TFEU, in practice article

¹⁴² See n 128.

¹⁴³ Ezrachi (n 11) 12; Waringer and Solek (n 17) 302; Witt (n 128) 17.

¹⁴⁴ See e.g. Final Report (n 3) paras 490-492.

¹⁴⁵ See n 126.

¹⁴⁶ See *supra* 7-8.

¹⁴⁷ *Pierre Fabre* (n 69) para 39.

101(3) TFEU defences do not normally succeed in ‘by object’ cases. Thus, the application of the VBER should be excluded based on article 2 and recital 10 thereof; the latter holds that ‘[t]his Regulation should not exempt vertical agreements containing restrictions which are likely to restrict competition and harm consumers or which are not *indispensable* to the attainment of the efficiency-enhancing effects’.¹⁴⁸

Considering not only the criticism that *Pierre Fabre* has received on this point, but also the pro-competitive effects of the selective distribution systems recognised both by the economic theory and the Commission,¹⁴⁹ this finding should be re-assessed. Reaching the conclusion that selective distribution systems not fulfilling the *Metro* criteria are restrictions by object would lead to legal uncertainty. Currently, the undertakings can self-assess whether their selective distribution agreements will benefit from the VBER. It is generally accepted that the VBER can apply even though the *Metro* criteria are not complied with.¹⁵⁰ However, if all selective distribution agreements inconsistent with the *Metro* criteria are *ipso facto* deemed as restrictions by object, in line with the above reasoning, the application of the VBER for all such agreements would be jeopardised, thus hindering the undertakings’ possibility to self-assess.

Instead, to reach the conclusion that a restraint is a restriction by object:

[R]egard must be had to the content of its provisions, its objectives and the economic and legal context of which it forms a part. When determining that context, it is also necessary to take into consideration the nature of the goods or services affected as well as the real conditions of the functioning of the market or the markets in question.¹⁵¹

¹⁴⁸ VBER (n 44) recital 10 (emphasis added).

¹⁴⁹ See e.g., G. Franklin Mathewson and Ralph Winter, ‘An Economic Theory of Vertical Restraints’ (1984) 15 *RAND Journal of Economics* 27; Rey Patrick & Vergé Thibaud, *Economics of Vertical Restraints*, in *Handbook of Antitrust Economics* 353 (Paolo Buccirossi ed., MIT Press 2008).

¹⁵⁰ Jones and Sufrin (n 37) 812.

¹⁵¹ *Cartes Bancaires* (n 55) para 53.

It should be also borne in mind that the concept of restrictions by object should be interpreted restrictively; it should cover only restrictions which are sufficiently deleterious to competition.¹⁵² Concomitantly, in case that an elaborate market analysis is required due to the complexity of the measure or due to inexperience with the restriction, *Cartes Bancaires* establishes that the restriction at hand is not a restriction by object.¹⁵³

In the light of the above, it could first be observed that if a look into the market dynamics¹⁵⁴ equals a detailed market analysis, then online marketplaces should not be looked at as a restriction by object. Given that the Commission launched the Inquiry, *inter alia*, to understand the characteristics of the online marketplaces restrictions, one could also question the experience with the restriction as well.¹⁵⁵ Furthermore, it may be true that online marketplace bans hinder competition for SMEs and even lead to their exclusion from reaching the mobile consumer. Nevertheless, this would be a finding that falls into the examination of the anti-competitive effects of the restraint and not of its object.¹⁵⁶

Moreover, the Commission concluded in the Final Report that the importance of the marketplaces as well as impact of the bans vary significantly between Member States and different products.¹⁵⁷ In addition, the limitation of price competition and the inducement of other forms of competition among retailers are inherent elements in selective distribution systems. While the Internet enhances price competition, it may reduce other forms thereof which are important in markets for products which normally merit selective distribution systems (high-end or technologically complex). Buccirossi notes that in such industries, maintaining a prestigious image is a form of competition in itself.¹⁵⁸ Finally, characterising online marketplace bans as restrictions by object can be questioned from a policy perspective as well. Considering that the object category should be reserved for restrictions which are sufficiently pernicious to competition, such a characterisation would assign the same moral disdain to online marketplace bans as that of price

¹⁵² Ibid para 58.

¹⁵³ Jones and Sufrin (n 37) 202.

¹⁵⁴ See n 121.

¹⁵⁵ Final Report (n 3) para 444.

¹⁵⁶ *Cartes Bancaires* (n 55) paras 80-81.

¹⁵⁷ Final Report (n 3) para 504.

¹⁵⁸ Buccirossi (n 45) 770-771.

fixing agreements. Is it warranted to treat the two restrictions under the same rule?

Having in mind these arguments, it is submitted that online marketplace bans should not be regarded as a restriction by object. Instead, their anti-competitive effects should be assessed before concluding that competition is restricted within the meaning of article 101(1) TFEU.

4.3 A Hardcore Restriction?

Assuming that online marketplace bans are not a serious restriction within the meaning of the VBER and hence they can in principle be block exempted, it is crucial to ascertain whether they constitute hardcore restrictions pursuant to article 4 VBER. Namely, it should be assessed whether (i) they restrict the retailers' customers, (ii) they restrict passive sales to end users, and/or (iii) they comply with the principle of equivalence.

It has been supported that for the purposes of article 4(c) VBER, third-party platforms' customers are a distinct customer group from customers who shop online in general, e.g. via a retailer's online shop.¹⁵⁹ This could also apply for the purposes of article 4(b) VBER, which, nevertheless, was not used by the CJEU to support the finding of a hardcore restriction in *Pierre Fabre*. However, the validity of the above statement needs to be examined. By way of example, if this proposition is true, a customer who would purchase sports articles from an online marketplace would belong to a different customer group from a customer who would do so from a retailer's website, e.g. Sportsdirect. According to this view, a critical difference is that online marketplaces offer a listing of the products and the customer can review their prices and characteristics comparatively. However, Sportsdirect's website also offers that possibility.¹⁶⁰ Furthermore, allegedly online marketplaces offer more choice. Retailers' webshops can provide broad choice as well; by accessing Sportsdirect's website, the consumer can purchase a variety of sports articles supplied by 983 brands.¹⁶¹ In addition, it is reported that

¹⁵⁹ See n 125.

¹⁶⁰ 'Search Results' (*Sportsdirect.com*, 2017) <[http://www.sportsdirect.com/SearchResults?DescriptionFilter=Football Boots](http://www.sportsdirect.com/SearchResults?DescriptionFilter=Football%20Boots)> accessed 14 August 2017.

¹⁶¹ 'Brands' (*Sportsdirect.com*, 2017) <<http://www.sportsdirect.com/brands>> accessed 14 August 2017.

customers prefer online marketplaces due to safer payment methods as well as to safer delivery schemes. Insofar as payment methods are concerned, Sportsdirect's online shop not only accepts the same credit/debit cards as Amazon but also provides for PayPal payment, which is not accepted by Amazon.¹⁶² Along the same lines, Sportsdirect provides for standard, express, and next day delivery, while its delivery system is supported by order confirmation and order tracking services.¹⁶³ Admittedly, online marketplaces enable the sports article customer to purchase at the same time products unrelated to sports, e.g. headphones; thus, they constitute one-stop shops. Nevertheless, retailers' shops can also be viewed as one-stop shops to a certain extent. For instance, a Sportsdirect customer can purchase at the same time a basketball and a suitcase, i.e. products that are also unrelated. Considering the above, it is observed that these grounds do not justify the categorisation of online marketplace customers' as a distinct customer group.

Furthermore, a key difference between online marketplace bans and the *de facto* ban on Internet sales is that the former restriction allows the retailers to sell the contract goods via their website. Given that (i) article 4(b) VBER applies to restrictions that have as their object to partition the market by territorial or customer allocation, (ii) online marketplace bans have as object to protect the brand image, which should be considered legitimate, and (iii) it is not evident that online marketplaces' customers form a distinct customer group, online marketplace bans should not be considered as a hardcore restriction under article 4(b) VBER. The difference between the two *scenarii* in conjunction with the reasoning requiring the restrictive interpretation of the passive sales concept indicate that such bans are not a hardcore restriction under article 4(c) VBER either.¹⁶⁴

Finally, it should be examined whether the principle of equivalence is breached. The view that third-party platform bans are hardcore restrictions accepts that such bans cannot be justified on equivalence grounds, since there

¹⁶² 'Amazon.co.uk Help: About Payment Methods' (*Amazon.co.uk*, 2017) <<https://www.amazon.co.uk/gp/help/customer/display.html?nodeId=201895610>> accessed 14 August 2017; 'Payment Options' (*Sportsdirect.com*, 2017) <<http://www.sportsdirect.com/customerservices/placingorders/paymentoptions>> accessed 14 August 2017.

¹⁶³ 'Delivery Options' (*Sportsdirect.com*, 2017) <<http://www.sportsdirect.com/customerservices/deliveryinfo/deliveryoptions>> accessed 14 August 2017.

¹⁶⁴ See *supra* 18-19.

is no comparable offline service for online marketplaces.¹⁶⁵ However, if the restriction cannot be justified due to the lack of a comparable service, it can neither be condemned on equivalence grounds. The existence of a basis for comparison is necessary to conclude that a restriction is equivalent or not to other restrictions. On the other hand, in case that it is accepted that such a comparable service exists,¹⁶⁶ it would be worth considering whether online marketplace bans could be equated to a restriction to operate from an unauthorised place of establishment in line with article 4(c) VBER, despite the finding in *Pierre Fabre*.¹⁶⁷

Concluding that online marketplace bans are neither restrictions by object nor hardcore restrictions is consistent with AG Wahl's recent Opinion in *Coty*.¹⁶⁸

5. The *Coty* case

Parfümerie Akzente GmbH was an authorised distributor within the selective distribution system operated by Coty Germany GmbH (Coty), a leading supplier of luxury cosmetics. Coty imposed an absolute ban on the use of online platforms in a discernible manner for the sale of contract goods and the OLG Frankfurt am Main referred the matter to the CJEU to determine whether this clause (i) is compatible with article 101(1) TFEU, and (ii) it constitutes a hardcore restriction under article 4 VBER.

On 26 July 2017, AG Wahl delivered his Opinion, whereby focal points of this article are addressed. First, it is clarified that the aim to maintain a prestigious brand image is compatible with article 101(1) TFEU insofar as the *Metro* criteria are met.¹⁶⁹ The finding in paragraph 46 of *Pierre Fabre* pertaining to the brand image concerned only the clause at stake in that case and 'belongs to the context of a review of the proportionality of the contractual clause actually at issue in the main proceedings'.¹⁷⁰ Therefore, the

¹⁶⁵ *Asics* (n 102) 11.

¹⁶⁶ Ariel Ezrachi, 'Online Marketplace Bans and Consumer Welfare – A Tale of Quality and Long Term Investment, or a Story of Limited Choice and Higher Prices' <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2983670> accessed 14 August 2017, 5.

¹⁶⁷ See n 137.

¹⁶⁸ He also acted as AG in *Cartes Bancaires* (n. 55).

¹⁶⁹ *Coty* (n 5) Opinion of AG Wahl para 93.

¹⁷⁰ *Ibid* para 83.

protection of the brand image can still justify the operation of a selective distribution system; finding otherwise would fundamentally alter the CJEU case law related to the evaluation of selective distribution under article 101(1) TFEU.¹⁷¹ This approach is also consistent with and endorsed by CJEU case law on trademarks, e.g. *Copad*.

Furthermore, AG Wahl proposes that even absolute online marketplace bans can be compatible with article 101(1) TFEU provided that the *Metro* criteria are complied with.¹⁷² The analysis does not elaborate on whether absolute online marketplace bans are a qualitative criterion, as this was not an issue in *Coty*. Rather, it is focused on the legitimacy of the bans as well as on their proportionality. Absolute online marketplace bans are in line with the Logo Clause and can be justified by the aim to protect the brand image, which requires the maintenance of quality standards regarding the presentation of the products. However, while using online marketplaces neither the retailers nor the supplier can control the image and the presentation of the products, as third-party platforms do not need to comply with the selective distribution agreement's terms. Therefore, absolute online marketplace bans may constitute a proportionate way to achieve the objectives pursued.¹⁷³ Moreover, this restriction differs from the absolute ban on online sales imposed in *Pierre Fabre*, as the retailers can still sell the contract goods via their websites, which according to the Final Report remain the preferred online distribution channel.¹⁷⁴

However, even if it is concluded that absolute online marketplace bans fail the *Metro* test, the restriction should not be considered as a restriction by object, because at present it does not entail a degree of harm equal to the one of the total ban on the use of the Internet. Hence, the agreements containing online marketplace bans can benefit from block exemption and from the individual application of the article 101(3) TFEU.¹⁷⁵

AG Wahl adds that online marketplace bans are not hardcore restrictions under article 4(b) VBER, as their content and objective do not indicate market partitioning. By appraising their economic and legal context, he concludes

¹⁷¹ Ibid paras 62-63.

¹⁷² Ibid para 122.

¹⁷³ Ibid paras 112-113.

¹⁷⁴ Ibid paras 107-111.

¹⁷⁵ Ibid paras 115-121.

that the results of the Inquiry suggest that online marketplaces' importance as a distribution channel varies significantly between member states as well as between products; thus, online marketplace bans cannot be compared with the ban imposed in *Pierre Fabre*.¹⁷⁶ Moreover, it has not been established that online marketplaces' customers are a 'definable customer base' so as to conclude that the online marketplace bans result to customer sharing.¹⁷⁷

Finally, in the light of the clause's content, objective and economic and legal context, it cannot be deduced that online marketplace bans intrinsically harm passive sales. It is reiterated that the ban at hand differs from the *Pierre Fabre* ban, as the retailers have the possibility to sell the products via their webshops and/or via third-party platforms in a non-discernible manner.

V. The Inquiry: A Contextual Appraisal

The Inquiry gives valuable insight to the various stakeholders about the Commission's views on online marketplace bans and constitutes a step forward towards the much-demanded legal certainty. This chapter analyses (i) the pivotal findings of the Commission regarding online marketplaces and online marketplace bans, (ii) the concerns of the various stakeholders related to the Inquiry, and (iii) the actual and potential impact of the Inquiry.

1. Key Findings

From the outset, the Commission's efforts regarding the Inquiry should be commended, as it examined approximately 8,000 distribution and licence agreements and collected evidence from around 1,900 undertakings.¹⁷⁸ The Commission's approach towards online marketplace bans remained the same throughout the Inquiry, despite the voices during the public consultation stage urging that online marketplace bans should be considered as hardcore

¹⁷⁶ Ibid paras 140-151.

¹⁷⁷ Ibid para 150.

¹⁷⁸ European Commission, 'Antitrust: Commission Opens Formal Investigation into Distribution Practices of Clothing Company Guess' (2017) <http://europa.eu/rapid/press-release_IP-17-1549_en.htm> accessed 14 August 2017.

restrictions.¹⁷⁹ In order to assess whether online marketplace bans can be block exempted, information was gathered from 37 marketplaces, 1051 retailers, and 259 manufacturers/suppliers.¹⁸⁰ The results of the Inquiry showed that only 4% of the respondent retailers use solely online marketplaces to sell contract goods, that the conversion rate achieved on retailers' webshops is marginally lower than the one achieved on online marketplaces (4% and 5% respectively) as well as that 88% of 669 respondent retailers not selling on online marketplaces in 2014 indicated that they were not contractually restricted from doing so.¹⁸¹ These findings should be seen in conjunction with the volatile importance of the marketplaces both among the EU Member States (85% of professional sellers listed on online marketplaces were established in Germany, United Kingdom and Poland) and among different product categories (only an average of 4% of computer games retailers sell on online marketplaces).¹⁸²

Moreover, it is recognised that even though online marketplaces are not the most important online sales channel for retailers, it is a channel of growing importance, as the number of professional sellers active on online marketplaces has increased by an average of 47% in 3 years.¹⁸³ Furthermore, the Staff Working Document affirms that online marketplaces are a very important sales channel for SMEs, as e.g. they account for 69% of online the sales for undertakings with an annual turnover € 500,000 – 2,000,000 that also sell contract goods via their website.¹⁸⁴ However, and despite numerous retailers' manifestations, the Inquiry showed that SMEs are not more likely to have restrictions on the use of online marketplaces than large retailers; instead, the Commission found that the significance of marketplace restrictions ranges between different product categories.¹⁸⁵

¹⁷⁹ See e.g. CCIA, 'CCIA Response to the Public Consultation on the Preliminary Report on the E-Commerce Sector Inquiry' (2016) <http://ec.europa.eu/competition/antitrust/e_commerce_files/computer_and_communications_industry_association_en.pdf> accessed 14 August 2017.

¹⁸⁰ Staff Working Document (n 3) para 70.

¹⁸¹ Ibid paras 447-448, 470.

¹⁸² Ibid paras 453-454.

¹⁸³ Ibid para 455.

¹⁸⁴ Ibid para 451.

¹⁸⁵ Ibid paras 471-472.

The interested stakeholders had the chance to comment on these findings during the public consultation stage, whereby concerns about the Commission's approach to online marketplace bans were raised.

2. A Critical Stance to the Inquiry's Results

Although the Inquiry was largely welcomed by the E-Commerce stakeholders,¹⁸⁶ the public consultation offered fertile ground for the assessment of the Preliminary Report's results and for points which the Commission may have missed.

First, it should be pointed out that the assessment of the Inquiry's findings is difficult to conduct without access to the datasets that the Commission itself used.¹⁸⁷ Nevertheless, it has been suggested that the results of the Inquiry may not reflect the actual E-Commerce conditions in the various Member States. It is indicative that there are 338 German retailers-respondents to Inquiry and only 38 and 48 respondents in Spain and France respectively.¹⁸⁸ This could be interpreted as an over-representation of German retail sector.¹⁸⁹ However, Ebay suggests that this number is too small, given that in 2010 more than 117.000 German enterprises were engaged in E-Commerce.¹⁹⁰ At the same time, it is proposed that SMEs are under-represented, as only a handful of SMEs are listed on the databases on which the Commission relied to select the retailers and by definition SMEs have less time and human capacity available to devote to answering the questionnaire.¹⁹¹ In addition, it is alleged that the Commission has defined very broadly some product categories as they encompass products which are not *prima facie* homogeneous, and thus 'raise completely different issues in terms of competitive dynamics, need for

¹⁸⁶ For the purposes of this research 28 public consultation submissions were studied, 18 of which commend the Commission for launching the Inquiry.

¹⁸⁷ Amway, 'Amway's response to the Public Consultation on the European Commission Preliminary Report on the E-Commerce Sector Inquiry' (2016) <http://ec.europa.eu/competition/antitrust/e_commerce_files/amway_en.pdf> accessed 14 August 2017, 3.

¹⁸⁸ Assonime, 'Assonime contribution to the Commission Consultation on the Preliminary Report on the E-Commerce Sector Inquiry' (2016) <http://ec.europa.eu/competition/antitrust/e_commerce_files/assonime_en.pdf> accessed 14 August 2017, 4.

¹⁸⁹ Ibid.

¹⁹⁰ Ebay (n 26) 15.

¹⁹¹ Ibid 14-15.

brand protection and protection against counterfeiting'.¹⁹² Furthermore, the Commission has received criticism that the Inquiry does not adequately provide guidance for market definition purposes as well for the calculation of the 30% market share threshold to determine whether the VBER is applicable.¹⁹³

Moreover, the Inquiry's findings regarding the manufacturers' concerns about online marketplaces have also been criticised. Amazon argues that it is wrong for the manufacturers to infer that online marketplaces are inherently incapable of addressing brand image considerations; tailored 'landing pages' and 'premium beauty stores' are examples of Amazon's efforts to address such concerns.¹⁹⁴ This is corroborated by the fact that the Commission has taken account of the marketplaces' steps to address quality requirements. It is indicative that 86% of the respondent marketplaces declare to have taken action to improve the services and the image of their platform.¹⁹⁵

At the same time, the sale of counterfeit products on marketplaces is also a contentious point. On the one hand, manufacturers argue that online marketplaces earn commissions out of the sale of counterfeit products and, thus, their operators are less incentivised to combat such sales.¹⁹⁶ On the other hand, retailers proclaim that manufacturers misuse the notification and take down procedures offered by the marketplaces to report the sale of original products as well.¹⁹⁷ While the sale of counterfeit products is an issue faced by 97% of the respondent marketplaces, it should be borne in mind that online marketplaces have an incentive to safeguard the quality of the products sold on their platforms to establish trust between the two sides of the market and due to network effects; the expansion of the sale of counterfeit products could tip the market in favour of their competitors. In that direction, leading marketplaces have recently announced their collaboration with the

¹⁹² Assonime (n 187) 4-5.

¹⁹³ Brands for Europe, 'E-commerce Sector Inquiry – Interim Report; Response' (2016) <http://ec.europa.eu/competition/antitrust/e_commerce_files/brands_for_europe_en.pdf> accessed 14 August 2017, 8.

¹⁹⁴ Amazon, 'Preliminary Report of the European Commission on the E-commerce Sector Inquiry; Comments by Amazon EU Sarl' (2016) <http://ec.europa.eu/competition/antitrust/e_commerce_files/amazon_eu_en.pdf> accessed 14 August 2017.

¹⁹⁵ Final Report (n 3) paras 490-492.

¹⁹⁶ Ibid paras 481-482.

¹⁹⁷ Ibid.

Commission in order to remove dangerous products sold on their platform, through the use of the Rapid Alert System.¹⁹⁸ Lastly, the call for a distinct analysis required between pure and hybrid marketplaces was not answered.¹⁹⁹ As hybrid marketplaces directly compete with the retailers using their platform, it has been reported that they have an incentive to free-ride on the proprietary data of the active retailers on their platform.²⁰⁰ Furthermore, it is alleged that hybrid marketplaces enjoy a beneficial taxation and regulatory regime which create competitive advantages against their retailers-competitors.²⁰¹

Insofar as the legal assessment of online marketplace bans is concerned, the Inquiry evidences the Commission's viewpoint that the current framework can adequately cover such restrictions. This approach has also been explicitly expressed by the Competition and Markets Authority.²⁰² Against this perspective, it has been suggested that the current framework is unclear to the benefit of the manufacturers who justify absolute online marketplace bans by referring to the Logo Clause,²⁰³ and, hence, a recalibration of the Guidelines (or even of the VBER) is necessary.²⁰⁴ It is argued that a consistent interpretation of paragraph 54 of the Guidelines would mean that absolute online marketplace bans are hardcore restrictions as they are not qualitative criteria.²⁰⁵ In any case, it has been alleged that both the wording and the scope of paragraph 54 do not reflect the current commercial reality. In particular, the Logo Clause has been criticised as inaccurately drafted, since online

¹⁹⁸ See European Commission, 'Keeping EU Consumers Safe – Online Marketplaces Join Efforts to Remove Dangerous Products From EU Market' (2017) <http://europa.eu/rapid/press-release_IP-17-602_en.htm> accessed 14 August 2017.

¹⁹⁹ European Consumer Organisation, 'E-Commerce Sector Inquiry; BEUC Comments on the Preliminary Report' (2016) <http://ec.europa.eu/competition/antitrust/e_commerce_files/beuc_en.pdf> accessed 14 August 2017, 7.

²⁰⁰ Independent Retail Europe, 'Commission "Preliminary Report on the E-Commerce Sector Inquiry": Preliminary Opinion of Independent Retail Europe' (2016) <http://ec.europa.eu/competition/antitrust/e_commerce_files/independent_retail_europe_en.pdf> accessed 14 August 2017, 6.

²⁰¹ Ibid.

²⁰² CMA, 'CMA Response to the Preliminary Report of the E-commerce Sector Inquiry' (2016) <http://ec.europa.eu/competition/antitrust/e_commerce_files/competition_and_markets_authority_en.pdf> accessed 14 August 2017, 1.

²⁰³ Amazon (n 193) 10.

²⁰⁴ Ezrachi (n 11) 17.

²⁰⁵ Amazon (n 193) 9.

marketplaces do not ‘host’ the retailers’ websites as it is suggested therein; rather, they give the retailers the chance to advertise their products.²⁰⁶ Moreover, the centrality of online marketplaces as intermediaries evidences that the overly wide scope of paragraph 54 of the Guidelines should be narrowed down to qualify online marketplace bans as hardcore restrictions in line with the approach to other restrictions pertaining to the use of the Internet such as dual pricing.²⁰⁷

Despite the as above criticism, the Inquiry has created a noteworthy impact, only a few months after the publication of the Commission’s Final Report.

3. The Inquiry’s Impact: What can be expected?

The developments observed during the various stages of the Inquiry evidence that its results are a valuable tool in the stakeholders’ hands. First, various companies in the clothing industry, as well as in other retail sectors, were incentivised to recalibrate their commercial practices on their own volition in order to align with the Commission’s findings.²⁰⁸ Furthermore, the experience gained by the Inquiry enabled the Commission to launch formal investigations into the distribution practices of Guess, as well as into the licensing and distribution practices of Nike, Sanrio and Universal Studios, alleging that these undertakings restrict the sale of licensed products cross-border and online.²⁰⁹ In this context, online marketplace bans (the understanding and appraisal of which was one of the goals of the Inquiry) should be scrutinised by the Commission in case the VBER is deemed inapplicable.²¹⁰

The Inquiry’s results have already proven to be of key importance in the appraisal of online marketplace bans. In the light of the above findings, AG Wahl was able to substantiate his Opinion in *Coty*, especially insofar as

²⁰⁶ Ibid 10.

²⁰⁷ Ezrachi (n 11) 17-18.

²⁰⁸ European Commission, 'Antitrust: Commission Publishes Final Report on E-Commerce Sector Inquiry' (2017) <http://europa.eu/rapid/press-release_IP-17-1261_en.htm> accessed 14 August 2017.

²⁰⁹ Ibid; European Commission, 'Antitrust: Commission Opens Formal Investigation into Distribution Practices of Clothing Company Guess' (2017) <http://europa.eu/rapid/press-release_IP-17-1549_en.htm> accessed 14 August 2017.

²¹⁰ Staff Working Document (n 3) paras 444, 511.

appraising the importance of online marketplaces as a sales channel and the economic and legal context of online marketplace bans are concerned.²¹¹ Specific reference was made to the results pertaining to the significant variance of online marketplaces' importance as a sales channel between Member States and products.²¹² The Inquiry evidenced that at the present stage online marketplace bans cannot be equated to the ban on the use of the Internet and, hence, classified as restrictions by object or hardcore restrictions, given that they are not sufficiently injurious to competition. Given the online marketplaces' evolving importance as a sales channel, this statement leaves open the possibility that in the near future online marketplace bans can be regarded as a restriction by object. Furthermore, AG Wahl's Opinion seen in conjunction with the Final Report, affirms the Commission's position that the current framework can adequately address online marketplace bans. It remains to be seen whether and to what extent the CJEU will use the Inquiry's findings in its decision in *Coty* as well as whether it will concur with AG Wahl's Opinion, which is not binding.

VI. Conclusion

Online marketplaces are progressively becoming an important sales channel that offers not only intense intra-brand and inter-brand price competition, but also increased price transparency and, thus, better information for consumers. Third-party platforms enable SMEs to effectively compete with large retailers by reaching a customer base they would not normally have access to, with significantly low costs.

Against these efficiencies, the limitation of price competition which is inherent in selective distribution systems should be contrasted and balanced. The *Pierre Fabre* judgment connects the CJEU case law concerning selective distribution agreements with the sales via the Internet in a seemingly tumultuous way which requires a careful approach. The decision sets out all agreements failing the *Metro* criteria as restrictions by object as well as that maintaining a prestigious brand image is not a legitimate aim for restricting competition.

²¹¹ See *supra* 11-12.

²¹² See n 175.

Under these circumstances, the appraisal of (absolute) online marketplace bans under article 101(1) TFEU has so far been nebulous. While the CJEU will resolve this controversy in *Coty*, it is submitted that online marketplace bans, if deemed not to fulfil the *Metro* criteria, should not be considered as restrictions by object. The CJEU case law on restrictions by object clarifies that this characterisation should be reserved only for restraints which are sufficiently injurious to competition. Given the inexperience with the restriction, the potential need for a detailed market analysis to ascertain the effects on consumers and SMEs as well as the Inquiry's findings, online marketplace bans cannot, for the time being, be equated to restrictions on the use of the Internet; thus, *Pierre Fabre* is not directly applicable.

Furthermore, the protection of the brand image should be perceived as one of the key goals of selective distribution. The relevant *Pierre Fabre* finding can be reconciled with previous CJEU case law only if it is interpreted as a proportionality requirement between the imposed restriction and the nature of the product, applying only to that case. This view is corroborated by AG Wahl's recent Opinion in *Coty*, which balances between the *intuitu personae* selection of the authorised retailers and benefits of online marketplaces in favour of the former. He proposes that online marketplace bans may even fulfil the *Metro* test, but nevertheless does not address the important point of whether (absolute) online marketplace bans are qualitative criteria.

Therefore, in principle, online marketplace bans should be able to benefit from block exemption under the VBER. Online marketplace bans do not have as their object to compartmentalise the market, but to protect the supplier's brand image, while it is not clear how they breach the principle of equivalence. Concomitantly, it has not been satisfactorily shown that online marketplace customers form a distinct customer group. Moreover, the need not to interpret overly broadly the concept of passive sales in juxtaposition with AG Wahl's conclusion that at present online marketplace bans do not amount to a restriction to sell online, indicates that such bans should not be considered as hardcore restrictions.

The above findings are largely founded on the Commission's Inquiry, which charts an until now undiscovered territory and presents the Commission's view (albeit criticised) that the Guidelines and the VBER can adequately cover restrictions as the third-party platform bans.

Finally, it is important not to lose sight of the economic, social and broader political goals that competition law aspires to achieve. Is it prudent from a policy perspective to over-enforce article 101(1) TFEU to reach the desired result more quickly? Considering that the online market circumstances evolve at an exponentially high pace, the day online marketplace bans should be regarded as restrictions by object may not be far away. In the light of the above, the CJEU ruling in *Coty* is eagerly anticipated.

REMEDIES IN AIRLINE MERGERS IN THE EUROPEAN UNION

Szymon Murek*

This paper aims at proposing suitable solutions for dealing with airline mergers in the European Union in the future, with focus on the types of remedies which are likely to precisely tackle any anticompetitive effects of concentrations. In the first part, the business of air transport will be described. Then, the merger control regime in the EU be presented. In the next part, several past airline merger cases will be critically discussed, with the aim of separating effective from ineffective solutions. The last part will discuss the current situation of the airline market in the EU and try to predict its future situation to describe the environment in which mergers are likely to appear prospectively and factors that the European Commission should take into consideration in assessing those mergers. In the concluding part, several solutions aimed at improving the process of clearing mergers in the European Union will be presented.

I. Introduction

Airline sector has always been considered a crucial part of the domestic economy in the majority of countries around the world. Historically, it was not widely accessible and many people, due to inflated prices and limited level of comfort, were forced to use alternative means of transport. Modern, civil aviation, close to today's standards originated in the 1960s in the US, especially due to implementation of jet engines to civil aircrafts (with the notable example of Boeing 707). Transportation of people and cargo has become much faster, cheaper and safer. With the revolution in civil aviation, various new business opportunities emerged, as travellers or goods were able to reach practically any place on earth within 24 hours. However, majority of people in Europe and in the US still were not able to benefit from these changes in civil aviation. Almost all airlines were state-owned, the whole sector was immensely regulated, with high barriers to entry making it almost

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impossible for any new player to enter the market. Due to the lack of effective competition on the market, air carriers had no incentive to reduce prices or improve quality of services, therefore until late 1970s prices of tickets remained on significantly high level.¹

The lengthy, but necessary process of deregulation commenced in 1978 in the US.² In 1982 provisions on price regulation were annulled, and in 1984 a sector regulator - Civil Aeronautics Board, was phased out, which shifted the control over airline sector from the political to market sphere.³ Between 1978 and 1985 number of air carriers in the US increased from 36 to 120 and prices on certain routes dropped up to 80%.⁴

Similar transition commenced in the European Communities with a minor delay, partially because of the transnational character of the body (as, unlike in the United States Congress, different countries needed to consent to any proposed changes). Moreover, because majority of European airlines at the time were state-owned, Member States had an evident conflict of interest, as they were commercially involved in business activity of air carriers regulating them via administrative laws at the same time, which **disincentivised** them from changing the status quo by allowing new entities to enter the market.⁵ Eventually, between 1987 and 1992, several pieces of legislation deregulating the airline industry were passed.⁶ Barriers to entry were significantly lowered in the spirit of free movement of people and goods within the Communities.

¹ Jagdish Sheth, Fred Allvine, Can Uslay, Ashutosh Dixit, *Deregulation and Competition: Lessons from the Airline Industry*, (Sage Publications 2007), 23.

² Airline Deregulation Act, Pub.L. 95-504 92 Stat. 1705.

³ Fred L. Smith Jr., Braden Cox, *The Concise Encyclopedia of Economics: Airline Deregulation*, 1. < www.econlib.org/library/Enc/AirlineDeregulation.html > accessed on 30 October 2017.

⁴ Peter Belobaba, Kari Hernandez, Joe Jenkins, Robert Powell, William Swelbar, *Productivity Trends in the US Passenger Airline Industry 1978-2010*, (Massachusetts Institute of Technology 2011), 19. <http://engineeringfiles.mit.edu/downloads/transportation/MIT_Airline_Productivity_Study_2011_Final1.pdf> accessed on 30 October 2017.

⁵ Sean Barrett, *Deregulation and the Airline Business in Europe: Selected Readings*, (Routledge, London, New York 2009), 15.

⁶ Council Regulation 3975/87, 1987 O.J. (L 374); Council Regulation 3976/87, 1987 O.J. (L 374); Council Decision 87/602, 1987 O.J. (L 374); Council Directive 87/601, 1987 O.J. (L 374); Council Regulation 2342/90, 1990 O. J. (L 217); Council Regulation 2343/90, 1990 O.J. (L 217); Council Regulation 2344/90, 1990 O.J. (L 217); Council Regulation 2407/92, 1992 O.J. (L 240); Council Regulation 2408/92, 1992 O.J. (L 240); Council Regulation 2409/92, 1992 O.J. (L 240).

As a result, multiple state-owned carriers were privatised and various new air carriers entered the market of air transport in European Communities.⁷ The process of liberalisation stimulated fierce competition, which resulted in lower prices of tickets, better quality of service, establishment of new airports and air routes, and finally significant rise in the number of passengers.⁸

With the liberalisation of the markets tough competition between air carriers began. Multiple airlines became insolvent, many air carriers required financial support from the government, some were restructured and a few companies merged. Under current competition regime, European Commission was involved in several mergers in airline sector, with some resulting in major problems with achieving a result satisfactory both to the authority and merging parties. The approach of the Commission has been shifting throughout the years with various types of remedies being tested in practice, producing different and sometimes undesirable results. As the situation in the airline market in the EU is likely to change in the future, mainly because of competitive pressure from non-EU airlines, the authorities should already start to think of the approach to possible future mergers and their impact on the European airlines and ultimately the consumers.

II. The business of air transportation

The business of air transportation is considered sophisticated and highly unpredictable due to quantity of often unrelated aspects. It normally has stiff competition and high barriers to entry. Key factors causing the market to be relatively closed to potential entrants include:

- a) Gigantic costs of commencing and continuing business activity – mainly cost of purchasing or lease of the aircrafts (brand new Boeing 737, one of the most popular modern airplanes for short-haul flights, costs between \$82-125mln),⁹ high costs of jet fuel, establishing the distribution network, market analysis, marketing costs and salaries of highly qualified professionals;

⁷ Jack Hirshleifer, Amihai Glazer, David Hirshleifer, *Price Theory and Applications. Decisions, Markets and Information*, (Cambridge University Press 2005), 231–238.

⁸ Communication from the Commission - *Community guidelines on financing of airports and start-up aid to airlines departing from regional airports*, 2005/C 312/01.

⁹ Official pricing list of Boeing from 2017, <www.boeing.com/company/about-bca/> accessed on 30 October 2017.

- b) The multitude of licenses needed to be obtained to assure that only entities capable of maintaining high safety standards are allowed to engage in the airline business;
- c) High requirements regarding the quality of services – especially considering safety standards: even low-cost airlines which obviously aim at lowering their operational costs to maximum by unifying their fleet, choosing cheaper airports, offering lower standard of in-flight entertainment or catering, do not reduce their costs which might potentially affect travel safety, for example crew training, aircraft maintenance etc.;
- d) Regulatory restrictions - despite significant liberalisation in the sector, airlines are not able to fully benefit from it, as multiple Member States keep their bilateral agreements with the third countries in force;
- e) Access to distribution channels and satisfactory landing slots at popular airports;
- f) The need to attract potential customers with significantly lower price (often predatory) than the airlines already present on the market.¹⁰

1. Cost structure

Extremely high costs of air transport are dependent on multiple factors. In 2008, a study of International Air Transport Association was published. Researchers collected data from the biggest air carriers in the world.¹¹ According to the study, main components of cost structure of air transport include:

- Fuel – 32.3%;
- Labour – 20.1%;
- Depreciation and amortisation – 5.9%;

¹⁰ See eg Joos Stragier, 'EC Competition Policy In The Aviation Sector: State Of Play And Outlook, Annual Conference of the Guild of European Business Travel Agents (GEBTA)', (Lisbon, 22 March 2002), <http://ec.europa.eu/competition/speeches/text/sp2002_009_en.pdf> accessed on 30 October 2017.

¹¹ IATA, 'Economic Briefing on Airline fuel and Labour Cost Share' (February 2010) <www.iata.org/whatwedo/Documents/economics/Airline_Labour_Cost_Share_Feb2010.pdf> accessed on 30 October 2017.

- Aircraft rentals – 3.5%.

Undoubtedly, fuel is the main cost item in airline transport industry. Its relevance is growing with time, as between 2001 and 2008 its share in the total cost structure rose from 13.6% to 32.3% and reached 33.3% in 2014.¹² Rapidly changing oil prices in the market, and high level of dependence of jet fuel prices from it, to a great extent affect the financial stability of the airline industry and cause perpetual fear of the CEOs of the air carriers of financial turmoil or even insolvency caused by sharp rise of value of the main cost component.

It must be underlined that air transport has become much cheaper in general – the air tickets (after inflation adjustments) were on average 60% less expensive in 2011 than in 1970.¹³ It encouraged more people to travel, as airlines became able to reach a wider customer base and attract more price-sensitive customers, who previously would have opted for alternative, cheaper means of transportation. This resulted in the lowering of the airline's profit margins significantly, as the companies needed to meet the demand of passengers for lower prices.

2. Black Swan Events

Another crucial factor affecting the financial stability of the airline industry is the “Black Swan Events” phenomenon. This term describes highly unpredictable, very rare, but extremely impactful events. The worst Black Swan Events from the airline's perspective are, undeniably, the terrorist attack on World Trade Centre on 11 September 2001 (when, between 2001 and 2005 profits of the airline industry in the US dropped by \$40bn)¹⁴ and Severe Acute Respiratory Syndrome (SARS) epidemic in 2003 (as a result of

¹² See eg Klemen Ferjan, ‘Airline Cost Management Group’, (Airline Cost Conference, Geneva, 26-27 August 2014) <www.iata.org/whatwedo/workgroups/Documents/ACC-2014-GVA/aocf-dev-FY2013-report_IATA.pdf> accessed on 30 October 2017.

¹³ McKinsey Report for IATA, ‘Profitability and the air transport value chain’ (2014) <www.iata.org/whatwedo/Documents/economics/profitability-and-the-air-transport-value%20chain.pdf> accessed on 30 October 2017, 9.

¹⁴ Paul Clark, *Stormy Skies. Airlines in Crisis*, (Ashgate, Farnham 2010), 1–20.

which Asian airlines lost around 8% of annual passenger traffic, which is estimated to have cost \$6bln in lost revenues).¹⁵

3. Yield management

Profits of airlines are even less predictable because of the industry-specific way of calculating fare prices, based on yield management. In practice, it results in a situation in which passengers on the exact same flight pay completely different prices based on numerous factors, even when travelling on the same travel class (economy, business etc.). What is more, some passengers are paying the price which is below the unit cost of the airline, however other customers (especially “premium” corporate passengers or those booking their flights on the last minute) are charged a price exceeding the unit cost multiple times. Generally, if the flight reaches a certain load factor (ratio of number of seats offered to passengers who bought the ticket), it is then able to make a profit from a particular flight even by offering a fraction of the tickets at a dumping price. This forces airlines to only serve the routes with a steady flow of customers and immediately close even slightly unprofitable destinations.¹⁶

4. Competition on the market

Another important factor with huge impact on an airline’s financial stability is the increasing competition in the market, arising mainly from three sources:

- a) The appearance and fast growth of low cost airlines in 1980s in the US and 2000s in Europe, offering “no-frills” service at very competitive price level;
- b) Increasing development of a hub-and-spoke model, allowing passengers to travel via intermediate airport – therefore, for example, the competitors of LOT Polish Airlines on a route between London and Warsaw are not only British Airways, Ryanair, Wizzair and

¹⁵ IATA, ‘Economic Briefing on Avian flu’, (2006) <www.iata.org/publications/economic-briefings/Avian-Flu-Impact.pdf> accessed on 30 October 2017.

¹⁶ See eg Janakiram Subramanian, Shaler Stidham, Jr., Conrad J. Lautenbacher, ‘Airline Yield Management with Overbooking, Cancellations, and No-Shows’, (1999), Volume 33, Issue 2, Transportation Science <<https://trid.trb.org/view.aspx?id=504184>> accessed on 30 October 2017.

Norwegian, which are offering a direct connection, but in fact other European airlines as well, including KLM, Lufthansa or Air France, which are often able to offer potential customers a slightly longer journey (around 4 hours instead of 2.5 hours) with a short transfer at one of their hubs (Amsterdam, Frankfurt, Paris accordingly), at a competitive price.¹⁷ Stiffer competition in absence of anticompetitive agreements normally results in lower profit margins of the market players;

- c) Growing popularity of internet search engines, which completely revolutionised the distribution of the airline tickets. Those websites (notable examples include tripsta.com, kayak.com and expedia.com) allow customers to instantly compare offers of multiple service providers on a particular route and choose the most suitable (presumably the cheapest) option, which undeniably increases the market transparency and forces the air carriers to aggressively respond to price reductions of their competitors.

5. Financial stability of the airlines

All the factors presented in this section affect the financial stability of the businesses active on the air transport market. It results in a relatively high risk associated with air transport, as it earns lower return on capital compared to, for example, other levels of the air transport supply chain including airports, freight forwarders, ground handling services etc.¹⁸ Due to vulnerability of airlines operating in uncertain environment, their dependence on the outside shocks and relatively high level of competition, they normally rely only on meagre profit margins. It appears to be nearly impossible, however, that in 2012 airlines, on average, made profits of around \$4 for every passenger.¹⁹ Considering the tremendous costs of activity of the airlines, it seems relatively easy to turn such a minimal profit into a loss in the next fiscal year. This

¹⁷ See eg Gerald N. Cook, Jeremy Goodwin, 'Airline Networks: A Comparison of Hub-and-Spoke and Point-to-Point Systems Airline Networks: A Comparison of Hub-and-Spoke and Point-to-Point Systems', (2008) Winter, Volume 17, Number 2, Journal of Aviation/Aerospace Education & Research.

¹⁸ McKinsey Report for IATA.

¹⁹ 'Why airlines make such meagre profits', *The Economist*, (23 February 2014), <www.economist.com/blogs/economist-explains/2014/02/economist-explains-5> accessed on 30 October 2017.

constitutes one of the main reasons why airlines are often eager to merge and grow bigger. It allows them to mitigate the risk and be better prepared for potential problems, including Black Swan Events or rising costs of jet fuel. Other benefits include reduction of costs of activity (especially on joint procurement, IT, common marketing) and possibility of delivering a better service, tailored to the needs of the customers.²⁰ Those benefits are usually recognised by the European Commission. However, allowing the companies to merge and reach market power has its side effects too as airlines can easily approach a dominant position. Therefore, competition authorities around the world assess the cases of airline mergers with great caution, even if they acknowledge the potential benefits arising from them at the same time.

III. Merger regime in the European Union

Merger regime in the European Union undoubtedly is highly influential to other merger review systems around the world. Although legal provisions similar to those existing in the EU have been over the years immensely adopted do legal systems of non-EU legislations around the world (with notable examples of India and Malaysia)²¹, uniqueness of the EU system arises mainly from the fact, that concentrations with effects existing within the EU can be assessed by the European Commission or independently by national competition authority of a particular Member State, depending mainly on the size of the merging parties.

1. The European Union Merger Regulation

The European Union Merger Regulation of 2004²² provides a mechanism for the assessment of mergers and acquisitions in the European Union. It obliges the merging parties to notify the planned concentration before it reaches the

²⁰ Franz Fichert, 'Remedies in Airline Merger Control – The European Experience', (16th International Conference of Hong Kong Society for Transportation Studies Hong Kong, 17-20 December 2011) <http://userpage.fu-berlin.de/~jmueller/gaprojekt/downloads/SS2012/Fichert_Remedies_GAB.pdf> accessed on 30 October 2017.

²¹ Prof. Richard Whish QC (Hon) guest lecture at the Latvian Law Institute, (Riga, Latvia, 30 May 2014) <www.youtube.com/watch?v=x_JtCQwIxKs> accessed on 30 October 2017.

²² Council Regulation (EC) No. 139/2004 of 20 January 2004 on the Control of Concentrations between Undertakings, 2004 O.J. (L 24) (EUMR).

final stage.²³ Transactions which have to be notified need to meet two criteria. They have to be:

- a) concentrations – defined as pure mergers of two or more previously independent undertakings, the acquisitions of direct or indirect control of the whole or parts of the undertaking or the establishment of a full-function joint ventures.²⁴ The concept of control in EU merger regime is widely defined and consists of rights, contracts or any other means which confer the possibility of exercising decisive influence over an undertaking;²⁵
- b) with EU dimension – based on purely jurisdictional criteria of worldwide and EU-wide turnover of the undertakings concerned.²⁶ Issues regarding the country of origin of the undertakings, place where the transaction takes place or law applicable to the transaction are of no relevance.

2. Powers of the European Commission

The EU merger regime is designed to assess a plethora of mergers, as both concepts described above cover wide spectrum of transactions. Vast majority of large, transnational mergers of non-EU companies, with their registered offices on other continents will have to be assessed by the European Commission, as long as the undertakings concerned generate at least some part of their profit within the European Union, even if this region is not of their particular concern. It increases the importance of EU merger control system, as its application is, to a certain extent, transnational. Undertakings concerned have to take into account the powers of the European Commission, even if they are based and mostly active in other regions. Notable example of the boldness of the Commission in exercising its rights in a cross-border manner is the merger of *GE/Honeywell*.²⁷ The transaction was cleared in the US and Canada, but blocked in the European Union, even though both

²³ EUMR, Art. 4.

²⁴ EUMR, Art. 3.

²⁵ EUMR, Art. 3.

²⁶ EUMR, Art. 1.

²⁷ Case No COMP/M.2220 *General Electric/Honeywell* [2001], OJ L48.

undertakings in question were based on the other side of the Atlantic Ocean and generated majority of their turnover there.²⁸

The assessment of mergers in the European Union consists of up to two phases and can (despite certain exceptions, mainly referrals of the cases to national competition authorities of the Member States) have three different outcomes:

- a) Unconditional clearance – when merger does not significantly impede effective competition and is fully approved by the European Commission;²⁹
- b) Conditional clearance – when merger will not significantly impede effective competition if certain conditions (remedies) aimed at mitigating the risk of anticompetitive outcome are met by the merging parties;³⁰
- c) Prohibition decision – when merger causes significant impediment to effective competition and its outcomes cannot be cured with remedies, it is blocked by the European Commission.³¹

The remedies of the air transport sector in the European Union become the main issue in practice, as airlines tend to struggle with obtaining unconditional clearance from the Commission and usually rely on certain conditions which they have to fulfil to be granted at least with conditional clearance. The relevant market in these cases is very narrowly defined by the authorities – usually it consists of only one route between two cities. Rarely, if other means of transportation can be regarded as close substitutes, they will be included in the market definition. It is especially relevant on busy, short-haul routes, when the duration and the standard of journey are comparable – for example between Paris and London, where Eurostar trains actively compete with airlines operating on this route.³² However, normally the relevant market can be even narrowed down, for instance where multiple

²⁸ Donna E. Patterson, Carl Shapiro, 'Transatlantic Divergence in GE/Honeywell: Causes and Lessons' (2001), Volume 16, Number 1, Fall 2001, *Antitrust Law Journal* <<http://faculty.haas.berkeley.edu/shapiro/divergence.pdf>> accessed on 30 October 2017, 22-23.

²⁹ EUMR, Art. 2(2).

³⁰ EUMR, Art. 6.

³¹ EUMR, Art. 2(3).

³² Franz Fichert, '*Remedies in Airline Merger Control – The European Experience*', 2.

airports serve one city or passenger traffic to a particular destination can be clearly divided into several unrelated segments (business and holiday, price-sensitive and corporate travellers, cargo etc.).³³

Due to the fact that in majority of mergers in aviation sector the relevant market is indeed narrowly defined, it is relatively easy for the companies to approach or even reach dominant position (as the competition on the market is weak or, in extreme situations, even non-existent), hence the analysis of a merger between airlines is quite unique, as the companies can be active on dozens, or even hundreds of relevant markets. In most cases of airline mergers only a small percentage of the markets will be affected by anti-competitive effects, but in majority they will be absent. Therefore, the anticompetitive effects arising from the merger of airlines can be either horizontal in nature (when two companies active on the same market merge directly diminishing rivalry on the relevant market) or conglomerate (when parallel markets are indirectly affected with the merger and merged entity can take advantage of portfolio effects). Due to the specificity of the sector, designing the correct remedies capable of precisely targeting the problematic part of the activity of the merged entity is of a particular importance in the sector in question.

IV. Remedies in mergers in the European Union - introduction

As outlined in the previous section, the European Commission is obliged to prohibit the merger when it considers that the transaction would significantly affect effective competition. In some cases, however, parties are able to address the concerns of the Commission by taking certain commitments, in order to eliminate the risk of jeopardising effective competition on the market. Parties are allowed to offer commitments at both stages of the merger review process. The obligations cannot be imposed unilaterally by the authorities - they have to be fully based on what has been offered by the parties.³⁴ In majority of cases the Commission has cleared mergers subject to

³³ Jakub Kociubinski, 'Relevant Market in Commercial Aviation in the European Union', (2011), Volume 1, Issue 1, Wroclaw Review of Law, Administration and Economics, 16-18.

³⁴ Case T-210/01 *General Electric v Commission* [2005] ECR II-05575, para 52.

commitments rather than prohibited them outright, which clearly shows the practical importance of this tool.³⁵

According to the Merger Regulation, the European Commission should clear a notified concentration where the undertakings concerned offer commitments aimed at rendering the transaction compatible with the common market.³⁶ Remedies are considered to be sufficient to allow clearance of the whole merger if they are capable of eliminating the identified competition problem, restoring effective competition and are proportionate to the competition concerns.³⁷

1. Notice on remedies

Main source of guidance on the types of remedies likely to be accepted by the Commission is the Notice on remedies from 2008.³⁸ The purpose of the document is to codify existing case law and provide merging parties with an insight on how the European Commission will approach the commitments offered. The document sets out general principles regarding remedies and requirements for the implementation of commitments.

2. Types of remedies

Traditionally, remedies have been divided into two main categories – structural and behavioural, with structural remedies having as their object restoration of the post-merger structure of the relevant market to its pre-merger shape. Most common examples of structural remedies include divestiture of brands, assets etc. On the other hand, behavioural remedies are based on a promise of the merged entity not to abuse its market power, which might be a result of the concentration. Naturally, there is a strong preference of the European Commission for structural remedies, as they are faster and easier to implement - they require less effort in the future from the Commission. It can “close the case” right after issuing its decision, without

³⁵ Ioannis Kokkoris, Howard Shelanski, *The EU Merger Control – A legal and Economic Analysis*, (Oxford University Press 2014), 515.

³⁶ EUMR, recital 30.

³⁷ EUMR, Art. 30.

³⁸ Commission Notice on Remedies Acceptable under Council Regulation (EC) No. 139/2004 and under Commission Regulation (EC) No. 802/2004 (2008) (Remedies Notice).

the ongoing need of monitoring the merged entity and its activity on the market.³⁹ Therefore, behavioural remedies are normally not accepted under the EUMR.⁴⁰

The more modern classification of remedies in the European Union can be found in a study performed by the European Commission in 2005:

- a) Transfer of a market position:
 - i) Divestiture of a controlling stake in a company;
 - ii) Divestiture of a business unit;
 - iii) Divestiture of mix-and-match assets;
 - iv) Divestiture or grant of a long-term exclusive license;
- b) Exit from a joint venture;
- c) Granting access to a market or to other areas:
 - i) Access to infrastructure or technical platforms;
 - ii) Access to technology via licences of IPRs;
 - iii) Termination of exclusive vertical agreements;
- d) Other remedies.⁴¹

The modern approach is undoubtedly more complex and include variety of possibilities of remedial actions which could be taken, however, to a certain extent, it is based on the traditional classification with category ‘a’ representing structural remedies and category ‘c’ representing behavioural (non-structural) remedies.⁴²

Nowadays merging parties are well equipped with different options regarding commitments which they are able to offer to ensure that, on the one hand, they address the competitive concerns of the authorities, and on the other that they are practical, proportionate and do not go beyond what is necessary,

³⁹ Remedies Notice paras 15-17.

⁴⁰ Jonathan Faull, Ali Nikpay, *The EC law of competition*, (Oxford University Press 2014), 6.

⁴¹ Directorate-General for Competition of the European Commission, *Merger Remedies Study*, (October 2005), <http://ec.europa.eu/competition/mergers/legislation/remedies_study.pdf> accessed on 30 October 2017.

⁴² Ioannis Kokkoris, Howard Shelanski, *The EU Merger Control*, 521.

which can result in harming the whole transaction and forcing the undertakings concerned to withdraw their initial intention to merge.⁴³

V. Remedies in airline mergers

The European Commission acknowledges the fact that certain sectors require specific remedies, tailored in a way which maximises their chances success. Over the years, the aviation sector has produced its unique range of remedies used in practice, mainly because the competition assessment in those cases is generally very complex compared to other industries, especially due to its network nature, exceptionally narrow definition of the relevant market, large number of routes and importance of the sector to consumers. Traditional, structural remedies are usually extremely difficult to apply and are not necessarily able to tackle potential problems with competition.⁴⁴

Normally, the first stage of the competitive assessment of any concentration is defining the relevant market. As previously mentioned, in the aviation sector authorities tend to separate the activity of the undertakings into numerous markets. Usually the European Commission takes into account a slightly wider picture and includes potential entrants to the relevant market in its assessment. It allows for correct application of the potential remedies in the future and provides a suitable framework which allows the Commission to assess all concentrations on a case-by-case basis.⁴⁵

1. Common types of remedies

As rightly argued by Scharpenseel, “One of the most significant obstacles to successful liberalization is airport congestion resulting in slot allocation

⁴³‘Transatlantic Airline Alliances: Competitive Issues and Regulatory Approaches, A Report by the European Commission and the United States Department of Transportation’ (16 November 2010), 109-114, <http://ec.europa.eu/competition/sectors/transport/reports/joint_alliance_report.pdf> accessed on 30 October 2017.

⁴⁴ Miglena Rahova, ‘Remedies in Merger Cases in the Aviation Sector: Developments in the European Commission's Approach’, (2013), Volume 12, Issue 3, *Issues in Aviation Law and Policy*, 508.

⁴⁵ European Competition Authorities, Report of the ECA Air Traffic Working Group, Mergers and Alliances in Civil Aviation - An Overview of the Current Enforcement Practices of the ECA Concerning Market Definition, Competition Assessment and Remedies (2003) <<http://ec.europa.eu/competition/publications/eca/report.pdf>>, accessed on 30 October 2017.

problems, because the absence of attractive slots is the main barrier to entry for competitors on high-density”.⁴⁶ Therefore, packages of remedies usually offered by the airlines in merger review process were slot divestitures.⁴⁷ At practically every airport in the world, scheduled flights depart and land at a specified time during the day which is assigned to them. At busier airports, especially those with high ratios of time-sensitive and premium passengers, time slots positioned at strategic parts of the day (when the demand is at its peak) are extremely valuable, as they allow airlines to generate more profit from their activity.⁴⁸

Slot divestitures appeared to be a simple yet proper solution, theoretically capable of solving all potential competition problems, as they decrease the chances of the merged entity to dominate the relevant market and encourage existing competitors to engage in tougher rivalry, or potential entrants to enter the market by giving them access to attractive time slots at busy airports. The idea seemed to be satisfactory and its use however did not require much effort from the airlines – they were not obliged to find a new market entrant. In fact, successful market entry after slot divestiture rarely happened in practice and the barriers to engage other airlines in effective competition remained at high level. Therefore, this approach did not necessarily succeed at fully addressing the competition concerns of the European Commission, as ultimately undertakings remained relatively free to gain or abuse market power.⁴⁹

2. Approach of the European Commission

Due to this fact, the European Commission started to change its approach to slot divestitures and ceased to treat them as an ultimate solution to competition problems in airline mergers. The Remedies Notice explicitly address this issue – in the document it is stated that “In air transport mergers,

⁴⁶ Moritz Ferdinand Scharpenseel, ‘Consequences of E.U. Airline Deregulation in the Context of the Global Aviation Market’, (2001), Volume 22, Issue 1, Fall, *Northwestern Journal of International Law & Business*, 108.

⁴⁷ Miglena Rahova, *Remedies in Merger Cases in the Aviation Sector*, 511.

⁴⁸ James D. Reitzes, Brendan McVeigh, Nicholas Powers, Samuel Moy, ‘Competitive Effects of Exchanges or Sales of Airport Landing Slots’, (2015), *Review of Industrial Organization*, Volume 46, Issue 2, March, 95-96.

⁴⁹ Joos Stragier, ‘Airline Alliances and Mergers - The Emerging Commission Policy’, (3th Annual Conference of the European Air Law Association, Zurich, 9 November 2001) <http://ec.europa.eu/competition/speeches/text/sp2001_040_en.pdf>, accessed on 30 October 2017.

a mere reduction of barriers to entry by a commitment of the parties to offer slots on specific airports may not always be sufficient to ensure the entry of new competitors on those routes where competition problems arise and to render the remedy equivalent in its effects to a divestiture.”⁵⁰ After several problematic airline mergers in the early 2000s, the Commission decided not to accept slot divestitures as a sole solution to competition problems in airline mergers anymore. Undertakings concerned had to create new, workable packages of remedies. Their efforts and the approach of the European Commission towards them will be analysed in the following part of the paper in the form of several case studies, where the types of remedies accepted and refused in the past will be presented in pursuance of depicting the evolution of the Commission’s policy.

VI. Case studies

1. *Air France/KLM*⁵¹

The merger of the national carriers of France and the Netherlands is still considered as the biggest and presumably one of the most controversial in history of the EU. The concentration required extensive effort of the undertakings concerned, as their market position in Europe was particularly strong, and as a result of the transaction the merged entity became the biggest airline group by turnover in the world (with €19.2 billion).⁵² Public opinion, as well as competitors of the airlines, widely expressed their concerns as they feared that the planned transaction would result in reduced capacity and higher prices of tickets.⁵³ Clearing the merger was dependant on numerous commitments offered by the parties during the process, however eventually the merging parties received the European Commission’s blessing.

The merger of Air France and KLM was notified on 18 December 2003. In the notification, parties claimed that the proposed concentration would bring

⁵⁰ Remedies Notice, par. 63.

⁵¹ Case COMP/M.3280 *Air France/KLM* [2004], OJ C60/5.

⁵² Internal corporate report of Air France/KLM – ‘Air France – KLM, a Global Airline Market Leader’, <http://corporate.airfrance.com/uploads/media/airfrance_klm_a_global_airline_market_leader_01.pdf> accessed on 30 October 2017.

⁵³ John Tagliabue, ‘Air France and KLM to Merge, Europe’s No. 1 Airline’, *The New York Times* (1 October 2003) <www.nytimes.com/2003/10/01/business/air-france-and-klm-to-merge-europe-s-no-1-airline.html> accessed on 30 October 2017.

benefits to consumers in form of cost reduction, improvement of the quality of service and establishment of new routes. The European Commission, however, expressed its concerns, as on 14 routes (both Intra-European and intercontinental) the airlines were considered as actual or potential competitors, therefore allowing those companies to merge would significantly reduce or even eliminate competition on those markets. Additional factors endangering the pro-competitiveness of the concentration were extremely valuable landing slots at both hubs (Paris and Amsterdam), and existence of national regulatory restrictions in France and the Netherlands.

Because of competition concerns of the European Commission, undertakings submitted a substantial package of proposed commitments. Firstly, parties offered to surrender 94 landing and take-off slots per day, which in practice equalled up to 31 new return scheduled flights that could emerge. It allowed establishing, for example, around 6 new daily flights between Paris and Amsterdam which would undoubtedly result in improvement of services and more competitive prices on a given route. Secondly, the landing slots were secured from being misused, as they were ultimately surrendered, for an unlimited duration and would not be returned to the merged entity even if their competitors showed no interest in taking them over. It created an additional increase in value of the slots surrendered and diminished the chances of lack of new entry.⁵⁴ Thirdly, the parties committed to refrain from increasing their offers on affected routes (“frequency freeze”) in order to allow their competitors to truly access the relevant market and give them a fair chance to compete, especially at the beginning of their activity.

Additionally, undertakings concerned agreed to enter into intermodal agreements with companies providing land transport services, in order to establish a common service so that, for example, passengers using Thalys railway link between Paris and Amsterdam could “mix-and-match” their travel choices by taking a plane on outward trip and a train on a bound trip. Finally, the national authorities of France and the Netherlands assured the European Commission that they would give traffic rights to airlines wishing

⁵⁴ Carsten Bermig, Oliver Stehmann, Michele Lamalle, ‘New Developments in the Aviation Sector, Consolidation and Competition: Recent Competition Cases’, (2004), Summer, 69, Competition Policy Newsletter
<http://ec.europa.eu/competition/publications/cpn/2004_2_66.pdf> accessed on 30 October 2017.

to stop over in Paris or Amsterdam en route to other, non-EU countries, which guaranteed access to the market to air carriers from outside the EU and undoubtedly increased competition on long-haul flights, especially transatlantic. Moreover, the authorities promised not to regulate prices on long haul flights.⁵⁵

Eventually, the transaction was cleared in Phase I of the investigation, subject to commitments outlined above. The Commission, despite its initial doubts, openly admitted that it predicts that the impact of the concentration will be positive. During the press conference following the merger, Competition Commissioner Mario Monti underlined that: "The outcome of this case shows that the long-awaited consolidation of the European airline sector can be done in full respect of competition rules. The merger between KLM and Air France will provide air passengers with a greater choice of destinations and services without having to pay a higher price on those routes where their presence is the strongest"⁵⁶.

However, the success of remedies can be questioned, as only in regards to two affected routes (Amsterdam – Milan and Amsterdam – Rome) market entry was eventually observed.⁵⁷ This means that in the vast majority of potentially problematic relevant markets parties did not face any new competitive pressure, which was the primal goal of the slot divestiture offered. Therefore, after the merger of Air France and KLM, the European Commission acknowledged that the approach to remedies offered by the parties in airline merger cases presumably has to shift, in order to guarantee that the commitments will in fact result in new market entry. This clearly proves that slot divestiture might constitute a credible solution to anticompetitive problems, but only under very specific market conditions and if they are accompanied by additional commitments.⁵⁸

Interestingly, despite the forecasts of the management before the merger, the concentration did not lead to major cost savings and synergy effects. As for 2016, Air France/KLM had one of the highest unit costs (available seat

⁵⁵ Press Release, European Commission, *Commission Clears Merger between Air France and KLM Subject to Conditions*, (11 February 2004) <http://europa.eu/rapid/press-release_IP-04-194_en.htm> accessed on 30 October 2017.

⁵⁶ *ibid.*

⁵⁷ Franz Fichert, *Remedies in Airline Merger Control – The European Experience*, 5.

⁵⁸ Jonathan Parker, 'Air France/KLM: an assessment of the Commission's approach to consolidation in the air transport sector', (2005), *European Competition Law Review*, 131.

kilometre) in Europe – more than 3 times bigger than Ryanair.⁵⁹ Because of the structure of the merged entity, in which both Air France and KLM were allowed to remain to a certain extent autonomous (in terms of branding, hubs etc.), some level of tension continues to arise between the Dutch and the French arm of the company, especially due to strong trade unions in Air France, which are not willing to accept the inevitable cost cutting and presumed lack of innovation damaging the whole enterprise.⁶⁰ The ultimate split of the company might be the only solution to the rising issues between the two branches. It would be an extremely interesting and quite cynical outcome of the biggest airline merger in the European Union, which was supposed to result in substantial savings and cheaper air tickets, but on the other hand, according to some specialists, should have not been cleared in the first place.⁶¹ The example of Air France/KLM clearly shows that the traditional approach to defining the relevant market in airline sector might need to be reconsidered and liberalised, as even in an event of insufficient remedies putting the merging entity in an advantageous position, companies are not able to exercise its strong market position and harm competition.

2. *Lufthansa/SN Airholding*⁶²

Acquisition of stakes by German national carrier – Lufthansa, in SN Airholding, the holding company of Brussels Airlines, constitutes another example of an important concentration in the airline sector in the European Union. The transaction was notified on 26 November 2008 and eventually cleared, subject to commitments, on 22 June 2009.

During the investigation, the European Commission acknowledged that in the initially proposed form, the transaction would lead to a significant impediment to effective competition on several passenger routes within the European Union, mainly on the routes: Brussels-Hamburg, Brussels-Munich (where the merged entity would even reach monopoly), Brussels-Frankfurt

⁵⁹ Michael Stothard, 'Air France struggles to make big cost cuts', *The Financial Times*, (20 October 2015) <<https://next.ft.com/content/3e42fc0e-6dd9-11e5-8171-ba1968cf791a>> accessed on 30 October 2017.

⁶⁰ Elco Van Groningen, Andrea Rothman, 'The Dutch Half of Air France-KLM Isn't Happy with the French Half', *Bloomberg* (4 July 2016) <<https://skift.com/2016/07/04/the-dutch-half-of-air-france-klm-isnt-happy-with-the-french-half/>> accessed on 30 October 2017.

⁶¹ See eg Jonathan Parker, 'Air France/KLM: an assessment of the Commission's approach to consolidation in the air transport sector', (2005), *European Competition Law Review*, 128.

⁶² Case COMP/M.5335 *Lufthansa / SN Airholding* [2009], OJ C295/11.

and Brussels-Zürich. Because of the high probability of anticompetitive problems, the European Commission decided to open an in-depth investigation. Considering the seriousness of the situation, Lufthansa submitted a comprehensive package of remedies aimed at reducing the barriers to entry and facilitating a possibility of entry for a new market player on the routes affected. Firstly, the German carrier offered to divest slots in all four routes, which would allow new entrants to operate their flights. The proposed divestiture provided for an efficient and timely slot allocation mechanism. Moreover, rights of companies which would eventually take over those slots were amplified as they would receive the so-called “grandfather rights”⁶³ to those slots if they had operated on the route for a certain pre-determined period of time. Additional remedies, designed to supplement the main ingredient of the remedies package offered, were special code-share agreements and the participation in Lufthansa’s frequent flyer programme.

The European Commission welcomed the package offered by the undertakings concerned and cleared the merger in Phase II, subject to conditions. In the opinion of the Commission, the commitments “not only target the problem of slot congestion, which is an important entry barrier on the problematic routes, but generally enhance the attractiveness for new entry on these routes”.⁶⁴ Unfortunately, the divestiture did not result in market entry creating a sufficient degree of competitive pressure on the merged entity.⁶⁵

Time has proved that the acquisition was considered a success from Lufthansa’s perspective, as currently it decided to buy the remaining 55% shares of SN Airholding (initially it bought only 45% of shares, however due to the fact that the transaction guaranteed Lufthansa decisive influence over business decisions of SN Airholding, it constituted a notifiable transaction).

⁶³ The rule commonly used on the market of landing slots, according to which the airline which has been actively using the allocated slots during a given season is automatically entitled to use them in the next one. See eg Gernot Sieg, ‘Grandfather rights in the market for airport slots’, (2008), Technische Universität Braunschweig, Economics Department <https://www.tu-braunschweig.de/Medien-DB/vwl/wp04_grandfather.pdf> accessed on 30 October 2017.

⁶⁴ Press Release, European Commission, *Mergers: Commission clears proposed takeover of SN Brussels Airlines by Lufthansa, subject to conditions* (22 June 2009) <http://europa.eu/rapid/press-release_IP-09-974_en.htm> accessed on 30 October 2017.

⁶⁵ Michele Giannino, ‘The European Commission Appraisal of Airline Mergers: The Rise of a New Generation of Slot Remedies’, (2012), Issue 52, Airlines Magazine <https://aerlinesmagazine.files.wordpress.com/2012/03/52_giannino_eu_slot_remedies.pdf> accessed on 30 October 2017.

The transaction was approved by the board of Lufthansa in September 2016 and is expected to be completed by the end of 2017.⁶⁶ The acquisition of the remaining shares is supposed to help Lufthansa to fold Brussels Airlines into Eurowings – its low cost unit, to better engage in a rivalry with its biggest competitors – Ryanair and EasyJet.⁶⁷

3. Lufthansa/Austrian Airlines⁶⁸

Another stage of Lufthansa's business expansion was the acquisition of stakes in the national carrier of Austria – Austrian Airlines. Interestingly, the transaction was notified before the European Commission granted Lufthansa with a conditional clearance in the acquisition of SN Airholding, on 8 May 2009. Moreover, both companies have already cooperated, to a certain extent, as they were members of Star Alliance, one of the biggest airline alliances in the world. The merger was subsequently cleared on 28 August 2009, subject to commitments.

During the assessment of the concentration, the European Commission identified risk of significant impediment to effective competition and decided to open the in-depth investigation, during which it narrowed down its concerns to the routes (relevant markets) of Vienna-Frankfurt, Vienna-Munich, Vienna-Stuttgart, Vienna-Cologne and Vienna-Brussels, where consumers would be likely to face reduced choice and higher prices. In Phase II, Lufthansa submitted a set of remedies, which was very similar to the one already proposed in SN Airholding. It included the divestiture of slots, with the option of grandfathering rights and some ancillary measures, mainly the participation in Lufthansa's Frequent Flyer Programme. The Commission was satisfied with the remedies offered and concluded that the merger will not lead to significant impediment to effective competition if the conditions are met. Unsurprisingly, the decision was contested by the main rival of the Austrian Airlines in Austria – Niki Lufthart, which decided to challenge the approval of the European Commission before the General Court, focusing in

⁶⁶ 'Lufthansa board approves Brussels Airlines takeover', *Reuters* (28 September 2016) <<https://www.reuters.com/article/us-lufthansa-m-a/lufthansa-board-approves-brussels-airlines-takeover-idUSKCN11Y1IK>> accessed on 30 October 2017.

⁶⁷ Richard Weiss, 'Lufthansa to Add Brussels Airline to Eurowings Low Cost Arm', *Bloomberg* (28 April 2016) <www.bloomberg.com/news/articles/2016-04-28/lufthansa-to-add-brussels-airline-to-eurowings-low-cost-arm> accessed on 30 October 2017.

⁶⁸ Case COMP/M. 5440 *Lufthansa/Austrian Airlines* [2009], OJ C16/11.

its motion on the fact that remedies offered by Lufthansa were not proportionate to the scale of anticompetitive impact of the merger.⁶⁹ The action however, along with the other claim brought by Niki Lufthart challenging the restructuring aid granted by the state, was dismissed by the General Court, which stated that the claimant failed to provide sufficient evidence to justify the action.⁷⁰

4. *KLM/Martinair*⁷¹

The merger of these airlines can serve as an example of the reserved approach of the European Commission to remedies, provided they are not essential to address the anticompetitive concerns. Both airlines were active on the market of transporting passengers and cargo from Amsterdam to multiple destinations worldwide, with Martinair being particularly focused on serving intercontinental routes. At the time of notifying the concentration to the Commission on 17 July 2008, KLM had already owned 50% of shares in Martinair and was attempting to buy the remaining part of the company to become a sole shareholder.

In the initial part of the investigation, the Commission concluded that the transaction raises serious doubts regarding its compatibility with the common market and decided to open an in-depth investigation. Competition concerns were identified mainly in relation to passenger routes of Amsterdam-Aruba and Amsterdam-Curacao. To remove the competition concerns, the parties offered a commitments proposal. The submitted remedies were unique, as they did not contain usual set of commitments (slot divestiture), but rather focused on benchmarking the price of the ticket in economy class on affected routes to the price evolution of the ticket prices on comparable routes. The Commission however found this mechanism far too complicated and difficult to establish and monitor in the future. Therefore, the commitment was refused because it failed to effectively address the competition concerns identified.

Surprisingly, despite the refusal of commitments offered by the parties, the European Commission decided to unconditionally clear the merger in Phase

⁶⁹ Case T-162/10 *Niki Luftfahrt GmbH v Commission*, [2015], C 213/44.

⁷⁰ General Court of the European Union, Press Release No 54/15, Judgments in Cases T-511/09 and T-162/10 *Niki Luftfahrt GmbH v Commission*, 13 May 2015 <<http://curia.europa.eu/jcms/upload/docs/application/pdf/2015-05/cp150054en.pdf>> accessed on 30 October 2017.

⁷¹ Case COMP/M.5141 *KLM/Martinair* [2008], OJ C51/4.

II, mainly because of the results of the survey conducted at Amsterdam's airport. It indicated that the majority of potential passengers on the affected routes would rather switch their destination, or even abandon the trip, in an event of sustained price increase. It clearly showed that the market was too narrowly defined, as the passengers were willing to switch the type of service offered by the airlines if they found it to be too expensive. The merged entity would have no incentive to significantly raise the prices on the affected routes, therefore there was no risk of consumer harm. Moreover, the Commission found out that market entry was highly likely, decreasing the incentives of KLM to elevate the prices even more.⁷²

KLM/Martinair is an important example of a case in which unbiased approach of the European Commission to mergers in aviation sector in the EU is clearly visible. Despite its initial concerns, which triggered the commitments proposal of the undertakings concerned, the Commission admitted that the transaction in its initially notified shape would not lead to significant impediment to effective competition and refused to accept remedies, clearing the merger without any conditions. The approach of the Commission appears to be bold and fair, focused on full understanding of the concentration and its potential effects, rather than "prosecuting" the merging entities and giving them additional, unnecessary hurdles through the process. It confirms that the European Commission, to a certain extent, truly believes in the consolidation of the sector and warmly welcomes airline mergers, especially of transnational character.

5. Ryanair/Aer Lingus⁷³

Despite its generally positive approach to airline mergers in the EU, in certain cases the European Commission considered anticompetitive effects to prevail over potential benefits arising from the concentration. The acquisition of stakes in Aer Lingus by Ryanair was notified on 30 October 2006. During the investigation, the European Commission questioned the competitors of the merging parties, slot allocation authorities, transport authorities, and civil aviation authorities. The Commission acknowledged that both airlines were

⁷² Press Release, European Commission, *Commission clears proposed take-over of Martinair by KLM* (17 December 2008) <http://europa.eu/rapid/press-release_IP-08-1995_en.htm> accessed on 30 October 2017.

⁷³ Case COMP/M.4439 *Ryanair/Aer Lingus* [2007], OJ C47/9; Case COMP/M.6663 *Ryanair / Aer Lingus III* [2013], OJ C 308/3.

close competitors in the Irish market (especially on Dublin airport), as they operated on similar routes, offered comparable (low-cost) quality of service and that customers regarded their offers as highly substitutable. Therefore, the prevailing dimension of merger was horizontal, unlike in other airline mergers in the EU, where usually conglomerate effects are analysed. It undoubtedly increased the potential anticompetitive effects of the concentration, as the merged entity would gain monopoly or dominant position on 35 routes. Moreover, after the merger, companies would operate around 80% of the short-haul passenger traffic from Dublin. Naturally, to address the concerns of the Commission, Ryanair offered a comprehensive package of remedies. It included an extensive slot divestiture in relation to affected routes, supplemented with an “upfront buyer” solution (where Ryanair committed to find a suitable airline to take over the divested slots, and therefore enter the market), “frequency freeze” obligation and a mechanism of calculating fares of Aer Lingus guarantying their acceptable level. At the beginning of Phase II, where merging parties already understood the critical view of the Commission regarding the concentration and remedies proposed, the package offered was extended with additional slot divestitures, and eventually amended at the end of Phase II.⁷⁴

After two phases of investigation and three packages of remedies offered by Ryanair, the Commission concluded that the transaction would significantly impede effective competition and decided to block the merger. The market test performed by the Commission showed that the commitments offered were insufficient to erase the risk of anticompetitive effect caused by the concentration. Promptly after the Commission’s decision, both merging parties decided to appeal to the General Court, however their actions were dismissed.⁷⁵

The significance of the failed concentration of Ryanair and Aer Lingus to the EU merger control cannot be overlooked, as it was the first airline merger blocked by the European Commission in its history.⁷⁶ The prohibition of this

⁷⁴ Press Release, European Commission, *Mergers: Commission Prohibits Ryanair's proposed takeover of Aer Lingus*, IP/07/893 (27 June 2007) <<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/07/893>> accessed on 30 October 2017.

⁷⁵ Case T-342/07, *Ryanair v. Commission*, [2010] OJ C 221/55; Case T-411/07, *Aer Lingus v. Commission*, [2010] OJ C221 56.

⁷⁶ Miglena Rahova, *Remedies in Merger Cases in the Aviation Sector*, 516.

concentration is particularly interesting because of the generally positive disposition of the Commission towards consolidation of the airline sector in the European Union.⁷⁷ It clearly marks the slight shift of approach of the Commission to remedies in airline mergers towards a more rigorous approach, potentially caused by the relative failure of commitments approved in previously mentioned merger of KLM and Air France, where slot divestitures practically did not result in market entry. Another factor, which undeniably affected the Commission's decision, was the fact that both Aer Lingus and Ryanair were based in Ireland, therefore breaking down of national markets and strengthening bonds between the Member States did not occur.

On the other hand, however, in its assessment the Commission presumably should have put more emphasis on the fact that Aer Lingus is a traditional, national carrier of Ireland and Ryanair is a relatively young, modern and dynamic airline, with noticeable merits regarding improved passenger traffic in European Union and market integration and without any history of abusing its dominant position by raising prices. Allowing the merger with Aer Lingus might have potentially helped Ryanair with achieving its business goals without causing any consumer harm. After the blocked concentration, Ryanair planned another attempt to acquire Aer Lingus, however it was ceased due to lack of interest from its shareholders.⁷⁸

The third, and yet final attempt of Ryanair to acquire control over Aer Lingus, took place in 2013. During the investigation, the European Commission concluded that the transaction would lead to creating a monopoly or a dominant position on 46 routes, where currently both airlines are competing vigorously. Since Ryanair has already experienced rejection from the Commission, it instantly offered a comprehensive set of remedies, presumably one of the biggest in history of airline mergers in the EU. It contained slot divestitures on all affected routes supplemented with the upfront buyer solution, meaning that Ryanair has already found airlines willing to take over the divested slots and operate on the routes for at least three years. Nonetheless, the European Commission considered the remedies

⁷⁷ Peter Alexiadis, Daniel Kanter, 'The European Commission consents to the Consolidation of Europe's skies: The Air France/KLM Merger', (2004) *Gibson Dunn & Crutcher LLP, Brussels* <www.gibsondunn.com/fstore/documents/pubs/Alexiadis-AirFrance_KLM_Merger_0205.pdf>, accessed on 30 October 2017.

⁷⁸ Miglena Rahova, *Remedies in Merger Cases in the Aviation Sector*, 516.

offered to be insufficient to erase the risk of anticompetitive effects on the affected routes, and decided to block the concentration on 27 February 2013.⁷⁹

The prohibition decision was not warmly welcomed by Ryanair's executives, who accused the Commission of being politically influenced.⁸⁰ During the final concentration attempt, parties submitted presumably the most adequate and the biggest package of remedies which could have been offered. Moreover, an unprecedented upfront buyer solution was proposed, which created an additional guarantee for the entrance of a new competitor to the relevant market.⁸¹ It appears that, according to the European Commission, remedies in airline mergers are suitable only in relation to certain transactions, where potential anticompetitive effects are minor. In cases of bigger and more hazardous concentrations of airlines, the Commission remains conservative and is not willing to accept any commitments from the parties, even if they are generous and well designed.

6. *IAG/Aer Lingus*⁸²

Eventually, the Irish national carrier became a part of International Consolidated Airlines Group (IAG), the holding company of British Airways, Iberia and Vueling Airlines. The concentration was notified to the Commission on 27 May 2015 and received the conditional clearance, after a fairly short investigation, on 14 July 2015.

In the initial stage of its investigation, the European Commission acknowledged that the transaction in the proposed form would lead to high market shares on Belfast-London, Dublin-London and Dublin-Chicago routes. IAG promptly submitted a set of commitments addressing those concerns. The package consisted of two main components. First of them was a traditional slot divestiture on the affected routes, however the second was

⁷⁹ Press Release, European Commission, *Mergers: Commission prohibits Ryanair's proposed takeover of Aer Lingus* (27 June 2013) <http://europa.eu/rapid/press-release_IP-07-893_en.htm?locale=en> accessed on 30 October 2017.

⁸⁰ See eg Aoife White, 'Ryanair Bid for Aer Lingus Blocked by EU Antitrust Agency', *Bloomberg*, (27 February 2016) <www.bloomberg.com/news/articles/2013-02-27/ryanair-s-aer-lingus-bid-blocked-by-eu-over-monopoly-concerns> accessed on 30 October 2017.

⁸¹ Eoin Kelly, 'Ryanair / Aer Lingus III – A Reflection on Remedies', (2013), Volume 17, Issue 1, *Irish Journal of European Law*, 128.

⁸² Case COMP M.7541 *IAG/Aer Lingus* [2015], OJ C314/01.

far more innovative and, surprisingly, purely behavioural in its nature, as IAG obliged to enter into agreements with its competitors, which operate long-haul flights from London-Heathrow, London-Gatwick, Manchester, Amsterdam, Dublin and Shannon.⁸³ The agreements in question forced Aer Lingus to provide those airlines with connecting passengers, in order to avoid the risk of foreclosure and guarantee a choice to use other airlines on transcontinental flights. The remedies offered by the parties in acquisition of Aer Lingus by IAG mark the inauguration of a tendency of the Commission to accept wider range of commitments, not only of mainly structural character.

7. Olympic/Aegean⁸⁴

Concentration of the two biggest air carriers in Greece naturally caused a heated public debate and tremendous controversy. The merger was notified for clearance on 24 June 2010. After a month, an in-depth investigation was opened, as the Commission acknowledged that the merger raised serious concerns regarding its compatibility with the common market. After a lengthy investigation, extended mainly because of two packages of remedies offered by the parties, the European Commission decided to block the proposed transaction on 26 January 2011.

Main concerns of the authorities regarded nine domestic routes, where the two airlines before the merger held around 90% of the market share, therefore the merged entity would have reached a quasi-monopoly because of the concentration. Undertakings failed to convince the Commission that the relevant market was too narrowly defined and alternative means of transport, mainly ferries, should have been included. Two packages of remedies offered by the parties contained an extensive slot divestiture on affected routes, however the study performed by the Commission showed that the availability of the slots in Greek airports, including Athens, was at sufficient level and potential entrants would not face difficulties with arranging landing slots. The real problem was the lack of potential entrant as such, which could exert a

⁸³ Press Release, European Commission, Mergers: *Commission approves acquisition of Aer Lingus by IAG, subject to conditions* (14 July 2015) <http://europa.eu/rapid/press-release_IP-15-5371_en.htm> accessed on 30 October 2017.

⁸⁴ Case COMP/M.5830 *Olympic Aegean Airlines* [2011], C174/08; Case No COMP/M.6796 *Aegean Airlines/Olympic II* [2013], C124/01.

credible competitive constraint to the merged entity. Even if the companies had given out their landing slots, there would have been no airline to take them over and the situation on the market would have not been likely to change. Therefore, the Commission concluded that the proposed concentration would significantly impede effective competition on the internal market.⁸⁵

The fact that after having received the prohibition decision from the Commission undertakings continue to make attempts to eventually acquire the desired company is not uncommon, however receiving a clearance decision for the same transaction in less than 3 years should be regarded as a rare event. The proposed merger of Olympic and Aegean was notified on 28 February 2013. Unsurprisingly, the European Commission in its assessment came to similar conclusions as two years before, opening an in-depth investigation in April 2013, because of the serious doubts regarding compatibility of the merger with the common market. This time however, merging parties did not focus on arguing that the market would not be affected because of the transaction, but rather claimed that Olympic, mainly because of the ongoing financial crisis in Greece, was a failing firm and was going to become insolvent and leave the market soon in any event, therefore Aegean might become a dominant firm on the affected routes anyway. The Commission's in-depth investigation has clearly demonstrated that Olympic is highly unlikely to become profitable in the future under any business plan. Moreover, there was no other entity willing to acquire the failing firm other than Aegean. On the other hand, however, both airlines had around 90% of the market share of domestic flights in Greece, with Aegean having around 52%, Olympic 38% and next biggest competitor – Astra Airlines, only around 3% of the market share.⁸⁶ Therefore the merger of the two main Greek carriers constituted a de facto two to one merger, the most problematic from the

⁸⁵ Press Release, European Commission, *Mergers: European Commission blocks proposed merger between Aegean Airlines and Olympic Air* (26 January 2011), <http://europa.eu/rapid/press-release_IP-11-68_en.htm> accessed on 30 October 2017.

⁸⁶ Centre for Aviation (CAPA), 'Aegean Airlines' acquisition of Olympic: approved by European Commission, but questions remain' (2013) <<http://centreforaviation.com/analysis/aegean-airlines-acquisition-of-olympic-approved-by-european-commission-but-questions-remain-133583>> accessed on 30 October 2017.

competition law point of view, as it nearly destroys any existing competitive pressure.⁸⁷

Merger of Aegean and Olympic to this day remains the only case in aviation sector, where the European Commission has accepted the failing firm defence. It cannot be doubted that Olympic indeed was a nearly broke entity at the time of the concentration, therefore the bold decision of the Commission appeared to be correct, especially because of the appearance of a new, strong entrant to the market of Greek domestic flight – Ryanair, which decided to open two operational bases in Athens and Thessaloniki in 2014 and increased its seat capacity by 50%.⁸⁸ As of 2017, competition on the market of domestic flights in Greece, despite the merger of the two biggest carriers in 2013, remains at a significantly high level (mainly because of several successful market entries) and the benefit of consumers remains unharmed.⁸⁹ What is more, the previously loss-making Aegean has recently started to be profitable.⁹⁰ It clearly indicates that failing firm defence constitutes a viable solution in airline mergers in the European Union, and can be successfully implemented under conducive conditions.

8. *Etihad/Alitalia*⁹¹

For years, non-EU airlines did not invest their money within the European Union, mainly because of the European legislation protecting the ownership of airlines, allowing the foreign entities to invest only up to a level, where they would reach decisive influence over the airline. However, in recent years, some tentative attempts to acquire assets in Europe were made by Etihad – one of the biggest airlines in Gulf region. Firstly, Etihad purchased

⁸⁷ Press Release, European Commission, *Mergers: Commission approves acquisition of Greek airline Olympic Air by Aegean Airlines*, (9 October 2013) <http://europa.eu/rapid/press-release_IP-13-927_en.htm> accessed on 30 October 2017.

⁸⁸ Centre for Aviation (CAPA), 'Ryanair's growth in Greece threatens Aegean's turnaround only months after Olympic acquisition' (2014) <<http://centreforaviation.com/analysis/ryanairs-growth-in-greece-threatens-aegeans-turnaround-only-months-after-olympic-acquisition-149078>> accessed on 30 October 2017.

⁸⁹ Alexandra Kassimi, 'Greek air market proves very attractive to foreign carriers', *Kathimerini* (16 May 2016) <www.ekathimerini.com/208704/article/ekathimerini/business/greek-air-market-proves-very-attractive-to-foreign-carriers> accessed on 30 October 2017.

⁹⁰ Aegean – Financial Results for 2016 <<https://en.about.aegeanair.com/investor-relations/financial-results/financial-results/>> accessed on 30 October 2017.

⁹¹ Case No COMP/M.7333 *Alitalia/Etihad* [2014], OJ C31/01.

a 29% stake in Air Berlin⁹² and continued its expansion in Europe with the acquisition of a 49% stake in Jat Airways (rebranded to Air Serbia soon after the purchase).⁹³ Because neither of the transactions amounted to gaining decisive influence over the acquired undertaking by Etihad, they were not notified to the European Commission. Nonetheless, the impact of Etihad over strategic decisions of Air Serbia, in which the majority of equity is still owned by the Serbian government, caused some degree of controversy and even encouraged the Commission to open an investigation into Air Serbia's ownership structure in 2014.⁹⁴ After a two-year investigation, the European Commission finally acknowledged that Air Serbia was fully in line with European rules on foreign ownership and that Serbian government held the decisive influence over the strategic behaviour of the company.⁹⁵ This case, however, clearly shows the serious attitude of Etihad towards its business expansion in Europe, which inevitably is going to strengthen in the future.⁹⁶

The third, yet major step of Etihad's expansion in Europe, was the acquisition of joint control over Alitalia, the national carrier of Italy. The transaction was notified on 29 September 2014 and cleared, subject to conditions, after a short investigation on 14 November 2014. The proposed transaction established New Alitalia (the completely new undertaking), jointly controlled by Alitalia Compagnia Aerea Italiana S.p.A. (the 'old' Alitalia), and Etihad Airways, with the latter acquiring the maximum permissible 49% of the equity.

In its investigation, the European Commission expressed its concerns regarding one of the routes, namely Rome-Belgrade, where the newly formed

⁹² Kerry Reals, 'Etihad acquires 29% stake in Air Berlin', *Flight Global* (19 December 2011) <www.flightglobal.com/news/articles/etihad-acquires-29-stake-in-air-berlin-366143/>, accessed on 30 October 2017.

⁹³ Haseeb Haider, 'Etihad Airways acquires 49% stake in Jat Airways' *Khaleej Times* (2 August 2013) <www.khaleejtimes.com/business/aviation/etihad-airways-acquires-49-stake-in-jat-airways> accessed on 30 October 2017.

⁹⁴ As of 2017 Serbia is not a member of the European Union, however as a candidate state it is obliged to adhere to the pre-accession guidelines and policies.

⁹⁵ 'EC clears Air Serbia after investigation', *EX-YU Aviation News* (16 July 2016) <www.exyuaviation.com/2016/07/ec-clears-air-serbia-after-investigation.html> accessed on 30 October 2017.

⁹⁶ Nicola Clark, 'Upstart Abu Dhabi Airline Becomes Ally to European Carriers', *The New York Times* (4 October 2013) <www.nytimes.com/2013/10/05/business/international/upstart-abu-dhabi-airline-becomes-ally-to-european-carriers.html?_r=0> accessed on 30 October 2017.

entity would have gained a monopoly, because the only carriers operating this route were Alitalia and Air Serbia (already owned in 49% by Etihad). The concerns were dispelled by the merging parties with the package of commitments offered, containing mainly slot divestitures.⁹⁷ Merger of Alitalia and Etihad is a clear example of two trends in airline mergers in the European Union: firstly, that in cases of minor competition concerns of the Commission, slot divestiture remains a key commitment capable of solving the problem of potential monopoly on a given route; secondly that non-EU airlines (mainly Gulf) which are interested in the European airline market, and will most probably continue their expansion in Europe in different forms.⁹⁸

VII. Remedies in airline mergers in the European Union - remarks

The approach of the Commission to remedies in aviation sector has been shifting throughout the years. With every merger cleared or blocked, new experience was gained by the authorities and undertakings willing to merge, especially when the Commission needed to face the challenges of the “merger mania” in aviation sector soon after the financial crisis of 2008, and correctly assess multiple concentrations at very short period of time. The Commission rightly had to examine the mergers proposed, and even slightly guide the parties in the direction of proposing the right commitments. The persistent need to strike a correct balance between the rights of the undertakings and protection of the markets (and, eventually, the final consumers), resulted in establishing a consistent, to a certain extent, approach of the Commission to concentrations of airlines. Historically, the emphasis was put on the very narrow definition of the relevant market (air routes between two cities, sometimes narrowed even more to divide, for example, different types of passengers using the same route), to which slot divestitures were considered the ultimate solution. After the relative failure of this approach in Air France/KLM merger, where practically no airline entered the market after the

⁹⁷ Press Release, European Commission, *Mergers: Commission approves Etihad's acquisition of joint control over Alitalia, subject to conditions* (14 November 2014) <http://europa.eu/rapid/press-release_IP-14-1766_en.htm> accessed on 30 October 2017.

⁹⁸ Vernon Silver, Deena Kamel Yousef, ‘Etihad Seals \$2.4 Billion Deal to Buy 49% of Ailing Alitalia’, *Bloomberg* (8 August 2014) <www.bloomberg.com/news/articles/2014-08-08/etihad-seals-2-4-billion-deal-to-acquire-49-of-ailing-alitalia> accessed on 30 October 2017.

concentration, focus has shifted to the assessment of network competition, rather than very narrow interpretation of the relevant market and strict examination of the effects of the merger on multiple point-to-point routes.⁹⁹ After several waves of mergers in the airline sector in the European Union, several types of remedies appear to be most commonly proposed by the undertakings and accepted by the Commission:

- 1) Structural remedies – mainly slot divestitures; despite their flaws and historical examples of situations when they do not solve the problem of monopolised routes, divestiture of landing slots remains the most commonly offered and accepted commitment in airline mergers, as it is relatively easy to implement and monitor. The rationale behind this solution is to lower the inflated barriers to entry, and encourage market entry of competitors to generate competitive pressure;
 - a) Upfront buyer solution – a solution supplementary to slot divestitures, aimed at guarantying that the undertaking willing to take over the divested slots exists and is genuinely willing to operate on the given route (offered for example by Ryanair during the final attempt to purchase Aer Lingus, but eventually declined by the European Commission);
 - b) Grandfathering of slots – another additional solution used along with slot divestiture, aimed at strengthening the rights of the undertakings taking over the divested slots, commonly proposed and widely accepted by the European Commission;
- 2) Behavioural remedies – they are gradually becoming more important in airline mergers, however only as a tool ancillary to slot divestiture. The most common include:
 - a) Participation in frequent flyer programmes – tool allowing the passengers of new entrants to participate in millage collection programmes of the merging entities, in order to enhance the attractiveness of switching the airline by loyal customers of the airline offering commitments, commonly proposed and widely accepted by the European Commission;
 - b) Prorate agreements – supporting the alternative means of transportation, to mutually assist and supply each other with a

⁹⁹ Peter Alexiadis, Daniel Kanter, *The European Commission consents to the Consolidation of Europe's skies: The Air France/KLM Merger*.

- steady flow of passengers, used mainly on popular, rather short-haul routes (for example Paris-Amsterdam in Air France/KLM);
- c) Code-share agreements – sharing the seats on a plane between the airlines by supplying each other with passengers, especially relevant in relation to hub-and-spoke business model, where steady flow of passengers is essential to operate a successful network of long-haul routes.

An interesting tool, of a rather procedural character, is appointing a monitoring trustee, which is supposed to overlook the behaviour of the merged entity after the merger and report any incompliance, in order to guarantee the correct application of commitments undertaken by the parties. This solution has not always been used in airline mergers in the European Union, however recently it was successfully adopted in several concentrations of air carriers, for example in Air France/KLM, Lufthansa/SN Airholding, Lufthansa/Austrian Airlines etc.¹⁰⁰

VIII. Situation on the air transportation market in the European Union

The airline sector in the EU has faced numerous challenges over the years. Multiple factors caused financial difficulties of multiple airlines, which needed to consolidate in order to avoid insolvency. Firstly, airlines were deeply affected by the economic crisis of 2008, which caused the wave of mergers in airline sector in the European Union in 2008 and 2009.¹⁰¹ Secondly, the rise of low-cost carriers resulted in stiff competition in the market and lowering their profit margins to the level of balancing on the brink of operating below costs. Thirdly, establishing alternative means of transport (bullet trains, extensive network of highways) encouraged more passengers, even corporate, to cease the use of airplanes in favour of those, especially

¹⁰⁰ Gordon Blanke, Phillip Landolt, *EU and US Antitrust Arbitration: A Handbook for Practitioners*, (Kluwer Law International 2011), 1710.

¹⁰¹ Lucia Bonova, Dagmara Koska, Axel Specker, 'Consolidation of the EU airline industry: How the Commission kept seatbelts fastened in the 2009 airline merger wave', (2009), Number 3, Competition Policy Newsletter <http://ec.europa.eu/competition/publications/cpn/2009_3_10.pdf> accessed on 30 October 2017.

because the growth of level of security at the airports increased the average travel time and noticeably lowered the comfort of air travel.

All those factors, combined with the generally positive approach of the Commission to consolidation of air carriers in the European Union, encouraged (or even forced) airlines to concentrate in order to be prepared for surviving the turbulent times. While assessing mergers in airline sector in the EU, despite numerous declarations of its officials,¹⁰² the Commission took a rather conservative approach, with a track record of two major concentrations blocked and most concentrations cleared subject to conditions, sometimes painful to the merging parties. In general, however, the Commission managed to avoid major mistakes, causing a detrimental effect to the market and consumers.

IX. Future of the airline market in the European Union

As previously mentioned, the airline industry is extremely susceptible to the external factors, which cannot be controlled or foreseen. In past epidemics, financial crises or terrorist attacks had a huge impact on the airline industry, and those kinds of events will inevitably continue to cause trouble to air carriers. Although the precise future of the airline industry is impossible to be foreseen, certain trends are already present on the market in the European Union, and indicate the wind of change in the airline industry.

The main threat to profitability (or even mere existence) of the traditional airlines in the European Union, especially those active on the international routes comes from the east, come mainly from the Gulf region, where at least three extremely successful and expansive air carriers – Emirates Airlines, Qatar Airways and Etihad are based. Those carriers could increase their seat capacity from 18 million in 2005 to 46 million in 2013.¹⁰³ Gulf airlines are able to offer customers a very competitive, good quality and often reasonably-priced service, especially on the routes from Europe to Asia, Australia, Africa and the Middle East. Business model of Emirates, Qatar and Etihad is based purely on the hub-and-spoke model, with only a small number of passengers

¹⁰² See eg Philip Lowe, Mel Marquis, *European Competition Law Annual 2012: Competition, Regulation and Public Policies* (Oxford: Hart, 2014), 84-85.

¹⁰³ Mark Scourse, 'Market Update: The Big Three Gulf Airlines', *Aviation Economics* (16 September 2013) <www.aviationeconomics.com/NewsItem.aspx?title=Market-Update:-The-Big-Three-Gulf-Airlines> accessed on 30 October 2017.

reaching their destination in the hub, and the majority of the customers treating the hub only as an intermediate point on the way to their final destination.¹⁰⁴

The success of these airlines is a combination of multiple factors:

- 1) The extremely efficient and modern management system, allowing the airlines to survive, or even benefit from the turbulent situation on the market;¹⁰⁵
- 2) Geographic location of the Gulf region – approximately halfway between Europe and East Asia, allowing the passengers to conveniently use a connection flight on their way to the final destination;
- 3) Access to large cash reserves of the Gulf states, coming mainly from oil and gas;
- 4) Access to cheaper, in comparison with Europe and the US, workforce (mainly migrants from India and Pakistan) and jet fuel;
- 5) Large fleet of cutting-edge, mostly wide-body aircraft, allowing the airlines to carry more passengers on a single flight and therefore reduce their unit costs;
- 6) Lack of restrictions on night flights in the Gulf region, allowing the airlines to operate nearly 24 hours per day, lowering the amount of time when aircrafts are not being used;
- 7) Deregulation in the European Union and the US, allowing the airlines to smoothly enter the biggest markets in the world;
- 8) Exceptional quality of service (in 2017 Qatar Airways has been voted “The best airline in the world” by Skytrax, Emirates Airways won the award in 2016);¹⁰⁶
- 9) Stiff competition within the Gulf region, naturally forcing the reduction of costs and maintaining the exceptional quality of service – even for the economy passengers.¹⁰⁷

¹⁰⁴ John F. O’Connell, ‘The rise of the Arabian Gulf carriers: An insight into the business model of Emirates Airline’ (2011) Volume 17, Issue 6, November, *Journal of Air Transport Management*, 339–346.

¹⁰⁵ Donald Sull, Sumantra Ghoshal, Felipe Monteiro, ‘Hub of the World’, (2005), Volume 16, Issue 1, Spring, *London Business School Business Strategy Review*, 36-37.

¹⁰⁶ The top 100 Airlines, Skytrax <www.worldairlineawards.com/Awards/world_airline_rating.html> accessed on 30 October 2017.

¹⁰⁷ Mark Scourse, *Market Update: The Big Three Gulf Airlines*.

Additionally, certain allegations have been made in the past regarding the unfair business practices of the Gulf airlines. They were facing accusations of being subsidised by the government and evading taxes on a regular basis, naturally mostly by their competitors in the US and the EU who, unlike the Gulf airlines, needed to comply with strict laws of their jurisdictions on competition and state aid, causing the alleged uneven playing field on the aviation market.¹⁰⁸ For a long period of time, those allegations did not materialise into an irrefutable proof, however in 2015 a detailed report was published by a group of airlines. It disclosed evidence of massive government subsidies amounting to \$42bln, mostly in form of “loans” with no repayment obligation, airport fee exemptions, etc.¹⁰⁹ The competitors of the Gulf airlines claimed that they were in fact branches of government, created and supported with an aim of building the national economies, not for the benefit of the undertakings themselves. It allegedly caused massive job losses in the European Union and the US, directly harming their economies.¹¹⁰

Those accusations were rebutted in great detail by the airlines (mostly by Emirates), nonetheless their statements were in fact mostly defending the brand image, because even if Emirates, Qatar Airways and Etihad did confess to receiving massive support from the governments of United Arab Emirates and Qatar, European or American authorities would have no direct jurisdictional power to condemn those actions.¹¹¹

Even if the assumption can be made that those accusations are far-fetched and based on no convincing evidence, the aggressive expansion of the Gulf airlines on the European market is a matter of fact, and the European air

¹⁰⁸ ‘Rulers of the new silk road’, *The Economist* (3 June 2010) <www.economist.com/node/16271573> accessed on 30 October 2017.

¹⁰⁹ ‘Airline subsidies in the Gulf: Feeling the heat’, *The Economist* (6 March 2015) <www.economist.com/blogs/gulliver/2015/03/airline-subsidies-gulf> accessed on 30 October 2017.

¹¹⁰ Afshin Molavi, ‘The Arab Battle for U.S. Skies’, *Foreign Policy* (4 May 2015) <<http://foreignpolicy.com/2015/05/04/dubai-qatar-etihad-emirates-fair-skies-open-skies-american-delta-united/>> accessed on 30 October 2017.

¹¹¹ Emirates Group, ‘Emirates’ response to claims raised about state-owned airlines in Qatar and the United Arab Emirates’, (29 June 2015) <http://content.emirates.com/downloads/ek/pdfs/openskies_rebuttal/EK_Response_Main.pdf> accessed on 30 October 2017.

carriers are undeniably going to be affected with their business plans.¹¹² Persian Gulf airlines are expanding their network at an enormous pace.¹¹³ The passenger traffic of Emirates, for example, rose by 43% between 2012 and 2014, while the main airlines of the European Union (British Airways, Lufthansa and Air France) could barely reach 12% level of growth of passenger traffic in that time.¹¹⁴ This can be illustrated with an example of routes between the US and India. Currently there are no direct flights between both countries, therefore passengers are forced to connect at one of the airports on the way. In 2008, only 3% of passengers flying from Dallas to Mumbai used the services of Gulf airlines, and 81% booked their flights with the carriers from the EU or the US. Only 6 years later, the situation on this route changed drastically, as Gulf carriers held the 70% of the market share, meaning that they managed to increase their share by nearly 2300% in only 6 years, on a very competitive market.¹¹⁵

Due to the anticipated changes, the approach of the European Commission to remedies and consolidation in airline sector as such, will inevitably have to change, in order to better address the potential anticompetitive concerns and reach certain goals aimed at ultimately benefiting the consumers. The authorities of the European Union and the Member States will not avoid the debate about the future shape of aviation business in Europe, because the traditional, European air carriers are starting to lose the market and are not able to compete with the giants of the Middle East on equal footing, no matter if the allegations of government subsidies are true or not.¹¹⁶

¹¹² Scott Mayerowitz, 'The rise of Middle East aviation hubs is a feat of geography', *Associated Press* (4 March 2013) <<https://skift.com/2013/03/04/the-rise-of-middle-east-aviation-hubs-is-a-feat-of-geography/>> accessed on 30 October 2017.

¹¹³ Richard Maslen, 'Emirates Airline Reveals Network Expansion and Route Capacity Growth', *Routes Online* (5 May 2012) <www.routesonline.com/news/29/breaking-news/155570/emirates-airline-reveals-network-expansion-and-route-capacity-growth/> accessed on 30 October 2017.

¹¹⁴ Scott McCartney, 'Emirates, Etihad and Qatar Make Their Move on the U.S.' *The Wall Street Journal*, (6 November 2014) <www.wsj.com/articles/emirates-etihad-and-qatar-make-their-move-on-the-u-s-1415226589> accessed on 30 October 2017.

¹¹⁵ Michael Scaturro, 'EU carriers battle Gulf airlines' expansion', *Deutsche Welle* (28 May 2015) <www.dw.com/en/eu-carriers-battle-gulf-airlines-expansion/a-18482670>, accessed on 30 October 2017.

¹¹⁶ Sean Cronin, 'Rapid expansion of Gulf airlines squeezes out European rivals', *The National* (14 July 2014) <www.thenational.ae/business/industry-insights/aviation/rapid-expansion-of-gulf-airlines-squeezes-out-european-rivals> accessed on 30 October 2017.

The EU is inevitably moving towards the direction of further market integration into one organism and removing barriers between the Member States. As Neelie Kroes, Member of the European Commission in charge of Competition Policy once said:

“Europe thrives from breaking down barriers between Member States not by erecting them. Open and competitive markets are key drivers for growth and jobs in Europe. Companies that are successful players in the European market are also well placed to compete globally. The Commission will always look with concern at any attempt by national governments, directly or indirectly, to interfere unduly in the process of cross-border corporate restructuring in Europe.”¹¹⁷

Therefore, the idea of allowing the existence of national champions might be relevant not only on the level of a particular Member State, but on the level of the whole European Union as well. The traditional European airlines are gradually losing the market of long-haul flights from Europe to the foreign carriers, mainly from the Gulf region, therefore some degree of tolerance to dominance in the European market and potential anticompetitive effects arising from it, might be unavoidable to save the airlines of the European Union from becoming insolvent in the long run.

X. Concept of a national champion

In general, concept of a national champion means supporting private undertakings by the government in order to create a powerful company ready to become a strong international player, for the benefit of the country. In context of merger control, it relates to a government intervention aimed at allowing the creation of a large entity, which normally would be prohibited due to potential anticompetitive effects. The reasons for allowing a creation of a national champion differ between the countries, however normally governments want to secure employment, create the economies of scale for the merged entity (allowing the reduction of a unit cost), or take into account

¹¹⁷ Neelie Kroes, ‘Introductory remark on Mergers in the internal market’, Speech delivered at European Parliament plenary session, Strasbourg, 15 March 2006 <http://europa.eu/rapid/press-release_SPEECH-06-172_en.htm?locale=en> accessed on 30 October 2017.

national security considerations.¹¹⁸ Countries may strategically apply (or disapply) their competition laws in order to reach wider economic goals, even at a price of sacrificing the competition on the domestic market.¹¹⁹ In the European Union, the tendency to support the national champions was mostly prominent in 1970s, mostly used in order to better engage in rivalry with bigger American corporations, who dominated multiple sectors.¹²⁰

XI. The need of rethinking the concept of a national champion in the EU

Due to progressive integration of the European market, and the attempts of the EU officials to create a genuinely common market of all the Member States, the concept of national champion in the European Union needed to be reformulated, as establishing a national champion in only one Member State would be contrary to the interests of the whole Union. A number of successful companies were officially (or unofficially) supported by the governments in order to elevate their chances for international success.¹²¹ The notable example of a fruitful cooperation between the Member States in such manner is establishing Airbus in the late 1960s – the British/French enterprise producing aircrafts.¹²² After more than 30 years on the market, Airbus is arguably the biggest producer of commercial jet aircrafts in the world, generating €67.5 billion in revenue (2016), producing around 500 airplanes yearly, and employing more than 133.000 people (2016).¹²³ Other examples of successful transnational mergers within the European Union, which could

¹¹⁸ Jonathan Galloway, ‘The pursuit of national champions: the intersection of competition law and industrial policy’, (2007), *European Competition Law Review*, 1-2.

¹¹⁹ Maher M. Dabbah, *International and Comparative Competition Law*, (Cambridge University Press 2010), 585-586.

¹²⁰ Emmanuelle Maincent, Lluís Navarro ‘A Policy for Industrial Champions: From picking winners to fostering excellence and the growth of firms’, (2006), *Industrial Policy and Economic Reforms Papers*, <<http://ec.europa.eu/DocsRoom/documents/1923/attachments/1/translations/en/renditions/native>>, accessed on 30 October 2017, 21-24.

¹²¹ Abel Moreira Mateus, Teresa Coelho Moreira, *Competition Law and Economics: Advances in Competition Policy Enforcement in the EU and North America*, (Edward Elgar Publishing, 2010), 353.

¹²² Airbus Group, History of early days (1967-1969) <www.airbus.com/company/history/the-narrative/early-days-1967-1969/> accessed on 30 October 2017.

¹²³ Airbus Group, Full-year results 2016 <www.airbusgroup.com/int/en/investors-shareholders.html> accessed on 30 October 2017.

be considered as the “European champions” include Alstom (Switzerland/Sweden/UK/France), AstraZeneca (Sweden/UK), Aventis (Germany/France) and many others.¹²⁴

The only merger in airline sector in the EU, which could possibly be considered as influenced by the concept of European champion, is the consolidation of KLM and Air France – the merger of two national carriers of the Netherlands and France, allowing them to create the biggest airline in the world at the time. Nonetheless, as previously mentioned, the aviation market is changing rapidly, therefore further consolidation of the airline sector in the European Union is inevitable. The market of aviation is truly global, many potential passengers of the European airlines are foreign and they are willing to spend their money on a good quality air transport. The airlines of the EU are about to face one of the biggest challenges in the history of their existence, and the role of the European Union (mainly the European Commission) is to support them in the turbulent times, even at a cost of potential and interim anticompetitive problems in the internal market, which represents only a fraction of the revenues generated by those airlines. It is in the best interest of the whole European Union to create a true global champion airline, well-equipped to compete on equal footing with the Gulf carriers. Therefore, the time has come to reevaluate the priorities and slightly shift the approach to consolidation in airline sector in the EU. It can be done with a number of ways, nonetheless the correct application of remedies, carefully tailored to mitigate the risk of potential anticompetitive effects, is undoubtedly one of the critical factors in creating the European champion.

XII. Conclusion

As already outlined, in the past, the approach of the Commission to consolidation in airline sector was rather conservative – several mergers were blocked and multiple packages of remedies offered by the parties during the investigation were not accepted. It is clear that the current approach of the European Commission to remedies in airline sector, even if it was appropriate during the last ‘merger wave’ of 2008 and 2009 and should not be fully condemned, will have to be reevaluated in the future due to anticipated crisis of the air transport industry in the European Union. Although the slot

¹²⁴ Peter Nolan, *China and the Global Economy: National Champions, Industrial Policy and the Big Business Revolution*, (Palgrave Macmillan 2001), 132-133.

divestiture should presumably maintain the main ingredient of the packages of commitments proposed, some additional factors should be taken into account by the Commission. They include:

- 1) The extremely narrow definition of the relevant market (city pair air routes, sometimes narrowed down even further) did not allow the Commission to notice the “bigger picture” and take into account wider implications of the notified transaction. The European Commission should not be excessively concerned with interim anticompetitive effects on short-haul routes, mainly because of the geography of the region (relatively short distance between the countries and permanent possibility to use alternative means of transportation – trains, coaches, cars etc.) and the real possibility of market entry – especially from the fast-growing low cost carriers, which managed to encourage even corporate passengers to use their services (for example the introduction of “Business plus” tariff by Ryanair in 2014);¹²⁵
- 2) The dynamic aspects of the market, and therefore wider acceptance of the failing firm defence - as the “traditional” European air carriers are very likely to become insolvent in the near future because of the extensive expansion of Gulf airlines;
- 3) The evidence of market behaviour of the particular airline from the past should be included in the assessment of the concentration. If there is evidence that the company, even at periods of being dominant on the relevant market, managed to maintain competitive level of prices and good quality of service, it should be taken into account by the Commission (for example Ryanair sticks to its philosophy of reasonable pricing of air fares, even at routes where it does not face noticeable competitive pressure from its rivals);
- 4) Up-front buyer solution should be regarded as an ultimate solution in majority of the situations, because it is capable of directly eliminating the anticompetitive risk. If the airline is able to encourage its competitor to take over the divested slots on the affected routes and operate the route for a reasonable period of time, the European Commission should be obliged to accept this remedy.

¹²⁵ Christopher Williams, ‘Ryanair introduces business class’, *The Telegraph* (27 August 2014) <www.telegraph.co.uk/finance/newsbysector/transport/11057948/Ryanair-introduces-business-class.html>, accessed on 30 October 2017.

The Commission undoubtedly is the guardian of the competition on the European market and its main goal is to eliminate any anticompetitive behaviour, capable of harming the consumers. On the other hand, however, it should not intervene automatically in every merger, without considering the wider considerations and the ultimate benefits which could be achieved, even despite some degree of interruption to the market. As rightly argued by Kokkoris, “The competition authorities should adopt a different approach towards remedies in periods of crises”.¹²⁶ The crisis in air transport sector in the European Union is not a distant future - perhaps the time has come to change the method assessment of mergers in airline sector in the European Union.

¹²⁶ Ioannis Kokkoris, Howard Shelanski, *The EU Merger Control*, 554.

EXPORT CARTELS AND THE CASE FOR GLOBAL WELFARE

Michael Ristaniemi*

Export cartels are generally exempted from domestic competition laws. The status quo causes inefficiencies and unnecessary friction in various markets around the world. As such, their treatment represents a gap in international antitrust. Despite several attempts, multilaterally agreed restrictions on export cartels elude the international community for a number of reasons, such as market access demands and protecting ‘national champions’. This essay examines trade friction occurring in the form of export cartels: what are they, are they problematic, and whom do they affect most? It explores the challenges that have prevented deeper international cooperation to address export cartels by building on prior legal discourse, in order to identify those issues on which a resolution hinges. The essay concludes by proposing both substantive resolutions as well as appropriate facilitators for negotiations and enforcers of a resolution.

I. Introduction

‘The only thing that will redeem mankind is co-operation.’¹

We live in a paradoxical world. Cross-border trade continues to rise and the digital revolution is bringing us closer to each other than ever before. Trade liberalization – that is, being open to cross-border trade – has been shown to provide positive effects to a nation’s economic growth and investments, on average.² Recognising this, most developing nations have introduced reforms that embrace external economic liberalisation in the past decades, following

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He is particularly grateful to the Ella and Georg Ehrnrooth Foundation and the Turku University Foundation for their financial support that helped make this paper reality, and to Professor Antti Aine for his helpful comments.

¹ Bertrand Russell, ‘Human Society in Ethics and Politics’ G. Allen & Unwin, 1954, 212.

² See eg Romain Wacziarg & Karen Horn Welch, ‘Trade Liberalization and Growth: New Evidence’ (2008) 22 *The World Bank Economic Review* 212-213.

in the footsteps of economically advanced nations.³ However, fear of the unknown and disappointment by those who are yet to enjoy the benefits of such liberalisation concurrently fuel nationalistic and inward-thinking political movements. In economic world, various regulatory barriers to trade represent the product of such protectionist and inward-thinking policy. These barriers may occasionally be beneficial to individual actors in individual situations, but certainly such friction cannot be regarded as generally beneficial in the long run, particularly when considering the welfare of any broader international community.

Export cartels are an example of a practice that is both welfare decreasing and widespread. They represent a non-tariff barrier to trade. Cooperation between exporting companies that runs excessively deep, so as to include hard-core cartel conduct, is often detrimental to global welfare, as will be further illustrated in the coming Sections. As such, there is a gap in international antitrust rules when it comes to export cartels. Hence, this is the focus of this essay. Export cartels range from agreements between entirely private entities to full state-to-state arrangements, such as the cartel between petroleum exporting nations (OPEC). In between, there are a range of cartels with mixed private and public interests, such as the international vitamin C cartel that has been under the sponsorship of the People's Republic of China (China).⁴

Along with spreading international trade liberalisation, competition law and its inherent welfare-enhancing benefits are ever more widely recognised. As of the publication of this essay, well over 100 nations have some form of competition legislation and an authority enforcing it. This represents a drastic increase compared to just a few decades ago: around 1990, only 16 jurisdictions globally had a competition authority.⁵ The increase is remarkable and is – in the author's opinion – a mostly positive thing, since this development makes it more likely that national domestic markets function competitively, i.e. effectively.

The *status quo* is, however, not without problems. Due to increasing international trade and more prevalence of competition laws and authorities,

³ Ibid, 187.

⁴ Eleanor Fox & Merit Janow, 'China, the WTO, and State-Sponsored Export Cartels: Where trade and competition ought to meet' (2012) 4 *Concurrences* 5-7.

⁵ OECD, 'International Co-operation in Competition Law Enforcement' (2014), available at: <[https://www.oecd.org/mcm/C-MIN\(2014\)17-ENG.pdf](https://www.oecd.org/mcm/C-MIN(2014)17-ENG.pdf)> (last visited 12.8.2017) 22-23.

there is more business taking place that simultaneously affects several jurisdictions. This means, there are also ever more jurisdictions whose competition laws may apply simultaneously and whose laws may be enforced simultaneously, and potentially extraterritorially. The end result equals unpredictability for businesses and inefficiency in general. All these underscore the potential benefits in cooperating with other jurisdictions.

The existence and effects of export cartels have been widely discussed for decades, whether in relation to the restrictive practices of large multinational corporations or concerning the market for a certain raw material or commodity that is dominated by the corporations of a certain nation. The topic appeared already in the draft charter of the envisaged United Nations (UN) agency, the International Trade Organisation (ITO) in late 1940s and has since – along with competition policy more broadly – been a subject of both discussion and negotiation within the UN and the World Trade Organisation (WTO). Despite the attempts at the various forums, restrictions on the use of export cartels on a multilateral level elude the international community.⁶ The latest discussions within the WTO where competition policy – and export cartels as a part of it – was discussed, took place at the Fifth Ministerial Conference in Cancún, Mexico, in September 2003. However, competition policy was dropped from the list of items to be further negotiated due to irreconcilable differences, both substantive and practical. Developing countries were particularly weary of subjecting themselves to the WTO dispute resolution mechanism, given the, generally, low level of experience and scarce resources they had in competition policy issues.⁷

In recent years, the topic has not received as much attention as it has during the previous decades and has instead been somewhat neglected. This essay's interest lies with the question of why the core issue remains unresolved, while the *status quo* is, still, clearly less than desirable in terms of global welfare.

The intention is to first unravel the phenomena that are export cartels in Section II by dissecting the concept of export cartels and addressing why they are relevant. This Section will also include a description of the common legal

⁶ The ITO charter was signed in Havana in 1948 during a UN Conference on Trade and Employment, but faced problems with its ratification. Ultimately, it was blocked by US Congress and the ITO never became what it was envisioned to be.

⁷ Aditya Bhattacharjea, 'The Case for a Multilateral Agreement on Competition Policy: A Developing Country Perspective' (2006) 9 *Journal of International Economic Law* 297.

frameworks by virtue of which the existence of export cartels is possible. Section III dives into a pro-con analysis on the impact of export cartels to the international community and whom it affects most. International cooperation in competition policy matters has been limited, including cooperation in relation to export cartels. Section IV describes the main reasons for this, while Section V attempts to list a few possible resolutions to the unsatisfying *status quo*. Section VI concludes the essay with a few thoughts built upon the preceding Chapters.

For practical purposes, this essay assumes that an increase in international trade equally increases global welfare and does not explore that area as such, while recognising however that such causation is an oversimplification. ‘Welfare’, as mentioned throughout this essay, is meant to refer to the economic welfare, i.e. the amount of prosperity of individuals. ‘Global welfare’, in turn, is meant to refer to the aggregated economic welfare of individuals without regard to borders between nation-states. Cartels that occur purely between nations, such as the cartel between oil-producing nations, OPEC, are excluded and instead focus is placed on the export cartel conduct of entities that are subject to domestic competition laws. The focus of this essay is export cartels exclusively, meaning that domestic cartels are not. International cartels will be addressed to the extent that their conduct affects markets other than their own domestic market.

II. The basics of export cartels

Merriam-Webster defines a cartel as ‘a combination of independent commercial or industrial enterprises designed to limit competition or fix prices’.⁸ Export cartels consist of exporters of goods or services that may include members from a single nation or from several nations acting in concert. The former is referred to as a ‘domestic’ export cartel and the latter as an ‘international’ export cartel. A ‘pure’ export cartel consists of conduct that affects solely foreign markets, whereas the competitive restraints contained in a ‘mixed’ export cartel also affect the exporting company’s

⁸ Merriam-Webster, Definition of a cartel <<https://www.merriam-webster.com/dictionary/cartel>> (last visited 12.8.2017).

domestic markets.⁹ Export cartels are a trade measure whose aim is to give exporters of a certain nation an advantage in world trade by – either explicitly or implicitly – exempting conduct to the extent that its effects do not harm domestic markets. This includes cooperation that otherwise might be prohibited as a hard-core cartel, if the international dimension were omitted. The term ‘beggar-thy-neighbour’ is often referred to when speaking about export cartels. This refers to an economic policy in which a nation attempts to improve its economic situation using means that are to the detriment of another nation.¹⁰ Indeed, export cartels represent a quite clear and unbridled nation’s bias in applying its competition policy in favour of exporting legal entities.¹¹ An original intention of such export cooperation was said to be to balance the detrimental effects of cartels then present on the buyer-side in the importing market.¹²

Problems arise when many nations begin to simultaneously enforce competition legislation and still maintain exemptions for export cooperation. Historically, this approach is understandable – proper codified competition policy was rare and consequentially the likelihood of infringing competition laws faced by an importing entity was significantly lower. As mentioned in the Introduction, this has since changed and some form of competition legislation and its enforcement is nowadays more the norm than the exception. Moreover, global welfare is not a zero-sum game and, thus, improved conditions for one do not inevitably mean respectively worse conditions for the other. There are a number of known export cartels, originating in a number of nations, *inter alia*, the vitamin C cartel in China,¹³

⁹ Frederic Jenny, ‘Export Cartels in Primary Products: The Potash Case in Perspective’ (2012) in: (Evenett/Jenny eds) *Trade, Competition and the Pricing of Commodities*, Centre for Economic Policy Research, London 99; Paul Victor, ‘Export cartels: An idea whose time has passed’ (1991) 60 *Antitrust Law Journal* 571.

¹⁰ Marina Bode & Oliver Budzinski, ‘Competing Ways Towards International Antitrust: the WTO versus the ICN’ (2005) 3 *Marburg Papers on Economics* 5.

¹¹ Andrew Guzman, ‘The Case for International Antitrust’ (2003) 128 *UC Berkeley Public Law Research Paper* 5.

¹² See Brendan Sweeney, ‘The Internationalisation of Competition Rules’ Routledge; 2011; 57.

¹³ Chinese Vitamin C manufacturers have fixed prices regarding sales into the United States, in 2013. See eg <<http://www.nytimes.com/2013/03/16/business/global/us-fines-chinese-vitamin-c-makers.html>> (last visited 12.8.2017).

the American soda ash cartel,¹⁴ Ghana's cocoa bean cartel,¹⁵ and the potash cartel between companies of Canadian origin.¹⁶ Given their prevalence, it is rather surprising that reliable empirical data about export cartels is scarce. This is largely due to most nations having chosen to implicitly allow export cartel activity, which requires no registration with authorities and which thus often operates undetected.¹⁷

The US Supreme Court has described cartels as the 'supreme evil of antitrust'¹⁸ and there seems to be a broad consensus across jurisdictions that cartels are harmful to competition.¹⁹ Hence, it is natural that hard-core cartel conduct often is treated as a *per se* infringement whose object is to infringe competition law. Still, export cartels are often treated differently: most nations with competition laws either implicitly or explicitly exempt restraints to competition, provided that such restraints do not affect domestic markets. Moreover, there are substantial disagreements over how export cartels should be treated on an international scale. Currently, most nations have chosen the path of implicit exemptions: *de facto* allowing export cartels by prohibiting cartel conduct only to the extent that the object or effect of such conduct impairs competition in domestic markets. This limitation to the scope of a competition regimes laws is stated in the relevant statutes. The EU provides an example in Article 101 of the Treaty on the Functioning of the EU (TFEU), which prohibits agreements and concerted practices that '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'.²⁰ Thus, while nations that maintain systems of implicit exemptions for export cartels do not usually separately give consent to the operation of

¹⁴ Export cartel involving the American Natural Soda Ash Corporation ('ANSAC'), an association formed under the Webb-Pomerene Act.

¹⁵ Ghana Cocoa Board, a government-controlled institution controls the price of cocoa beans in Ghana.

¹⁶ Canpotex Limited handles the exports of majority of the Canadian potash industry. See also Jenny (n 9) for an analysis about this export cartel.

¹⁷ See however Margaret C. Levenstein & Valerie Y. Suslow, 'The Economic Impact of the U.S. Export Trading Company Act' Valerie Y. (2007) 27 Antitrust Law Journal for an interesting analysis on US export associations under the Export Trading Act.

¹⁸ Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, 540 U.S. 398 [2004].

¹⁹ Jenny (n 9) 99-100. This view was echoed by Richard Whish at the 2015 International In-House Counsel Journal Competition Law Conference.

²⁰ Consolidated Version of the Treaty on European Union [2008] OJ C115/13, art. 101.

export cartels, these are allowed to operate by virtue of the limitation of the scope in such nation's competition laws.

A few nations, such as the US²¹ and Australia²² maintain systems of explicit exemptions that allow export cartels to operate without infringing domestic antitrust laws, if they remain within a determined framework. It is common that an explicit exemption system is accompanied by a notification or registration requirement, for authorities to confirm an arrangement's compatibility with the exemption system. The popularity for implicit exemptions has grown in recent years, for unknown reasons, as opposed to maintaining a system of explicit exemptions.²³ *Levenstein & Suslow* argue that explicit exemptions would be a better system compared to the currently more often-used system of implicit exemptions. Notification systems are usually used in conjunction with explicit exemptions, to exempt only those arrangements that truly do not harm domestic competition. This allows for a proper *ex ante* analysis of the likely effects of the arrangement.²⁴ This is both an interesting and valid point. As will be discussed further in the following Section, domestic spillover effects of export cartels may well be significant and very much possible. Thus, pre-emptive review of such arrangements is quite warranted.

A system of explicit exemptions is, however, not a comprehensive solution, even for the exporting nation. This is because export cartels – more precisely the companies participating in them – risk encountering problems with the importing nation's competition authorities. Usually, such cartel conduct is not exempted in said importing nation, i.e. the nation that bears the detrimental effects of the cartel's conduct. Nevertheless, since the existence of export cartels does not seem to be bound to a certain level of a nation's economic development or choice of legal system, export cartels originate in nations that substantially differ from each other. Further, it seems that export cartel activity is not limited to certain types of goods: they appear to be possible in both primary and intermediate goods, as well as in final products.

²¹ 15 U.S.C. §§ 61-65. [1973].

²² Australian Competition and Consumer Act 2010.

²³ Margaret C. Levenstein & Valerie Y. Suslow, 'The Changing International Status of Export Cartel Exemptions' (2004) 20 *American University International Law Review* 18.

²⁴ *Ibid* 4 & 7.

In the US, the Webb-Pomerene Act²⁵ has allowed limited exemptions for export associations since 1918. The purpose of the Act was to boost trade by allowing an antitrust exemption to associations of competitors to engage in collective export sales.²⁶ It was, however, perceived as having certain gaps and, in 1982, the US export cartel exemption system was supplemented by the Export Trading Act²⁷ and the Foreign Trade Antitrust Improvements Act²⁸ in order to increase the system's popularity. The supplementary Acts expanded the system by exempting all conduct that did not have a 'direct, substantial, and reasonably foreseeable' effect on US commerce as well as by exempting essentially all categories of trade, where the original Webb-Pomerene Act had only concerned commodities and had not applied to arrangements with any spillover effects to the US.²⁹

III. Are export cartels a problem?

The impact of export cartels is a highly-debated topic. It is still somewhat unresolved, partly owing to the dearth of reliable and comprehensive empirical data for the reasons explained in the previous Section. This section will nevertheless highlight a few of the main arguments that are considered most compelling, both for and against export cartels.

1. Critical views

It seems that many credible scholars do recognise detrimental effects of export cartels to welfare, particularly when taking a perspective broader than concerning a single nation. Many of these detriments appear in substantially similar ways to those of domestic hard-core cartel conduct, e.g. as higher prices and limited output.³⁰ It must be noted that views do exist that the currently available data is not sufficiently robust to form this conclusion about

²⁵ 15 U.S.C. §§ 61-65. [1973].

²⁶ Einer Elhauge & Damien Geradin, 'Global Competition Law and Economics' Hart Publishing; 2011; 1188-1189.

²⁷ 15 U.S.C. §§ 4001-4003 [2000].

²⁸ 15 U.S.C. § 6a [2000].

²⁹ Victor (n 9) 572-575.

³⁰ See eg Victor (n 9) 577; Jenny (n 9) 104; Bhattacharjea (n 7) 320.

export cartels.³¹ The most vocal opponents of export cartels seem to consist of the EU and Japan, which have stated that export cartels distort trade and mostly appear to benefit larger companies (instead of SMEs which are in more justifiable need of such help) and have called for multilateral restrictive regulation.³²

An acknowledged policy risk associated with export cartels concerns excessive information exchange between competitors, meaning inorganic market transparency and resulting tacit collusion.³³ This is a recurring and significant issue that general anti-cartel laws attempt to address and is highly relevant in export cooperation as well: authorities are concerned about potential – and rather likely – spillover effects affecting domestic markets when horizontal export cooperation takes place. Spillover effects tend to be a main feature in the review of authorities in jurisdictions where explicit limited antitrust exemption may be granted to export cartels, such as in the case of the US and Australia. Such nations attempt to avoid any such cooperation to develop that would include material spillover to the domestic market by performing an advance review of it. For instance, the Australian Competition and Consumer Commission explicitly states in its guide on interpreting the Australian regime for export cartel exemptions that ‘[s]pillover effects from an export arrangement reducing competition in domestic markets are a concern, and therefore the exemption only relates to the export of goods and services.’³⁴ In export cooperation, spillover effects are indeed often likely once competitors have shared sensitive information about conduct in foreign markets and coordinate related practices. Such information may in itself allow excessive transparency in breach of regulation on horizontal cooperation and the familiarity of cooperating closely on foreign markets is only a short step from repeating the same domestically as well.

Further, the existence and operation of export cartels has the effect of creating additional trade tension between nations, more internationally speaking. This is contrary to the WTO’s aim of promoting free trade and reducing barriers

³¹ See Daniel D. Sokol, ‘What Do We Really Know About Export Cartels and What is the Appropriate Solution?’ (2008) 4 *Journal of Law and Economics* 982; and Sweeney (n 13) 71.

³² See Sweeney (n 12) 58.

³³ See Victor (n 9) 577-578.

³⁴ Australian Competition and Consumer Commission, ‘Guide to the export agreement exemption in the Competition and Consumer Act’ (2011) 2.

to trade. Export cartels are argued to cause trade friction and harm in the form of added legal complexity and ambiguity, as experienced in, e.g. the Wood Pulp case.³⁵ If nothing else, they are against the spirit and principles of trade liberalisation.³⁶

A common argument is that export cartels are mainly a problem for developing nations³⁷. However, it appears that export cartels may harm both advanced and developing nations, since the formation and maintenance of an export cartel is possible irrespective of a nation's level of development. The main difference lies in enforcement of export cartels originating in other nations: advanced nations are often better placed to both enforce their competition laws extraterritorially and to otherwise put pressure the exporting nations by utilizing other trade measures. Thus, the net effect is likely most felt in nations whose domestic enforcement resources and international bargaining power are limited.

Even if extraterritorial application of its own antitrust rules is possible for a national competition authority (NCA), in principle, it is challenging to apply these rules in practice. If certain conduct is not against the laws of the exporting nation – due to an implicit or explicit exemption of cartel conduct occurring in relation to exports – this nation's NCA may be reluctant to cooperate with the NCA of the importing nation. Even in cases where international agreements exist between the two nations, cooperation between NCAs is commonly exercised on a voluntary basis, whether related to comity or otherwise. The problem with voluntary cooperation is that a nation may decline to assist for a number of reasons, including protectionism. In the absence of cooperation, difficulties arise both for finding evidence of potential infringements as well as fining entities for infringements, since both would require extraterritorial application of a nation's competition laws, which – in turn – requires significant support in the form of comity from nations in which such entities are based or where the cartel conduct has taken place.

³⁵ Ibid 577; Joined cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85 A. *Ahlström Osakeyhtiö and Others v Commission* [1993] ECR I-01307.

³⁶ Sweeney (n 12) 72.

³⁷ See eg Aditya Bhattacharjea, 'Export Cartels: A Developing Country Perspective' (2004) 38 *Journal of World Trade* 15-22

2. Favourable views

Certain commentators and nations – particularly the US – put forward the argument that export cartels do not pose a serious problem owing to their efficiency gains and enhanced possibilities for conducting cross-border trade, and that their net effect is positive.³⁸ This essay will highlight a few of the main points generally made in this regard.

One main claimed benefit is that enhanced efficiency is likely to outweigh possible negative effects on competition that an export cartel may have. This is claimed to be due to the economies of scale materialized by sharing resources in the marketing, distribution and sales functions directed to certain foreign markets. The efficiency argument was a major part of the US soda ash export cartel's (ANSAC) defence when it encountered problems with foreign competition law authorities a few decades ago.³⁹

Another claimed benefit of export cartels is that they enable exporting entities to reach markets they would not be able to reach otherwise. This 'enabling' argument is one of the main justifications that are commonly mentioned in conjunction with the US Webb-Pomerene Act⁴⁰. Indeed, this may be the case for SMEs, but it is largely dependent on the case at hand, given that export cartels have been said to mostly benefit larger companies,⁴¹ which possess the potential to access markets individually. Market access arguments were raised, inter alia, in the ANSAC proceedings, but were not accepted – authorities deemed the parties to be able to enter the markets in question individually without cooperating within an export cartel.⁴² *Jensen-Eriksen* argues that, from a trade policy perspective, the above-mentioned two benefits can be significant for smaller, developing nations in which exporting companies are located and refers to Finland as an example. The paper and pulp sector in 20th century Finland was a highly-cartelised affair, but also helped the then smaller companies compete with leading players on

³⁸ Eg Sokol (n 31) 972-973.

³⁹ The defence was ultimately unsuccessful, as authorities were not convinced that efficiencies would outweigh negative effects. For a detailed account of ANSAC's defence, see Bhattacharjea (n 37) 15-22.

⁴⁰ 15 U.S.C. §§ 61-65. [1973].

⁴¹ Sweeney (n 12) 61.

⁴² Bhattacharjea (n 37) 15-22.

international markets and eventually helped transform Finland into a modern economy, a view also echoed by the former head of the Finnish competition authority^{43, 44}.

What is left to be discussed is the ‘defence’ argument. In brief, this argument deals with situations in which importing nations exhibit certain structures that are either legislatively created or otherwise existing that constitute *de facto* barriers to entry for an exporting company⁴⁵. As such, it is related to enhanced market access and is similar in justification to the ‘enabling’ argument. Proponents of export cartels suggest that coordinating efforts are needed to gain access to the market by acting as a countervailing force of sorts.⁴⁶ The ‘defence’ argument may carry some weight to the extent that export cartel members are new entrants to the import market; otherwise it is not likely to be of relevance.

3. Balancing interests

As mentioned in the previous Section, substantive empirical data on export cartels activity is rather limited. This disadvantage creates difficulty in taking a firm stance on them, since one would like to base such stance on actual, empirical economic data, instead of mere scholarly opinions, even if they are reasoned ones.

The harm for an export cartel largely depends on its market power and its treatment should equally depend on its true effects on the foreign market in question, rather than considering it a *per se* infringement of competition law.⁴⁷ However, this inevitably begs the question: why assess export cartels using different criteria than when assessing domestic cartels? From a legal standpoint, it should be sufficient and appropriate to subject all conduct to the same criteria and allow the effects to speak for themselves. *Jenny* argues that cooperation in export cartels may well be partially procompetitive, but may also partially be conduct that would be classified as hard-core collusion,

⁴³ Matti Purasjoki, ‘Kartelli, uskonto ja isänmaa’ (2004) Helsingin Sanomat.

⁴⁴ Niklas Jensen-Eriksen, ‘A Potentially Crucial Advantage. Export Cartels as a Source of Power for Weak Nations’ (2013) Vol. 64 *Revue économique* 1095.

⁴⁵ *Ibid* 15-22.

⁴⁶ Bhattacharjea (n 37) 26.

⁴⁷ Brendan Sweeney, ‘Export Cartels: Is There a Need for Global Rules?’ (2007) 10 *Journal of International Economic Law* 89; Jensen-Eriksen (n 44) 1090.

should the effects hit the domestic market, instead of being directed elsewhere.⁴⁸ It is not likely necessary to consider that such combination of cooperation is inevitably essential, specifically in an export context. Rather, it would make sense to treat such cooperation as it would be treated, if the effects were to occur in the domestic market.

By focusing on the trade-enhancing side of export cartels – the benefit for the exporting nation – the assessment looks different. Export cartels may be used as a way to promote a nation’s important industries, to increase employment and to bring a boost to the nation’s economy. Domestically, interfering with a benefit-generating model like export cartels would need to entail countervailing benefits of – at least – equal proportion that could be realised with high certainty. From the perspective of a net exporting nation, its own export cartels may not be problematic. The perspective of this essay, however, is global economic welfare as a whole. By allowing export cartels to originate and operate in an exporting nation means effectively exerting a negative externality; a decision for which the exporting nation does not bear the resulting cost and which creates inefficiencies within the global economy.

Welfare economics provides useful tools for assessing how to balance interests. The so-called Kaldor-Hicks efficiency tests attempt to assess whether a measure is an improvement to the economic welfare of a society or not.⁴⁹ A measure is an improvement inasmuch as the presumed ‘winners’ gain exceeds the presumed ‘losers’ loss. This is assessed by considering whether said ‘winners’ could, in theory, compensate said ‘losers’ for their loss and still be better off than originally; provided simultaneously that the maximum sum that said ‘losers’ could – in theory – pay the ‘winners’ for not undertaking the measure is lower than the minimum that the ‘winners’ would accept.⁵⁰ Indeed, on a global level, removing special treatment expanded to export cartels could well, in the author’s view, pass the Kaldor-Hicks tests and bring our global economy one step closer to Pareto efficiency⁵¹ and thus help increase global welfare.

⁴⁸ Jenny (n 9) 101.

⁴⁹ Thomas J. Miceli, ‘The Economic Approach to Law’ Stanford University Press; 2009; 5-6.

⁵⁰ Ibid.

⁵¹ Pareto efficiency refers to a distribution of resources in which a reallocation is impossible without making a certain actor worse off. Ibid 4-5.

Furthermore, the challenges of extraterritorial application of a nation's competition laws should be considered. In a prior article, I have discussed the negative effects that multinational companies face due to competition laws being applied on an extraterritorial basis, or even due to the potential for such application to take place. There are clear difficulties that extraterritorial application poses for authorities and there are related ambiguities that still trouble companies today.⁵² It is important to understand that export cartels are one of the main causes for such extraterritorial application.⁵³ Should export cartels be banned or restricted (in whatever way), a likely consequence would be a lessened emphasis on such extraterritorial application. However, it would not be a 'silver bullet' – nations would likely continue to have an extraterritorial interest in merger control and in cases of unilateral conduct, at least when there is a risk that effects might spill over to their jurisdiction.

A popular course of action in contemporary competition policy is banning so-called 'naked' cartels by virtue of, e.g., the *per se* rule in the US. The logic behind said prohibition is that the likelihood of the cartel being procompetitive is marginal and imposing a prohibition without a thorough review is the most effective way to utilise an authority's resources, even while acknowledging that some of this prohibited conduct might contain procompetitive elements in practice.⁵⁴ One cannot but wonder what would alter such a basic notion not to hold true in an international context. The following Section will address the main issues for which it has proved difficult to find common ground.

IV. Challenges in embracing a common approach

Historically, there have been a number of attempts to address the problem of export cartels. Often it has been a part of broader framework of negotiations about a possibility for multilateral harmonisation on competition policy questions. Already in the 1940s during the negotiations for founding the ITO,

⁵² Michael Ristaniemi, 'What Extraterritorial Application of Competition Law Means for MNCs' (2014) Vol. 7, No. 28 International In-house Counsel Journal 1.

⁵³ This view is echoed by, eg Marek Martyniszyn, 'Export Cartels: Is it Legal to Target Your Neighbour? Analysis in Light of Recent Case Law' (2012) 15 Journal of International Economic Law 39.

⁵⁴ Andrew M. Rosenfield, Dennis W. Carlton & Robert H. Gertner, 'Communication among Competitors: Game Theory and Antitrust Application of Game Theory to Antitrust' (1997) 5 George Mason Law Review 425.

competition policy was discussed and a chapter concerning regulating both public and private restraints to competition was included in its charter. Despite the ITO charter having been signed, it however was never finally ratified⁵⁵ and its importance thus never became what it could have been.

Thus, far the main multilateral treaty in force that is related to competition policy is the General Agreement on Tariffs and Trade (GATT), which has been ratified by 100+ nations as of the date of this essay. The GATT has been successful in limiting the scope for government-imposed restraints of international trade significantly. It deals, however, exclusively with government policies and there has been a lingering concern about trade restraints imposed by private undertakings – this has been the idea behind negotiating and preparing an agreement on international competition policy, in order to extend to where the GATT properly does not.⁵⁶

As has been mentioned, the latest comprehensive attempt to agree on international rules in the realm of competition policy took place in Cancun, Mexico, as a part of the Fifth WTO Ministerial Conference, in 2003. Competition policy was one of the four so-called ‘Singapore issues’, matters for which Working Groups had been set up at the previous ministerial conference that took place in Singapore in 1996.⁵⁷ However, the negotiating parties ran into a mountain of differing stances that proved insurmountable for such a multilateral agreement, at least for the time being. Despite since having been discussed on multiple forums, the path towards the next broad multilateral attempt at an agreement still eludes us.

Below, this essay will introduce a few of the most compelling reasons for the absence of deeper cooperation in dealing with the competition issues related to export cartels.

1. Market access needs

Certain nations, of which the US are the most influential one, argue that export cartels are needed to help ensure access to foreign markets. As argued,

⁵⁵ See Bhattacharjea (n 7) 297.

⁵⁶ Ibid 295-296.

⁵⁷ The other matters were the intersection of trade and investment, trade facilitation, and how to add transparency into government procurement.

this is most relevant in cases where the receiving nation's markets do not have an adequate level of competition laws and related enforcement and, as a result, local markets are distorted to the extent that importing entities are in need of something to help countervail such distortion, e.g.. export cartels.⁵⁸

However, *Nagaoka* argues that export cartels do not affect market access and that cartel prohibitions might even be bad for market access.⁵⁹ This makes sense, since domestic price-fixing cartels keep prices high, which would actually allow for easier market entry, not *vice versa*. Improving domestic competition laws should enhance domestic welfare and effectively enforcing a ban on domestic cartels can help make domestic markets more competitive which, in turn, is likely to make *de facto* market access more difficult.

Given what was stated in the previous paragraph, it is curious that multilateral talks seem to have been problematic due to market access demands. Currently, tariffs are imposed by many importing nations, in part due to the assumed collusion on the end of the exporting producers.⁶⁰ Advanced actors in negotiations – and of those, the EU in particular – have demanded improved market access conditions, meaning lower import tariffs, in exchange for more stringent treatment of export cartels in their nations. One argument in justification of allowing export cartels is that they help penetrate foreign markets.⁶¹ However, while pooling resources and cooperating might well aid in expanding to new markets, it is not at all as clear that such expansion would require cartel-like collusion to succeed, as discussed earlier in this essay.⁶²

2. Protectionism: national champions, national sovereignty & national welfare

As stated in the previous Section, export cartels may be considered harmful to both developing and advanced nations. Concurrently however, each may also derive benefits from them. Certain nations may have a single industry

⁵⁸ Sokol (n 31) 972.

⁵⁹ Sadao Nagaoka, 'International Trade Aspects of Competition Policy' (1998) No. 6720 National Bureau of Economic Research Working Paper 18.

⁶⁰ See Bhattacharjea (n 7) 296.

⁶¹ *Ibid.*

⁶² Jenny (n 9) 101.

where its companies may hold a strong market position globally, or in several individual nations, and consequently the industry is of particular importance to the exporting nation. Should the possibility to utilize export cartels be limited, it would inevitably reflect on the economy of their nation as well, which helps explain as to why such a ban is viewed quite critically.⁶³ A view voiced by developing nations during the WTO Cancún negotiation round was that export cartels of advanced nations be banned and such ban being enforced by competition authorities of said advanced nations, while export cartels of developing nations would remain untouched.⁶⁴ The rationale for this was that such a ban would lower the prices for raw material and equipment that developing nations require which would help with their industrialisation process.⁶⁵

Further, international binding agreements concerning competition policy are seen as problematic due to the resulting restrictions in a nation's sovereignty. This is a classic issue of federalism, which raises its own questions. Many developing nations have, for long, been encouraged to adopt policies and related laws of advanced nations in North America and Europe and tend to be rather reluctant to such transplants, pointing to their nations' own characteristics.⁶⁶ This concern is amplified in resolutions that would include any degree of surrendering jurisdiction over conduct of such nation's citizens or over conduct that has occurred within its borders.⁶⁷

The primary concern of all nations, as rational actors, is their own welfare. Change in economic policy, including competition policy, requires an incentive, given that export cartels may well be welfare-increasing for the exporting nation and concurrently are, as such, unlikely to be welfare decreasing for such nation. It is, however, of no use for a single nation to unilaterally prohibit export cartels and interfere with their anticompetitive edge, as it would be merely hurting its own economy and economic welfare.⁶⁸ *Sweeney* rightfully calls the situation a 'prisoner's dilemma', where the equilibrium currently lies in permitting export cartel conduct across the globe.

⁶³ Bhattacharjea (n 7) 298 & 310; Bhattacharjea (n 37) 4.

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*

⁶⁶ *Sweeney* (n 12) 397.

⁶⁷ *Ibid.*

⁶⁸ *Victor* (n 9) 578.

Doing otherwise unilaterally would not be wise from the perspective of an individual nation – the classic paradigm of game theory in economics. Being able to ‘escape the prison’ genuinely calls for an international, multilateral agreement.⁶⁹

3. Enforcement

Appropriate enforcement of any understanding to be reached is a key challenge for deeper cooperation in competition issues, including in relation to export cartels. Should there be binding international rules of some sort pertaining to export cartels, enforcement of such rules is nevertheless needed in a formalised manner that is clear on any issues that might arise.

The main proposals usually belong to either of the following two categories: 1) whether to utilise current national competition authorities (NCAs) – either of advanced nations only or of all contracting parties, or 2) whether to rely on a supranational authority, such as the WTO and its dispute resolution mechanism, for enforcement.⁷⁰ Benefits of the latter include less risk of protectionism and a promise of more equality, since NCAs drastically vary from nation to nation, both in terms of resources as well as experience.⁷¹ Relying on NCAs alone to enforce a multilateral agreement would risk creating diverging standards. Supranational organisations are not without their faults, either. They may be costly, especially if a new one was to be created, and they may be perceived as undemocratic.⁷² However, as the WTO appellate body has once stated: ‘when a nation enters into an international treaty, that act equals exercising its sovereignty and is inevitably based on its own national interests and benefits that it assumes it will eventually receive by doing so.’⁷³

A third alternative is the path of soft law, in the form of non-binding cooperation that takes place on a lower, technocratic level between government actors. *Bradford* has called this type of cooperation

⁶⁹ Sweeney (n 12) 70-71.

⁷⁰ See eg Guzman (n 11) 32-33.

⁷¹ Bhattacharjea (n 7) 297.

⁷² Paul Stephan, ‘Regulatory Cooperation and Competition - The Search for Virtue’ (1999) 99-12, University of Virginia Law School Legal Studies Working Paper 36-37.

⁷³ WTO, Appellate Body Report, Japan—Taxes on Alcoholic Beverages (1996) 13–14 WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R 15.

‘transgovernmental networks’, as opposed to the more official intergovernmental cooperation, mostly visible in the form of trade agreements between nations.⁷⁴ Indeed, such administrative cooperation between authorities and other state actors of different nations has streamlined international merger review as well as investigations of certain international cartels. On a broader scale, the ICN has been an important forum for such transgovernmental cooperation that has helped spread best practices and experience in competition laws and their enforcement from between authorities worldwide. However, administrative cooperation and sharing ‘lessons learned’ is still far from negotiating changes to a nation’s competition policy. The limits of voluntary cooperation are likely to be reached in situations where a net-exporting nation was to face limitations on export cartels originating within its national territory – a view echoed by *Sokol* by stating that authorities would likely have little incentive to pursue export cartels together.⁷⁵

4. Belief in a market economy

Finally, a key hurdle in finding a multilateral agreement on the treatment of export cartels, and on competition law more broadly, hangs on the differing perspectives of nations of the virtues of a market economy. *Bhattacharjea* argues that certain nations are not as convinced in this as many advanced economies are and want to retain more control on their own industrial policy.⁷⁶ An example of such a nation is China and its socialist market economy, in which resource allocation is not left to be decided by the market, but partially by the nation-state which attempts to retain a certain degree of control over the market.⁷⁷ The principles of this type of market economy may, at times, be challenging to reconcile with free and international trade, as envisioned by the WTO.

Significant dogmatic differences in approaches to economic thinking can surely be difficult to overcome. For the purposes of this essay, however,

⁷⁴ Anu Bradford, ‘Assessing Theories of Global Governance: A Case Study of International Antitrust Regulation’ (2003) 39 *Stanford Journal of International Law* 211-214.

⁷⁵ *Sokol* (n 30) 979.

⁷⁶ *Bhattacharjea* (n 7) 298.

⁷⁷ Yong Huang, ‘Coordination of International Competition Policies’, (Guzman ed) *Cooperation, Comity and Competition Policy*; Oxford University Press; 2011; 239.

prohibitions or other restrictions on export cartels do not really require comprehensive harmonisation of nations' competition laws or policy, as such.

V. Possible resolutions

1. Substantively

Among commentators, proposals for improving the *status quo* seem to vary. Proposed resolutions often include removing special treatment and instead advise to prohibit anticompetitive conduct of export cartels on equal grounds as would be done in cases of domestic cartels. Even total bans on export cartels have been proposed.⁷⁸ Further, a number of trade-related resolutions have been proposed, some proposing using revamping the WTO anti-dumping to apply to overcharges or by utilising innovative interpretations of the GATT to encourage states to act in the collective benefit.

One key change that is needed is to first cease the special treatment that is currently still afforded to export cartels by explicitly exempting conduct that would otherwise be considered *per se* illegal. While this would, in itself, be an arduous process requiring legislative changes in several countries, it would however still not suffice to handle the problem as long as implicit exemptions exists by virtue of an 'effects' doctrine, since effects of export cartels are mostly outside the exporting nation's territory.⁷⁹ To be comprehensive, a resolution is needed where the exporting nation has an obligation to take effects occurring in an importing nation into consideration in its competition law review, particularly provided that it has received a request to do so from said importing nation. Further, in order to be in a position to make such a request, the importing nation must also have the right to cooperate with the NCA of the exporting nation, in terms of gathering evidence and otherwise in its own investigations.⁸⁰ Another interesting approach would be to utilise the GATT for combating export cartels. The nation hurt by an export cartel could, in theory, bring complaints based on a GATT violation.

⁷⁸ See Patrick Messerlin, 'Should Antidumping Rules be Replaced by National or International Competition Rules?' (1994) 49 *Aussenwirtschaft* 2-3.

⁷⁹ Jenny (n 9) 571.

⁸⁰ Sweeney (n 13) 395-398; See also OECD, 'Trade and Competition Policies' (1994) 18 *World Competition* 185-191.

Most nations utilise an implicit exemption of competition laws for export cartels in which case a so-called 'non-violation' complaint would, in principle, be possible. Such complaints may be raised where a nation's measure may not directly be in breach of its obligations under the GATT, but where its measure *de facto* impairs existing concessions made under it. A nation could argue that not prohibiting the hard-core cartel conduct of an export cartel constitutes a 'regulatory subsidy' that could then give rise to a non-violation complaint. In other words, the importing nation would be the complainant and the exporting nation the defendant who would have allegedly violated its GATT-based obligations.⁸¹ While this approach is not novel, it is yet to be tested and – in my opinion – it seems like stretching the boundaries of the GATT, since the main purpose of the GATT is to smoothen out and eliminate government-imposed restraints to trade, such as tariffs and quotas⁸². Privately run cartels are quite a separate thing from that.

In terms of state-supported export cartels, *Jenny* proposes that making nations pay for the privilege of being able to maintain them in a multilateral framework may be a way forward. His logic is that nations engaging in trade will likely restrain from engaging in state-supported export cartels if the risk of retaliation against them from importing nations by withdrawing trade concessions becomes excessively costly.⁸³ A key challenge in finding a broadly satisfying resolutions lies in the following state of affairs: nations that benefit significantly from exporting, so-called 'net exporters', have different incentives than nations whose companies import more than export, so-called 'net importers'. Net exporters would naturally prefer to keep the *status quo*. Some proposals lean more heavily on the trade aspect in order to correct the current imbalance. Some propose that the importing nation should be able to counter detrimental effects of export cartels with trade measures under the WTO. The main approaches are:

⁸¹ Bernard Hoekman & Petros Mavroidis, 'Competition, Competition Policy and the GATT' (1994) Volume 17, Issue 2 *The World Economy* 25-26; See also Joel Trachtman, 'International Regulatory Competition, Externalization and Jurisdiction' (1993) 34 *Harvard International Law Journal* 48.

⁸² Hoekman & Mavroidis (n 81) 3-4.

⁸³ *Jenny* (n 9) 130.

- Utilising the WTO anti-dumping system for export cartel originating overcharges, by imposing a sanction based on the sum that represents excess above a calculated ‘normal price’;
- Imposing tariffs on goods sold by export cartel participants; and
- By suspending relevant compliance with the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs).⁸⁴

As *Sweeney* notes, these approaches are unorthodox for handling competition problems, since they utilize tools that are typically more commonly used in relation to market access conflicts.⁸⁵ Further, setting tariffs on imports based on export cartels are likely to result in domestic consumer welfare losses in developing nations as well as in smaller nations, owing to resulting higher entry barriers and in case the export cartel members exits such markets.⁸⁶ Given the vastly differing interests of nations and the resulting challenges that have thus far encountered those who have been involved in negotiating comprehensive multilateral agreements in competition law matters, prohibitions might be too ambitious goals to achieve. While any of the alternatives discussed above would likely bring significant benefit on a global level, if implemented on a broad multilateral basis, it seems that none of them are truly realistic to achieve, at least for the time being. Other forms of cooperation thus need to be considered in order to achieve convergence and harmony on a global scale in terms of export cartels.

Voluntary cooperation has an established role in international competition law. Most of the actual international cooperation in competition law and policy has thus far been and still is conducted in bilateral and regional trade agreements (TAs) as well as more informally, such as within the International Competition Network (ICN), where competition authorities are able to share best practices and other practical information. It may sound surprising, but nearly half of the recent TAs globally do contain provisions on competition policy, typically contain assurances that each signatory will prohibit restrictive business practices, such as cartels, abuses of dominant position etc. as well enforce such prohibitions adequately. The common denominator is

⁸⁴ Bhattacharjea (n 37) 32-35.

⁸⁵ *Sweeney* (n 13) 402-403.

⁸⁶ *Ibid* 70.

that said cooperation is mostly of a *de facto* non-binding nature only⁸⁷.⁸⁸ This has likely facilitated such widespread appearance of these provisions in TAs. The absence of sanctions for non-compliance means that nations are more easily able to accommodate wishes for such chapters, while emphasis may instead be placed elsewhere in TA negotiations.

Soft law may be helpful to an extent, *inter alia* in investigations regarding potential infringements as well as in mergers requiring review by several nations running in parallel. However, non-binding international cooperation has not been able to induce nations to restrict the conduct of export cartels. What is needed in addition to mere soft law, are regulations that bind nations to action. To the extent that chapters on competition policy are included in TAs, they should include provisions on export cartels and be made binding on the contracting parties, with appropriate dispute resolution mechanisms included.

Guzman favours deeper cooperation than that offered by the current framework of voluntary information sharing, but is sceptical about whether a proper multilateral agreement on international competition law is reachable. Instead, he proposes a system of compensatory payments in exchange for accepting a policy that differs from the nation's preferences.⁸⁹ While this could, theoretically, be useful in certain isolated bilateral trade agreements, it is difficult to imagine that nations would be prepared to ever render such payments in practice. *Saggi & Hoekman* have proposed a trade-off of sorts: they suggest that developing nations reduce tariffs for imports coming from a certain developed nation, in exchange for such developed nation banning export cartels which affect said developing nation.⁹⁰ However, this approach does not take into consideration that possible detrimental effects of export cartels are not limited to nations that fall below a certain level of 'development'. While disregarding the concept of 'development', a

⁸⁷ Some TAs include binding chapters on competition policy, but these generally lack a dispute resolution provision, which means that breaches are thus actually unenforceable.

⁸⁸ Laksmi Puri, 'Competition Provisions in Regional Trade Agreements: How to Assure Development Gains' (2005) United Nations Publication, vii-ix; Daniel D. Sokol, 'Order without (Enforceable) Law: Why Countries Enter into Non-Enforceable Competition Policy Chapters in Free Trade Agreements' (2008) 83 *Chicago-Kent Law Review* 116-118.

⁸⁹ *Guzman* (no 11) 23.

⁹⁰ See Bernard Hoekman & Kamal Saggi, 'Trading Market Access for Competition Policy Enforcement' (2004) 3188 *World Bank Policy Research Working Paper* 1.

resolution could be that nations grant market access benefits for those net exporting nations that limit possibilities for export cartels to operate *vis-à-vis* the importing nation.⁹¹ This kind of *quid pro quo* approach does indeed seem pragmatic, particularly in a bilateral trade relationship. However, its application would inevitably be complex to apply in a multilateral context, owing to the differing statuses of contracting nations.

Given the challenges summarised above in Section IV, it seems naïve to believe in a comprehensive binding multilateral agreement being formed anytime soon. The author feels that perhaps the simplest and the most realistic way to achieve substantive progress would be to couple export cartel restrictions with compensatory payments or tariff reductions of some form, in order to incentivise net exporting nations to act in a manner that would otherwise conflict with their nation's welfare. In terms of the format for such agreements, competition policy has already begun to appear in trade agreements, as described above. Expanding this to the restriction of anticompetitive practices of export cartels affecting the contracting parties would be a mere step away. It would, hence, be sensible to begin with provisions on export cartel conduct in bilateral or regional trade agreements, since regional agreements between fewer nations with potentially similar economic structures could be easier to reach. This would also be in line with the development of international competition policy cooperation more broadly and would, in turn, enable a path towards a more comprehensive multilateral agreement.

2. Possible facilitator and enforcer of such resolutions

A key question is the appropriate forum for negotiations as well as the appropriate enforcer of a multilateral agreement, should such an agreement be reached. Some commentators propose that the WTO would be best placed to administer the negotiations and act as the umbrella organisation of an agreement,⁹² while others favour a separate multilateral arrangement.⁹³ Should a stand-alone multilateral resolution be reached, it would, however, require setting up a separate system for monitoring and dispute settlement, something that already exists within the WTO. Thus, out of the two, the WTO

⁹¹ Jenny (n 9) 130.

⁹² Hoekman & Saggi (n 90) 6.

⁹³ Jenny (n 9) 130.

seems more practical. Nevertheless, the WTO is not the only plausible organisation. *Bradford* suggests that developing countries would prefer an agreement concerning competition policy to be under the UN Conference on Trade and Development, which forum could help maximise the number of potential signatories.⁹⁴ *Guzman* proposes expanding the WTO to non-trade areas, including competition policy, particularly encouraged by the example in the area of intellectual property: after failing to conclude a multilateral agreement under the World Intellectual Property Organisation (WIPO), the WTO was expanded to cover IP matters by virtue of the TRIPs Agreement, which sets a minimum standard for IP regulations applicable to all WTO members.

There are indeed certain analogies between international negotiations in competition policy and intellectual property in terms of their strategic implications to nations as well as the fact that in IP, negotiations take place within the WTO as well as separately, which are the two main options being discussed for competition policy as well.⁹⁵ Expanding the WTO to competition issues would be logical, since the GATT, administered by the WTO, already covers related areas and could principally already be used to restrict internationally anticompetitive business practices, as discussed previously in this Section.

On a regional level, the negotiation of agreements would logically fall within the scope of regional trade organisations, such as ASEAN, COMESA, CARICOM, the Andean Community et cetera, since they are existing forums for cooperation between respective nations and their authorities. In terms of enforcement, a choice would have to be made whether to solely empower NCAs to enforce such an agreement, create a regional competition authority or rely on nation-to-nation dispute resolution, as agreed in the rules of the relevant regional organisation. Whichever path is chosen, a multitude of lingering questions and challenges will surely remain.

⁹⁴ Anu Bradford, 'International Antitrust Negotiations and the False Hope of the WTO' (2007) 48 *Harvard International Law Journal* 435.

⁹⁵ Andrew Guzman, 'International Antitrust and The WTO: The Lesson From Intellectual Property' (2003) 43 *Virginia Journal of International Law* 933.

VI. Concluding Remarks

Something should be done to maximise global welfare, i.e. the collective wellbeing of all of us living on planet Earth. As described in the preceding Sections of this essay, the *status quo* of how export cartels are treated is far from optimal, at least if a perspective is taken that values welfare that transcends the borders of an individual nation state.

Cartel conduct should not be treated in varying ways based on where the effects occur. After all, procompetitive cooperation would anyway likely continue to be viewed as such, while ‘hard-core’ restraints, whose object is restraining competition, could be better minimised than today. In the case of global welfare, the assumptions regarding the adverse effects of cartel conduct are valid irrespective of where the effects happen to occur. It is noteworthy that certain types of cooperation between exporting entities may well possess procompetitive elements. Thus, a blanket ban on such cooperation would not be an improvement. Instead, a resolution would be to remove the special treatment that export cartels have thus far enjoyed. Only this would truly allow for more fair and consistent international competition policy, to the extent that the issue of export cartels is concerned. For the time being, however, reaching a comprehensive multilateral agreement seems beyond reach, for the reasons described throughout this essay. This should not, however, be seen as the only available avenue towards progress.

Cooperation within the ICN appears to work to the extent of sharing best practices on a voluntary basis between NCAs. This is useful for *de facto* international convergence of competition law, since most NCAs globally do participate in the ICN, at least to some extent. Further, TAs nowadays often do contain provisions on competition policy, which is a trend worth monitoring, as – if continued – it may prove instrumental in restricting the use of export cartels in the future.

The onus is on the advanced and influential competition law regimes, such as the EU and the US. They have sophisticated doctrines of dissecting the good from the bad, the cooperation beneficial to society from cooperation detrimental to it. Their economies are also generally those that carry the most weight in international trade negotiations. These regimes could make

contributions towards a more internationally consistent and fair treatment of cartel conduct, irrespective of the origin or destination of such conduct.

In an ever more connected and global world, steps should be taken to maximise global welfare. While world trade with minimum barriers is integral in doing so, export cartels continue to exist as a lingering barrier that distort markets and allow inefficiencies through negative externalities. It would be wise to keep in mind that competition policy is not a zero sum game, neither domestically nor internationally.

Book Review

European Union Law of State Aid

By Kelyn Bacon QC

Oxford University Press, Oxford 2017, Third Edition, 704 pp.,

ISBN: 9780198787365

Reviewed by **Marlene Wimmer-Nistelberger***

In 2014, the European Commission (Commission) changed the EU state aid rules with the publication of its amended General Block Exemption Regulation¹ and its respective guidelines² quite significantly. In line with its ‘more economic approach’, which is also used in other areas of EU competition law, the Commission gave greater responsibility to the Member States by providing a system of self-assessment. The Commission thereby aimed to prioritise enforcement activities, simplification and transparency in this area.³ The last edition of the “European Union Law of State Aid” was published in 2013, and since then the need for an updated edition has been evident. The new edition of this book includes two additional chapters and extensive revisions of the previous edition.

Similar to the second edition, the authors of the book are experienced practitioners in the area of EU competition law. This book focuses on the main aspects of respective areas of EU state aid law in a clear manner from

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¹ Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty [2014] OJ L 187/1 (‘GBER’).

² Commission, ‘State Aid Legislation > Horizontal Rules’ (European Commission, 2 July 2014) <http://ec.europa.eu/competition/state_aid/legislation/horizontal.html#rescue> accessed on 6.07.2017.

³ Recital 3 GBER.

the view of a practitioner. It therefore has a deeper engagement in practice, using case law extensively. *Dupont*⁴, in his book review of the 2009 edition of this book, criticised the lack of references and discussions of academic commentary. Although Part I, chapter 1 “Introduction to State Aid Law and Policy” now includes a richer citation of academic articles, this book still mainly focuses on legislation, guidelines and case law. However, this does not seem to decrease the usefulness of this book as the cited case law constitutes an excellent basis for research on academic discussion in relation to the various covered topics as well.

The structure of the book has not changed extensively compared to the second edition. It is still divided into three parts: Part I - General Rules, Part II - Specific Types of Aid and Part III – Enforcement and Remedies. Moreover, each part is divided into chapters and sub-chapters. In the beginning of each chapter there exist structure of the sub-chapters, an overview of the main legislation, guidelines and policy documents, which provides the reader with a broader overview.

The first part starts with a short introduction about state aid law and policy in general and about its themes and aims. Furthermore, the first part examines the notion and the compatibility of aid.⁵ This chapter on the notion of aid and its conditions is comprehensive, including analysis of a huge amount of case law; by so doing, this chapter constitutes the basis of the whole EU state aid law. On this basis, it deserves specific attention. Later, the book deals systematically with the compatibility of aid and explains the differences between automatic compatibility under Art 107(2) TFEU and the discretionary compatibility under Art 107(3) TFEU. Furthermore, it briefly assesses services of general economic interest under Art 106(2) TFEU by explaining the relationship between the *Altmark* decision and Art 106 TFEU and describing SGEI package⁶ and then concludes by explaining the

⁴ Pierre-Emmanuel Dupont, ‘Book Review: Kelyn Bacon (ed), European Community Law of State Aid, Oxford: Oxford University Press, 2009, ISBN 978-0-19-954301-4 (hardback), xc + 572 p.’ [2010] 21 European Business Law Review 885, 887.

⁵ and now covers the awaited Notice on the notion of aid: Commission, ‘Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union’ [2016] OJ C 262/1.

⁶ Kelyn Bacon QC, *European Union Law of State Aid* (3rd edn, OUP 2017), p 110 et seq; for more information on the SGEI package see Commission, ‘Legislation > Services of General Economic Interest (SGEI)’ (European Commission, 1 October 2012) <http://ec.europa.eu/competition/state_aid/legislation/sgei.html> accessed on 2.08.2017.

authorisation by the Council.⁷ The fourth chapter of this part deals with international agreements such as the EEA agreement, accession to the EU, WTO, and the relationship between EU state aid law and international investment treaties. One should agree with *Bacon* who points out in her preface to the third edition⁸ that this chapter might be of particular relevance to the UK due to its forthcoming exit from the European Union.

Part II starts with an overview of the scope and common conditions of the 2014 GBER and its monitoring provisions. This chapter is new as the previous edition of this book was published prior to the new GBER and its respective guidelines. Moreover, it is especially welcome since the GBER is at the heart of the EU state aid rules, with the aim to simplify the applicability of rules.

Subsequently, specific types of aid are discussed. This review only highlights those with important changes. As a starting point, the book deals with regional aid⁹ and explains the applicability of the GBER and the revised framework along the new 2014-2020 Regional Aid Guidelines. Then, it discusses SME and risk finance aid¹⁰ which may be covered by the GBER (see Section 2 and 3 of the GBER). The new version also includes the Guidelines on State aid to promote risk finance investments and short-term export-credit insurance which are covered by the Communication¹¹ and are in effect from 1.1.2013 until 31.12.2018. This Communication replaces the former Communication which became invalid on 31.12.2013.

Furthermore, chapter 8 on research, development and innovation¹² has been updated extensively in order to include new rules, granting Member States more leeway in relation to the implementation of R&D&I projects, i.e. increased thresholds in the GBER.¹³ Moreover, the chapters on energy and environmental aid¹⁴ have been merged into one, which is reasonable, since

⁷ *Ibid*, p 91.

⁸ *Ibid*, viii, ix.

⁹ *Bacon* (n 6), p 161 et seq; see also Section 1 GBER.

¹⁰ *Ibid*, p 181 et seq.

¹¹ Commission, 'Communication on the application of Articles 107 and 108 of the Treaty on the Functioning of European Union to short-term export-credit insurance' [2012] OJ C392/1.

¹² *Bacon* (n 6), p 199.

¹³ See e.g. Commission, 'R&D&I state aid rules Frequently asked questions' <http://ec.europa.eu/competition/state_aid/modernisation/rdi_framework_faq_en.pdf> accessed on 8.08.2017.

¹⁴ *Ibid*, p 223 et seq.

the new Guidelines on State aid for environmental protection and energy 2014-2020 deal with both of these areas together.

In addition, the new edition is concerned even more extensively with rescue and restructuring aid,¹⁵ which has become very important in the European Union since the financial crisis. The chapter now has new sub-chapters, such as authorisation criteria and procedural issues and explains the changes in the legal framework.¹⁶ Finally, chapter 12, “transport”, has been amended to also cover the new aviation guidelines which came into force in April 2014 that include aid to specific types of airlines and airports.¹⁷

In addition to the widely rewritten and revised chapters mentioned above, the new edition has two new chapters that deal with issues now included in the new GBER.¹⁸ These new chapters discuss disaster aid¹⁹ and cultural, heritage, sport and local infrastructure.²⁰

Part III still is about enforcement and remedies and was written by *Bacon* herself. Similar to the previous edition, it provides a good overview of the supervision by the Commission and enforcement by European and national courts. These chapters remain more or less untouched, although the relevant cited case law and legal framework²¹ have been updated. Nevertheless, chapter 18 now gives credit to the increasing significance of the European Ombudsman, whose role should not be underestimated as the Ombudsman – according to *Bacon* – has so far decided 39 state aid cases by September 2016.²² Moreover, this chapter now discusses the Commission’s power to carry out sector inquiries in the area of state aid law which were included in the 2013 revision of the Procedural Regulation.²³

There are not many reference books in the field of EU state aid law that are as comprehensive and easy to read as *Bacon’s* “European Union Law of State

¹⁵ *Ibid*, p 349 et seq.

¹⁶ Commission, ‘Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty’ [2014] OJ C249/1.

¹⁷ Commission, ‘Guidelines on State aid to airports and airlines’ [2014] OJ C99/3.

¹⁸ See Recital 1 GBER.

¹⁹ *Bacon* (n 6), p 255 et seq.

²⁰ *Ibid*, p 341 et seq.

²¹ e.g. Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (codification) [2015] OJ L 248/9.

²² *Bacon* (n 6), p 497.

²³ *Ibid*, p 495.

Aid”. Therefore, there is no doubt that it would be of great use to practitioners. However, the main issue remains that a reference book in an area with such a high volatility of provisions may be outdated within a very short period. Although this recent edition provides the legal framework and case law as of September 2016 it is already not entirely up to date as the following example demonstrates: The Commission already extended the scope of the GBER to ports and airports as a result of two public consultations as of May 2017.²⁴ Nevertheless, the main changes due to the revised edition of the GBER and the respective guidelines and policy documents are included in this third edition and therefore, it can be deemed mostly up to date.

²⁴ Commission, ‘State aid: Commission simplifies rules for public investment in ports and airports, culture and the outermost regions’ (European Commission, 17 May 2017) <http://europa.eu/rapid/press-release_IP-17-1341_en.htm> accessed on 4.08.2017.

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