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LETTER FROM ACTECON

First, we would like to thank all the participants who submitted articles for evaluation. It was a difficult task to choose from among so many compelling topics, but we had to make a choice. We believe that many of the articles that were not selected will find the opportunity for publication elsewhere in the future.

For those whose articles were published, we would like to congratulate you. It was a great pleasure to work with you. We hope the articles will be useful to academicians and practitioners in the field of competition law.

Dear reader, in this publication, the issues discussed are among the cutting-edge topics in competition law. We now, in turn, briefly present to your attention the topics of the articles we have selected for this issue.

Competition authorities around the globe (including the Turkish Competition Authority) have become ever more vigilant about big tech. Therefore, we as competition lawyers, have incorporated digital markets and big tech into our lives to a greater degree than before. Digital markets have given rise to new debates that will not be settled in the near future. We will yet see the outcome of the battle between big tech and the competition authorities.

Sustainability and green innovation as a topic, is as worthy as the so called "battle" of enforcers against the big tech. However, this topic is yet to be seen in the practice of Turkish competition law. Even though the European Commission, to some extent, has considered these issues in its previous decisions, we hope they will be discussed more by the Turkish Competition Authority in its decisions.

Unlike sustainability and green innovation, the intellectual property rights practice is well established in Turkey, but it is rare to see a cross-over between competition law and intellectual property rights law in practice. Indeed, standard essential patents are rare in the decisional practice of the Turkish Competition Authority. However, we believe that the topic is very technical and worthy of inclusion.

As regards the most favored nation clauses, or MFN, is a better-established topic. The MFN clauses have seen much hostility in the practice of competition law in the past. With the rise of e-commerce platforms, interest in MFN clauses has increased once more as they are applied by the e-commerce platforms, from booking services to food delivery. Indeed, the Turkish Competition Authority recently has investigated MFN clauses in its decisional practice, and we may yet see more decisions regarding them.

On the other hand, Turkish competition law is going through exciting times with the recent communiqués issued by the Turkish Competition Authority. Indeed, the Communiqué on Agreements, Concerted Practices and Decisions and Practices of Associations of Undertakings

That Do Not Significantly Restrict Competition recently has come into force. As a consequence, the concept of "de minimis" has been incorporated officially into the practice of Turkish competition law, and we may certainly see the concept utilized in the decisional practice of the Turkish Competition Authority.

As for the Covid-19 pandemic, it has influenced everything, from daily life to law. Competition law is no exception, and in some jurisdictions, we have seen a willingness to relax the rules of competition law. The Turkish Competition Authority has seemed unaffected by the pandemic as the Authority has conducted numerous investigations and continues to do so.

Lastly, it should be mentioned that Turkish competition law is deeply influenced by European competition law. The Turkish Competition Authority draws knowledge from many authorities around the globe (including the but not limited to the European Commission). Thereby, we believe that academicians and practitioners must always approach competition law in a comparative manner.

Last but not least, we would like to thank ELSA Turkey for this great project, and we hope to collaborate again in future projects.

Yours sincerely,

The ACTECON Team

ARE DIGITAL ECOSYSTEMS PARASITES ON COMPETITION? A CRITICAL APPROACH

Kazım Berkay ARSLAN*

Abstract

Technology-based companies evolved to major economic actors. As they continued to grow, the interest of competition or antitrust authorities shifted to them. This has led to several investigations against companies such as Microsoft and Google in multiple jurisdictions. The focus of these investigations was to determine whether the traditional concepts of competition law were sufficient to address the possible challenges on competition that these technology companies may pose. Particularly, the concepts of big data, platform economy and network effect became the central point of current debates. This article argues that a different approach should be adopted. It takes the view that the concerns of competition authorities are in fact caused by the ecosystem phenomena of these technology-based companies. Indeed, as opposed to a traditional business model, companies like Apple and Amazon tend to operate in multiple markets and create a connection between these markets. Any possible threat they may create on competition may be explained by their structures as digital ecosystems. Digital ecosystems are particularly important for competition as they often operate as a gatekeeper and a competitor at the same time. This dual role needs great care for it to simultaneously create prosperity and not hinder competition.

This article focuses on six case studies. It examines the relevant market structures and whether they constitute an exclusionary or exploitative abuse in terms of Article 102. Thereafter, it discusses whether there might be possible justifications in terms of consumer benefit. Finally, it concludes by assessing the available options of competition authorities to address any possible anti-competitive conducts of digital ecosystems.

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1. Introduction

Our economy is dominated by technology-based firms. Five of the six largest companies in the world are Microsoft, Apple, Amazon, Alphabet (Google's parent company) and Facebook.[1] One common feature that these companies have is that they are integrated in our lives in multiple ways. This is because they provide a user experience which combines software (such as operating systems (OS) and applications) and hardware (such as smartphones and laptops). Tech-companies enhance this user experience by creating an integration among their products. As a result, they operate as a digital ecosystem,[2] which offers a holistic technology experience to consumers.

The landmark example of these digital ecosystems is the Apple ecosystem.[3] Apple produces a number of different hardware devices including smartphones, tablets, laptops, personal computers, headphones, smart watches and smart speakers. In addition, they also develop different software products such as OSs, app stores and entertainment applications (Apple Arcade, iTunes etc.). Through the high level of compatibility between these hardware and software products and additional interoperability features such as 'continuity',[4] which allows for example iPhone users to smoothly complete a task on their MacBooks which they have started on their iPhones, Apple creates an ecosystem of different products incentivising a user of one of its products to use other Apple products as well. This is also called a 'lock-in' effect[5] or a 'walled garden'.[6]

Another example for digital ecosystems is Google. Its most important product is Google Search; however, it produces diverse products from headphones to mobile operating systems such as Android. Google adopts a different approach to being an ecosystem. Rather than creating a complex and interrelated network between its different product categories, Google puts Google Search in the centre of its ecosystem and builds other products around it. For this reason, other Google products including Google Maps, YouTube or Google Shopping are integrated in Google Search results.

Through ecosystems, technology-based companies operate in a number of different markets.[7] They seek to increase the number of their consumers in each of these markets and they benefit

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[1] The 100 largest companies in the world by market capitalization in 2020, available at <https://www.statista.com/statistics/263264/top-companies-in-the-world-by-market-capitalization/> accessed 31 August 2020.

[2] Jacques Crémer, Yves-Alexandre de Montjoye & Heike Schweitzer, *Competition Policy for the digital era* (2019) 43

[3] The Apple Ecosystem (March 14, 2018) available at <https://applemagazine.com/the-apple-ecosystem/36702> accessed 31 August 2020.

[4] See for different examples <https://www.apple.com/macos/continuity/> (accessed on 31 August 2020)

[5] See, B. Garcia Mariñoso, 'Technological Incompatibility, Endogenous Switching Costs and Lock-in' (2001) 3 JINDEC 281.

[6] Steve Streza, 'The Paywalled Garden: iOS is Adware' (February 17, 2020) available at <https://stevestreza.com/2020/02/17/ios-adware/> accessed 31 August 2020.

[7] James F Moore, 'Predators and Prey: A New Ecology of Competition' (1993) 71(3) Harvard Business Review 75.

from the network effect.[8] However, this creates a paradox. On one hand they try to increase the number of users of their products and on the other they aim to grow in a market where they compete with their own users.

In the instance of Apple, the app developers are Apple's users in the iOS App Store market. At the same time, they are Apple's competitors in the app markets where Apple develops its own apps such as Apple Music or iTunes and Apple TV.

As a result, digital ecosystems risk becoming a parasite on competition.[9] They benefit from competition in certain markets, because these competitors are also their consumers in other markets. However, they may also endanger competition, because of their incentives to use their dominance in certain markets to leverage their position in other markets where they compete with their own users. This is evidenced by a quote from Apple where it highlights the fact that its success is dependent on the third-party app developers.[10]

Digital ecosystems carry certain risks for competition. As such, companies operating these ecosystems face the risk of antitrust proceedings. The trend to scrutinise the activities of these companies has started with the investigations against Microsoft and Google. Now, it continues with new proceedings against Apple and Amazon. Indeed, Apple and Amazon are faced against several anticompetitive claims in Europe and the United States. The European Commission announced that it has started two investigations against Apple with respect to the iOS App Store[11] and Apple Pay.[12] Moreover, the Dutch Antitrust Authority (Authority for Consumers & Markets or ACM)[13] as well as the Federal Antimonopoly Service of the Russian Federation (FAS)[14] also investigated Apple's conduct in connection with the iOS App Store. Finally, Apple also faces two litigations in the United States regarding its 30% commission fee applied to in-app purchases (IAPs).[15]

[8] See, Michael Katz & Carl Shapiro, 'Systems Competition and Network Effects' (1994) 2 JEP 93.

[9] A parasite is 'an animal or plant that lives on or in another animal or plant of a different type and feeds from it' from Cambridge Online Dictionary, available at <https://dictionary.cambridge.org/dictionary/english/parasite> accessed 31 August 2020.

[10] Apple Inc., 'Annual Report pursuant to Section 13 or 15(D) of the Securities Exchange Act of 1934 for the fiscal year ended September 28, 2019' (2019) 8.

[11] Antitrust: Commission opens investigations into Apple's App Store rules, available at <https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1073> accessed 31 August 2020.

[12] Antitrust: Commission opens investigation into Apple practices regarding Apple Pay, available at <https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1075> accessed 31 August 2020.

[13] ACM launches investigation into abuse of dominance by Apple in its App Store, available at <https://www.acm.nl/en/publications/acm-launches-investigation-abuse-dominance-apple-its-app-store> accessed 31 August 2020

[14] FAS found Apple abusing its dominant position in the mobile apps market, available at <http://en.fas.gov.ru/press-center/news/detail.html?id=54965> accessed 31 August 2020.

[15] *Apple Inc. v Pepper*, 587 U.S. [2019] and *Epic Games Inc v Apple Inc* [2020].

The number of antitrust investigations concerning digital ecosystems is expected to increase in the future.[16] Most recently, the United States Department of Justice filed an antitrust complaint against Google for an alleged abuse of dominant position.[17] Similarly, the Federal Trade Commission filed a lawsuit against Facebook for an alleged illegal monopolisation.[18] In addition, on 18 May 2021, the German competition authority Bundeskartellamt announced that it had started a new investigation against Amazon and emphasised the threat that ecosystems may pose to competition.[19] The main focus of these antitrust investigations should be to determine whether the creation of digital ecosystems is beneficial for consumers or do they act as parasites and harm consumers by hindering competition.

This article adopts a critical approach and aims to answer the question whether digital ecosystems are in fact acting as parasites on competition by abusing their dominant position. It is mainly focused on the European competition law and Article 102 TFEU, however some references to the U.S. antitrust law are made, where relevant. Section 2 explains the facts of six case studies which will be examined in this article and defines the relevant markets in order to determine whether the concerned undertakings are dominant. Section 3 addresses the possible exclusionary abuses realized by these companies, whereas Section 4 points out exploitative abuses. Section 5 deals with possible justifications for the abuses of dominance by digital ecosystems. Finally, Section 6 discusses the appropriate remedies for such abuses.

2. Market Definition and Dominance

In order to assess whether the conduct of an undertaking is contrary to Article 102 TFEU and thus constitutes an abuse of dominant position, it should be first determined if the undertaking holds a dominant position in the relevant product market.[20] The dominant position is defined as follows:

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[16] See for example, Adi Robetson, 'Everything you need to know from the tech antitrust hearing' (July 29, 2020) <https://www.theverge.com/2020/7/29/21335706/antitrust-hearing-highlights-facebook-google-amazon-apple-congress-testimony> accessed 31 August 2020, and Antitrust: Commission opens investigation into possible anti-competitive conduct of Amazon, <https://ec.europa.eu/commission/presscorner/detail/en/IP_19_4291> accessed 31 August 2020.

[17] Justice Department Sues Monopolist Google for Violating Antitrust Laws (October 20, 2020) <https://www.justice.gov/opa/pr/justice-department-sues-monopolist-google-violating-antitrust-laws> accessed 7 November 2020.

[18] FTC Sues Facebook for Illegal Monopolization, <https://www.ftc.gov/news-events/press-releases/2020/12/ftc-sues-facebook-illegal-monopolization> accessed 12 December 2020.

[19] Proceedings against Amazon based on new rules for large digital companies (Section 19a GWB), <https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2021/18_05_2021_Amazon_19a.html> accessed 19 May 2021.

[20] Walter Frenz, *Handbook of EU Competition Law* (1st edn, Springer 2016) [1842].

> *'a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of the consumers.'*[21]

In this regard, it should be noted that the existence of a dominant position should be established only for the relevant market. Therefore, an examination of an undertaking's dominance is limited to a specific market.[22]

The determination of a specific market is not always straightforward. Indeed, two-sided digital markets cause certain problems. Two-sided markets are defined as markets where 'the platform can affect the volume of transactions by charging more to one side of the market and reducing the price paid by the other side by an equal amount; in other words, the price structure matters, and the platforms must design it so as to bring both sides on board'.[23] In cases of digital ecosystems, it is usual to have multi-sided platforms which are even more complex than two-sided platforms.[24] The relevant market in these cases is often determined by taking into account transaction and non-transaction markets.[25]

As Article 102 TFEU does not provide for a definition of dominant position, case-law developed some criteria to assess whether an undertaking is in a dominant position. These include *inter alia* market share, position of competitors and barriers of entrance.[26]

A necessary starting point for the assessment of dominant position is the market share of the concerned undertaking.[27] Where an undertaking holds a market share of more than 50%, it is presumed that the undertaking is dominant in that market.[28] In rare circumstances, it is possible to face a situation of super-dominance, if the undertaking has a market share superior to 90% where most certainly the concerned undertaking possesses a dominant position.[29]

However, market share alone is not sufficient to establish the existence of a dominant position. As the European Commission notes, a high market share is but a useful first indication.[30]

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[21] Case 85/76 *Hoffmann-La Roche & Co. AG v Commission of the European Communities* [1979] 461, para 38.
[22] Case C-52/09 *Konkurrensverket v TeliaSonera Sverige AB* [2011] ECR I-564, paras 79–80.
[23] Jean-Charles Rochet & Jean Tirole 'Two-Sided Markets: A Progress Report' (2006) 37(3) RAND Journal of Economics 645 at 657.
[24] Lapo Filistrucchi, Damien Geradin, Eric van Damme & Pauline Affeldt 'Market Definition in Two-Sided Markets: Theory and Practice' (2013) 10(2) Journal of Competition Law and Economics 1 at 11.
[25] Lapo Filistrucchi, Damien Geradin & Eric van Damme 'Identifying Two-Sided Markets' (2012) TILEC Discussion Paper No. 2012-008 <https://ssrn.com/abstract=2008661> at 4.
[26] Richard Whish & David Bailey, *Competition Law* (7th edn, OUP 2012) at 181.
[27] See, Case 27/76 *United Brands Company and United Brands Continentaal BV v Commission of the European Communities* [1978] 207; Case 85/76 *Hoffmann-La Roche & Co. AG v Commission of the European Communities* [1979] 461; Case C-457/10P *AstraZeneca AB and AstraZeneca plc v European Commission* [2012].
[28] Case C-62/86 *AKZO Chemie BV v Commission of the European Communities* [1991] ECR I-3359 para 60.
[29] See, for example, Case T-201/04 *Microsoft Corp. v Commission of the European Communities* [2007] ECR II-3601.
[30] Communication from the Commission – Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings ('TFEU Article 102 Communication') para 13.

Another important criterion to be taken into consideration is the position of the undertaking's competitors. The overall market structure may provide guidance in order to determine the existence of dominance.[31] If other competitors have a comparatively small market share, it would be more likely for an undertaking to hold a dominant position.[32]

Finally, barriers of entrance such as legal barriers or economic advantages may also indicate the existence of a dominant position.[33] In this context, the network effect is also important. As stipulated by the Court of Justice of the European Union (CJEU), the network effect created in certain markets may contribute to the existence of a dominant position.[34]

2.1. Case Study Nº 1: Apple's Closed Ecosystem

The first case study focuses on Apple and its closed ecosystem. The Apple ecosystem comprises a wide range of hardware products combined with software developed by Apple to work in integration with those hardware products. The most noticeable characteristic of the Apple ecosystem is that it offers a wholistic technology experience to end-users by creating a full integration. As such, consumers benefit greatly from this integration as it offers them new features and a better overall experience.[35]

The interoperability between Apple products is highly beneficial to consumers. However, it should also be noted that Apple does not allow other manufacturers and developers to benefit from this integration and interoperability. For this reason, the Apple ecosystem is called a closed ecosystem[36] which does not allow third parties to offer the same benefits to their consumers through Apple products. This could cause problems under Article 102 TFEU,[37] if Apple is to be considered as a dominant undertaking.

An example showcasing the close nature of the Apple ecosystem is the difference between Apple Music and Spotify. Both apps are subscription-based music providing services working on mobile phones, laptops and web browsers. Apple Music is developed by Apple and Spotify is developed by a third-party app developer.

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[31] Walter Frenz, *Handbook of EU Competition Law* (1st edn, Springer 2016) [1958] - [1960].

[32] Case 27/76 *United Brands Company and United Brands Continentaal BV v Commission of the European Communities* [1978] 207 para 111 – 120; Case 85/76 *Hoffmann-La Roche & Co. AG v Commission of the European Communities* [1979] 461 para 51; Case 322/81 *NV Nederlandsche Banden Industrie Michelin v Commission of the European Communities* [1983] 3461 para 52

[33] TFEU Article 102 Communication para 16 – 17.

[34] Case T-201/04 *Microsoft Corp. v Commission of the European Communities* [2007] ECR II-3601 para 562

[35] See, for example, Ecosystem, <https://developer.apple.com/videos/play/ecosystem/?video=ecosystem> accessed 7 November 2020.

[36] Friso Bostoen & Daniel Mândrescu, 'Assessing Abuse of Dominance in the Platform Economy: A Case Study of App Stores' (2020) <https://ssrn.com/abstract=3629118> accessed 19 May 2021.

[37] Antitrust: Commission sends Statement of Objections to Apple on App Store rules for music streaming providers, available at <https://ec.europ.a.eu/commission/presscorner/detail/en/ip_21_2061> accessed 19 May 2021.

The users of Apple Music can give instructions such as to play a certain song or to increase the volume level to Apple's voice assistant Siri on their iPhones. This integration between Apple's hardware products and software products creates a convenience for Apple Music users. However, when Spotify asks to use the same interoperability feature i.e., giving vocal instructions to Siri, this demand is rejected by Apple.[38] As a result, Spotify users cannot benefit from the same convenience that Apple Music users have. Hence, Apple as a hardware manufacturer leverages its music service by creating a close ecosystem consisting of its hardware and software products.

Another illustration is the existence of an Apple Music app on Apple Watch, whereas Apple does not allow Spotify to create an app for Apple Watch. Although Apple addressed these issues upon Spotify's complaint to the European Commission,[39] the risk continues for other developers competing with Apple's services. For instance, Spotify users still cannot use Siri on MacBooks and iMacs.

In general, two different markets are at issue for this case study: mobile phones market and music streaming market.[40] Since Spotify alleges that Apple uses its dominance in the mobile phone market to leverage its position in the music streaming market, it is relevant to determine the scope of that market and whether Apple holds a dominance.

Starting with the determination of the relevant market, there are three possibilities. First, the relevant product market can be determined as the smartphones market. Considering Apple's moderate market share of almost 13%,[41] it should be concluded that Apple does not hold a dominant position and therefore its conduct cannot breach Article 102 TFEU. Secondly, the relevant market can be defined as the market of premium smartphones. In this scenario, Apple's iPhone has a market share of 60% when compared to the 19% market share of its closest competitor.[42] Apple's market share combined with the market structure proves that it holds a dominant position in the premium smartphone market. The third possibility for the determination of the product market is an independent market of iOS Devices. The European Commission concluded in *Google Android* that app stores for Android devices are different from app stores

[38] Thomas Höppner, Philipp Westerhoff & Jan Markus Weber, 'Taking a Bite at the Apple: Ensuring a Level-Playing-Field for Competition on App Stores' (2019) Hausfeld Article, <https://ssrn.com/abstract=3394773> accessed 7 November 2020.

[39] Tom Warren, 'Spotify is finally getting Siri support with iOS 13' (September 27, 2019), <https://www.theverge.com/2019/9/27/20886783/spotify-siri-integration-support-ios-13-beta-launch-airpods> accessed 7 November 2020.

[40] Although it is possible to replace the music streaming market with other services which Apple also offers such as streaming service or mobile games.

[41] Statista, Global market share held by leading smartphone vendors, <https://www.statista.com/statistics/271496/global-market-share-held-by-smartphone-vendors-since-4th-quarter-2009/> accessed 9 November 2020.

[42] Varun Mishra 'Four Out of Five Best Selling Models in the Premium Segment Were From Apple' (June 15, 2020), <https://www.counterpointresearch.com/apple-captured-59-premium-smartphone-segment/> accessed 7 November 2020.

for iOS devices.[43] This is because consumers rarely switch from an Android device to an iOS device and vice versa.[44] If a parallel is drawn from this understanding, the market for iOS devices could be separated from other markets and could be considered as a stand-alone product market. In this case, since Apple produces all the iOS devices, it would be in a dominant position.

2.2. Case Study Nº 2: AmazonBasics

The second case study relates to Amazon and the products titled as 'AmazonBasics' which are sold on the Amazon Marketplace. There are more than 1,500 AmazonBasics products offered by Amazon which tend to be extremely competitive in terms of their price.[45] Some examples include batteries, laptop bags, paper, kettle and headphones.

As can be noticed, some concerns are raised with regard to AmazonBasics products because Amazon acts both as a marketplace for the sale of diverse products as well as a seller competing with other seller operating in a marketplace owned and controlled by Amazon itself. Some have even argued that Amazon uses the data it collects from the sales of other merchants on Amazon Marketplace to develop and enhance its AmazonBasics products.[46] The concern here is that Amazon may create an advantage for its AmazonBasics products by using the data it collects from other merchants operating in Amazon Marketplace.

The relevant market is the online retail platforms market.[47] In the United States, Amazon holds a market share of almost 50%, whereas the combined market share of its competitors such as eBay, and Walmart stays at 10%.[48] Further, it should be noted that merchants see Amazon as indispensable.[49] All these factors combined show that Amazon holds a dominant position in online retail platforms market.

2.3. Case Study Nº 3: In-App Purchase Systems

The third case study concerns IAP systems. Users interact with their smartphones through apps which work on operating systems such as Android and iOS. These apps are downloaded from app stores. For Android devices, the most common app store is Google Play Store, whereas for iOS

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[43] *Google Android* (Case AT.40099) Commission Decision C (2018) 4761 [2018] OJ C402/08, para 281.

[44] Lukasz Grzybowski & Ambre Nicolle, 'Estimating Consumer Inertia in Repeated Choices of Smartphones' (2018) CESifo Working Paper No. 7434 <https://ssrn.com/abstract=3338788> accessed 7 November 2020, at 8–9.

[45] Mike Murphy, 'AmazonBasics is moving well beyond the basics' (December 14, 2017), <https://qz.com/1155843/amazonbasics-is-moving-well-beyond-the-basics/> accessed 7 November 2020.

[46] Lina M. Khan, 'The Separation of Platforms and Commerce' (2019) 119 CLR 973 at 988.

[47] Désirée Klingler, Jonathan Bokemeyer, Benjamin Della Rocca & Rafael Bezzera Nunes, 'Amazon's Theory of Harm' (2020) Yale University Thurman Arnold Project 1 at 4.

[48] Emily Dayton, 'Amazon Statistics You Should Know: Opportunities to Make the Most of America's Top Online Marketplace', <https://www.bigcommerce.com/blog/amazon-statistics/> accessed 7 November 2020.

[49] Angus Loten & Adam Janofsky, 'Sellers Need Amazon, but at What Cost?' (January 14, 2015), <https://www.wsj.com/articles/sellers-need-amazon-but-at-what-cost-1421278220> accessed 7 November 2020.

devices the only option to download apps is Apple's own App Store. There are both free and paid apps available on these app stores.

In addition, it is also possible for app developers to offer certain paid services or features within their apps. The system used for this kind of purchases is called IAP systems. Both Google Play Store as well as App Store require app developers to use Google's and Apple's own IAP systems. Otherwise, apps are not allowed to be on their app stores.[50] Moreover, they both impose a 30% commission fee for each transaction realised through their IAP systems. Only recently, Apple and Google have announced that they reduced their commission fees to 15% for app developers gaining less than USD 1 million per year.[51]

The requirement to use a single IAP system and the obligatory commission fee applied by Google and Apple face strong opposition from app developers.[52] Most recently, Spotify[53] and Epic Games[54] brought antitrust claims against Google and Apple. They claim that they should not be required to use Google's and Apple's IAP systems and that the 30% commission fee is excessive. The European Commission's preliminary view is that such practice distorts competition.[55]

In this respect, there are two separate markets: app store market for Android devices and app store market for iOS devices. This conclusion is in line with the European Commission's *Google Android* decision.[56] Although there are different app stores available on Android devices, most of the apps are downloaded from Google Play Store.[57] Moreover, as a result of the network effect, Google Play Store creates high barriers to entry.[58] Thus, with more than 90% market share and existing barriers to entry, Google holds a dominant position. As for the app store market for iOS devices, Apple does not allow downloading apps from sources other than its App Store. Therefore, it holds a monopoly and is in a dominant position.

A separate consideration should be made for IAP services. Since these are services essentially tied to operating systems, they can be considered within a downstream product market. Again, the

[50] Bapu Kotapati, Simon Mutungi, Melissa Newham, Jeff Schroeder, Shili Shao & Melody Wang, 'The Antitrust Case Against Apple' (2020) Yale University Thurman Arnold Project 2, <https://ssrn.com/abstract=3606073> accessed 19 May 2021.

[51] Apple announces App Store Small Business Program (November 18, 2020), <https://www.apple.com/newsroom/2020/11/apple-announces-app-store-small-business-program/> accessed 12 December 2020; Boosting developer success on Google Play, <https://android-developers.googleblog.com/2021/03/boosting-dev-success.html> accessed 19 May 2021.

[52] Friso Bostoen & Daniel Mândrescu, 'Assessing Abuse of Dominance in the Platform Economy: A Case Study of App Stores' (2020) <https://ssrn.com/abstract=3629118> at 15–16 accessed 12 December 2020.

[53] Antitrust: Commission opens investigations into Apple's App Store rules, <https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1073> accessed 12 December 2020.

[54] Complaint for Injunctive Relief, *Epic Games, Inc. v Apple Inc.* (13 August 2020).

[55] EC Statement of Objections.

[56] *Google Android* (Case AT.40099) Commission Decision C(2018) 4761 [2018] OJ C402/08, para 28.

[57] *Google Android* (Case AT.40099) Commission Decision C(2018) 4761 [2018] OJ C402/08, paras 591–614.

[58] Friso Bostoen & Daniel Mândrescu, 'Assessing Abuse of Dominance in the Platform Economy: A Case Study of App Stores' (2020), <https://ssrn.com/abstract=3629118> accessed 12 December 2020.

market for iOS devices differs from Android devices. As such, there are two downstream markets: IAP services for iOS devices market and IAP services for Android devices market.

2.4. Case Study Nº 4: Google Search

The fourth case study is about Google Search. Google is a company which offers diverse services such as video streaming (YouTube), advertisement (Google Ads), search engines (Google Search), mailing service (Gmail) and mapping (Google Maps).[59] In order to provide a better experience to its users, Google chooses to integrate its services. For example, when a user conducts a search on Google's search engine, the relevant results are displayed in connection with other services. If someone searches for a company, its address is shown on Google Maps. If someone searches for the result of a sports event, its highlights are shown on YouTube. As a result, Google directs its Google Search users to its other products and creates a network of integrated services at the core of which lies Google Search.[60]

The relevant market in this regard is the online searching market.[61] According to the approach taken by the European Commission in *Google Shopping*, Google possesses a dominant position in this product market.[62]

2.5. Case Study No 5: Facebook Products

The fifth case study deals with Facebook's data abuse. Facebook mainly acts as a social media platform. However, it also operates in other fields related to its main business.[63] For instance, Facebook as a social media platform contains – what is called – Facebook products which work within Facebook. It is possible for third party-developers to build apps which would work in Facebook, but Facebook itself also develops such apps and competes with third-party in-app developers. In addition, it controls other platforms such as Instagram and WhatsApp.

It has been alleged that Facebook collects data from its in-app developers and other online services. It then uses this data to build a similar product or to buy other services. One example is Facebook's purchase of Instagram. Facebook approached Instagram with an offer. When its offer was rejected

[59] Nicolas Petit, *Big Tech and the Digital Economy: The Moligopoly Scenario* (1st edn, OUP 2020) at 106.
[60] Patrick F. Todd, 'Digital Platforms and the Leverage Problem' (2019) 98(2) Neb. L. Rev. 486 at 496–497.
[61] For the discussion on free services and the absence of a search market see, Nicolas Petit, *Big Tech and the Digital Economy: The Moligopoly Scenario* (1st edn, OUP 2020) at 22.
[62] See, *Google Search (Shopping)* (Case AT.39740) Commission Decision C(2017) 4444 [2017] OJ C9/08.
[63] Nicolas Petit, *Big Tech and the Digital Economy: The Moligopoly Scenario* (1st edn, OUP 2020) at 94.

it threatened Instagram by developing a similar Facebook product and stealing its customers, forcing Instagram to accept Facebook's offer.[64]

A similar strategy has been followed by Facebook against Vine. Vine was a video platform operated by Twitter – Facebook's competitor – which allowed its users to upload short videos of 7 seconds. Facebook initially offered its application programming interface (API) to Vine's developers so that they could build a Facebook application for Vine, allowing more users to access their service through Facebook. However, once Facebook figured out that the user-base of Vine grew bigger meaning that its competitor Twitter gained an advantage against it, it decided to cut off Vine's API access, which had in result an effect of reducing the number of Vine users and Vine's ability to collect user data from Facebook.[65]

The relevant market is social media platforms market. Facebook has a market share of more than 70%, when compared to a combined 20% market share of its two nearest competitors, Pinterest and Twitter.[66]

2.6. Case Study Nº 6: App Store Search

The sixth case study is centred around Apple's App Store search results. It has been discovered that Apple gives priority to its own apps for the search results of the iOS AppStore.[67] For example, when a user searches for the term 'podcast' in the App Store in order to download a podcast app, Apple Podcast comes in first place followed by other unrelated apps developed by Apple. Another third-party podcast app which is a competitor to Apple Podcast comes up only as the 15th result after unrelated Apple apps.[68]

As explained above in Section 2.3., app store for iOS devices market is a stand-alone market whereby Apple has a monopoly. Therefore, Apple is in a dominant position in this regard.

[64] Casey Newton & Nilay Patel, 'Instagram Can Hurt Us: Mark Zuckerberg Emails Outline Plan to Neutralize Competitors' (July 29, 2020), <https://www.theverge.com/2020/7/29/21345723/facebook-instagram-documents-emails-mark-zuckerberg-kevin-systrom-hearing> accessed 19 May 2021.

[65] Adi Robertson, 'Mark Zuckerberg personally approved cutting off Vine's friend-finding feature' (December 5, 2018), <https://www.theverge.com/2018/12/5/18127202/mark-zuckerberg-facebook-vine-friends-api-block-parliament-documents> accessed 19 May 2021.

[66] Social Media Stats Worldwide, <https://gs.statcounter.com/social-media-stats> accessed 7 November 2020.

[67] Damien Geradin & Dimitrios Katsifis, 'The Antitrust Case Against the Apple App Store' (2020) <https://ssrn.com/abstract=3583029> accessed 19 May 2021.

[68] Jack Nicas & Keith Collins, 'How Apple's Apps Topped Rivals in the App Store It Controls' (September 9, 2019) <https://www.nytimes.com/interactive/2019/09/09/technology/apple-app-store-competition.html> accessed 7 November 2020.

3. Exclusionary Abuses of Digital Ecosystems

In general, a distinction is made between two types of abuses under Article 102 TFEU: exclusionary abuses and exploitative abuses.[69] However, it should be noted that the line between the two types of abuses started to blur as dominant undertakings tend to adopt conduct which can be considered both as exclusionary as well as exploitative.[70] Nevertheless, this article takes a more classical approach and examines the above-mentioned case studies under these two headings.

As exclusionary abuses foreclosing competition, this Section focuses on (3.1.) refusal to supply, (3.2.) predatory pricing, (3.3.) tying, (3.4.) margin squeeze and (3.5.) atypical exclusions. It explains each category and examines whether the case studies referred to above could be considered as violating Article 102 TFEU as an exclusionary abuse under one of these categories.

3.1. Refusal to Supply and Apple's Closed Ecosystem

As the European Commission notes in its Communication, anti-competitive practices may arise when a dominant undertaking competes with its users in the downstream market and refuses to supply.[71] It sets out three criteria in order to determine the existence of a refusal to supply.[72] First, the refusal should relate to an objectively necessary product or service.[73] Being objectively necessary does not mean that the competitors cannot survive without access to that product or service, it suffices that they do not have an actual or potential alternative to mitigate the refusal of supply.[74] Secondly, the refusal to supply should eliminate the competition in the downstream market.[75] Thirdly, it should harm the consumers.[76] In this regard, hindering innovation is particularly important.[77] Furthermore, the refusal to supply also encompasses the refusal of granting access to an essential facility to competitors in the downstream market.[78]

Case Study N° 1 on Apple's closed ecosystem is interesting in this context. Apple creates an integration between its different products. In order to do so, it develops certain interoperability

[69] TFEU Article 102 Communication para 7.
[70] See, for example, Bundeskartellamt, Case B6-22/16, *Facebook*, 15 February 2019; Bundeskartellamt, Case B2-88/18, *Amazon*, 17 July 2019.
[71] TFEU Article 102 Communication para 76.
[72] TFEU Article 102 Communication para 81.
[73] Case C-7/97 *Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG, Mediaprint Zeitungsvertriebsgesellschaft mbH & Co. KG and Mediaprint Anzeigengesellschaft mbH & Co. KG.* [1998] ECR I-7791 para 44–45.
[74] Case T-201/04 *Microsoft Corp. v Commission of the European Communities* [2007] ECR II-3601 para 428.
[75] Joined Cases 6 and 7/73 *Istituto Chemioterapico Italiano S.p.A. and Commercial Solvents Corporation v Commission of the European Communities* [1974] 223 para 25.
[76] Case T-201/04 *Microsoft Corp. v Commission of the European Communities* [2007] ECR II-3601 paras 643–656.
[77] Case C-418/01 *IMS Health GmbH & Co. OHG v NDC Health GmbH & Co. KG.* [2004] ECR I-5039 para 49.
[78] Walter Frenz, *Handbook of EU Competition Law* (1st edn, Springer 2016) [2074] – [2075].

features. However, Spotify contends that Apple does not allow other companies to have access to these advanced interoperability mechanisms.

One example is the ability to use Siri to give voice commands. Although apps developed by Apple benefits from this feature, Apple does not allow third-party developers to have access to this interoperability. Another example is the continuity feature on Apple computers which allows iPhone users to continue to work on their Apple computers, a task they started on their iPhones. Other computer manufacturers are not allowed to benefit from this interoperability by allowing iPhone users to continue their work on their laptops.

The upstream market in this case study concerns hardware products. As explained in Section 1.1., it is disputed whether Apple holds a dominant position for iPhones depending on the definition of the relevant market. Considering *in arguendo* that Apple is a dominant undertaking, the downstream market would be software products, for example mobile streaming apps market in the example of Spotify.

As established in Microsoft, refusing access to interoperability features may lead to a violation of Article 102 TFEU.[79] In order to determine whether Apple abuses its dominant position by refusing to grant access to third-party app developers for its ecosystem, it should be established that the three criteria mentioned above are met.

Starting with assessing whether Apple's interoperability features are objectively necessary, it is clear that competitor apps can survive in the market without having access to those features. Moreover, the interoperability of the Apple ecosystem does not offer new features to users, which were not available to them. It rather operates as a convenience factor and provides a better user experience. For instance, one can choose to skip a song by giving commands to Siri or by pressing a button on their iPhones. As such, benefiting from the interoperability of Apple's ecosystem does not seem to be objectively necessary for third-party app developers. Secondly, Apple's conduct does not eliminate competition in the downstream market. Although not having access to Apple's advanced features, Spotify retains a higher market share than Apple Music.[80] Thirdly, it could be said that consumers do not benefit from this refusal of supply, because this might hinder further innovation with respect to interoperability. Moreover, consumers are directed to a single app if they want to benefit from the convenience of the Apple ecosystem.

Overall, since the three criteria are not met for the closed nature of Apple's ecosystem, it could be said that Apple's refusal to supply does not violate Article 102 TFEU as an abuse of dominant

[79] Case T-201/04 *Microsoft Corp. v Commission of the European Communities* [2007] ECR II-3601 para 374.

[80] Share of music streaming subscribers worldwide in 2019, <https://www.statista.com/statistics/653926/music-streaming-service-subscriber-share/> accessed 7 November 2020.

position. However, Apple's monopoly on interoperability features of its hardware devices carries a certain risk for creating possible negative impacts for consumers.

3.2. Predatory Pricing and AmazonBasics

Dominant undertakings may adopt very low prices in order to attract the consumers of their competitors. Since they are in a dominant position, they possess the margins to tolerate the occurred losses for certain periods.[81] Once their competitors are eliminated from the market, they return to applying their ordinary – or even higher – prices.

In order to appreciate whether companies abuse their dominant position by applying predatory prices, the Areeda-Turner Rule developed in the United States is used.[82] European Commission also adopts this test.

At first glance, predatory pricing may seem irrelevant to digital ecosystems. However, this may not always be correct.[83] Indeed, in the context of Amazon, which built a digital ecosystem around e-commerce, predatory pricing may well become a problem.[84] As shown under Case Study N° 2, Amazon does not only act as a digital platform allowing sellers to connect with buyers, it also actively operates as a manufacturer and seller through AmazonBasics products.

Amazon, as the operator of Amazon Marketplace, collects valuable data from all purchases made from different merchants. As a result, it holds information on seller preferences. By using this information, Amazon determines which products and features are more important to consumers. It then uses this information to create AmazonBasics products and sell them significantly cheaper when compared to other sellers operating on Amazon Marketplace.[85] This is because by holding the data of every seller, Amazon uses its resources more efficiently and is able to cut costs.[86] On the other hand, an ordinary merchant on Amazon Marketplace may only have access to consumer data of its own buyers. As a result of this information discrepancy between Amazon and other sellers, Amazon is able to offer AmazonBasics products for very low prices.

Amazon's example is unique in two regards. First, although its conduct may seem *prima facie* as predatory, the reason why Amazon is able to offer such costs is simple. The selling price of AmazonBasics products is more likely to be above Amazon's average avoidable costs. This is

[81] Case C-62/86 *AKZO Chemie BV v Commission of the European Communities* [1991] ECR I-3359.
[82] See, Herbert Hovenkamp, 'Predatory Pricing under the Areeda-Turner Te.st' (2015) U Iowa Legal Studies Research Paper No. 15-06, <https://ssrn.com/abstract=2422120> accessed 19 May 2021.
[83] Nicolas Petit, *Big Tech and the Digital Economy: The Moligopoly Scenario* (1st edn, OUP 2020) at 11.
[84] Lina M. Khan, 'Amazon's Antitrust Paradox' (2017) 126 YLJ 710 at 67 – 68.
[85] Désirée Klingler, Jonathan Bokemeyer, Benjamin Della Rocca & Rafael Bezzera Nunes, 'Amazon's Theory of Harm' (2020) Yale University Thurman Arnold Project 1 at 32.
[86] Ben Bloodstein 'Amazon and Platform Antitrust' (2019) 88(1) Fordham Law Review 187 at 210 – 211.

because Amazon brings its costs down by having access to and analysing big data on consumer behaviour. As such, Amazon's pricing policy cannot be described as being predatory.

Secondly, Amazon is based first and foremost on a digital platform connecting online sellers and buyers. For this reason, the more online sellers it has, the more it can benefit from its network effects and gain more profit. If Amazon applies predatory pricing and eliminates other sellers from Amazon Marketplace, this strategy would be beneficial for AmazonBasics products, but overall, it would lose the profit it gains from the commissions it gathers from all other online sellers on Amazon Marketplace, as their numbers continue to decrease. As such, it is crucial for Amazon to adopt a balanced competition strategy.

3.3. Tying and Google Search & IAP Systems

The European Commission explains tying as 'situations where customers that purchase one product (the tying product) are required also to purchase another product from the dominant undertaking (the tied product)'.[87] In order for tying to be considered against Article 102 TFEU, two cumulative conditions should be met.[88] First, the tying product and the tied product should be distinct products. Secondly, the tying should lead to anti-competitive market foreclosure.[89]

Concerning Case Study N° 4 on Google Search, some concerns may be raised. This is because Google integrates its other services to Google Search. This could be viewed as tying.[90] Although Google does not require Google Search users to use its other services *per se*, it promotes its own services in the top rankings and does not promote other services. As such, users are directed to use other Google services when they conduct a search on Google Search.[91]

It is evident that Google Search as a tying product is distinct from the tied products, i.e., other Google services such as Google Maps or YouTube. Taking into consideration that most of Google's services tend to have great market shares in their respective product markets when compared to their competitors, it could be concluded that Google's tying tends to create anti-competitive effects. However, an examination of the companies' data which are not publicly available is needed in order to reach a certain conclusion.

Another example of tying relates to IAP services referred to under Case Study N° 3. In this context, App Store and Google Play Store are the tying products and IAP systems are the tied products.

[87] TFEU Article 102 Communication para 48.
[88] Case T-30/89 *Hilti AG v Commission of the European Communities* [1991] ECR II-1439.
[89] Case T-201/04 *Microsoft Corp. v Commission of the European Communities* [2007] ECR II-3601; Case C-333/94 P *Tetra Pak International SA v Commission of the European Communities* [1996] ECR I-5951.
[90] Case 311/84 *Centre belge d'études de marché - Télémarketing (CBEM) v SA Compagnie luxembourgeoise de télédiffusion (CLT) and Information publicité Benelux (IPB)* [1985] 3261.
[91] See, for example, *Google Android* (Case AT.40099) Commission Decision C(2018) 4761 [2018] OJ C402/08.

This is because, both Apple and Google require app developers to use their own IAP systems if they wish to adopt an IAP within their apps. For this reason, when Epic Games tried to use its own IAP system to offer paid features within its mobile gaming app Fortnite, it was removed from the App Store.

In addition, the mandatory character of IAP systems is accompanied by the so-called 'anti-steering provisions or rules'. These provisions or rules prohibit app developers to promote alternative payment methods which would by-pass Apple or Google's IAP system. They even go as far as limiting app developers' ability to inform their users by email about alternative subscription methods. The European Commission noted with respect to the ongoing investigation against Apple concerning music streaming services that such conduct contributes to the distortion of competition.[92] Apple argues in return that its anti-steering rules prevent companies from benefiting from App Store without paying anything for it.[93]

It is clear that the two products i.e., app stores and IAP systems, are tied, but arguments could be made as to their distinction. Apple asserts that IAP systems are an integral feature of the App Store and therefore cannot be thought of separately from it.

App developers on the other hand argue that IAP systems are distinct products from app stores. Indeed, not all apps use an IAP system. The ones that use an IAP system use it as a payment system, similar to those services offered by PayPal or credit cards. Therefore, they can be separated from the features of app stores. As such, it could be concluded that IAP services are distinct from app stores.

When it comes to foreclosure, it is clear that both Apple and Google create a monopoly for IAP services, by not allowing third-party app developers to use another IAP service. Hence, it is very probable that these conducts may amount to an abuse of dominant position.

3.4. Margin Squeeze and IAP Systems

Margin squeeze is defined as an undertaking in a dominant position charging 'a price for the product on the upstream market which, compared to the price it charges on the downstream market, does not allow even an equally efficient competitor to trade profitably in the downstream market on a lasting basis'.[94] In order to determine that a dominant undertaking's margin squeeze

[92] Statement by Executive Vice-President Margrethe Vestager on the Statement of Objections sent to Apple on App Store rules for music streaming providers, <https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_21_2093> accessed 19 May 2021.

[93] Tom Warren, 'EU accuses Apple of App Store antitrust violations after Spotify complaint' (April 30, 2021), <https://www.theverge.com/2021/4/30/22407376/apple-european-union-antitrust-charges-app-store-music-competition-commission-margrethe-vestager> accessed 19 May 2021.

[94] TFEU Article 102 Communication para 48.

violates Article 102 TFEU, as-efficient competitor test should be applied[95] and possible anticompetitive effects on the downstream markets should be proven.[96]

As explained under Case Study Nº 3, Apple charges a 30% commission fee for apps in its App Store using IAP services. Although it is true that Apple reduced its commission fee to 15% for 'small' app developers, 95% of its revenue comes from 'big' app developers which are subject to a 30% commission fee for in-app purchases.[97]

This means that 30% of most of the transactions made in an app on iPhones is collected by Apple. According to Spotify, this commission fee is excessive and makes businesses unprofitable. This is because Apple Music is able to lower its price because it does not have to pay the 30% fee. The European Commission also found that other music streaming services had to reflect this commission fee to their end consumers which increased their prices.[98]

In this example, the upstream market is IAP services for iOS devices market and the downstream market is the music streaming services market. Spotify is very similar if not better than Apple Music. Its pricing is also very similar to those of the Apple Music. As such, it could be reasonably argued that Spotify is an as efficient competitor as Apple Music.[99]

Concerning the anticompetitive effects, Apple applies a high commission fee which increases the costs of its competitors in the downstream market and enhances its position through anti-steering rules. These facts may demonstrate that Apple uses the advantage of its monopoly in the upstream market to favour its own apps in downstream markets and abuses its dominant position.[100]

3.5. Atypical Exclusionary Abuses and Facebook Products

The classification of different types of abuses made under Article 102 TFEU is not exhaustive. As the European Commission notes, it is possible to have atypical exclusionary abuses which hinder competition.[101] This is the case when a dominant undertaking adopts conducts which create obstacles to competition without creating any efficiencies.

One example of these abuses can be seen in Case Study Nº 5 concerning Facebook Products. Facebook holds a dominant position in the social media market. However, it is much more

[95] Case C-280/08 P *Deutsche Telekom AG v European Commission* [2010] ECR I-9555, paras 196–202; Case C-52/09 *Konkurrensverket v TeliaSonera Sverige AB* [2011] ECR I-564, paras 31–33.

[96] Case C-280/08 P *Deutsche Telekom AG v European Commission* [2010] ECR I-9555, paras 252–254; Case C-52/09 *Konkurrensverket v TeliaSonera Sverige AB* [2011] ECR I-564, paras 60–74.

[97] Nick Statt, 'Apple's biggest App Store critics are not impressed with its new fee cut for small developers' (November 28, 2020), <https://www.theverge.com/2020/11/18/21573109/epic-tim-sweeney-apple-app-store-fee-cut-reduction-criticize> accessed 12 December 2020.

[98] EC Statement of Objections.

[99] Friso Bostoen, 'Online Platforms and Vertical Integration: The Return of Margin Squeeze?' (2018) 6(3) JAE 355 ('Bostoen') at 15.

[100] EC Statement of Objections.

[101] TFEU Article 102 Communication para 22.

complex than a simple social media platform.[102] Through its other social media platforms such as Instagram and WhatsApp as well as the Facebook Products, Facebook creates a social media ecosystem in which users can benefit from different aspects of social media services.

One concern in that regard has always been centred on Facebook's attitude vis-à-vis its competitors. Facebook often adopts very sharp policies against its competitors. It tries to acquire them and if it gets refused, it copies the features of its competitors in its own platforms. This was the case for Facebook's attempt to acquire Snapchat.

Another strategy – perhaps more concerning for competition – is to use its leverage on social media platforms to eliminate its competitors in other markets. This is showcased by the fact that Facebook decided to stop Vine's access to Facebook API when it became a real competitor.[103] As a result, Vine who has lost its access to Facebook Products and user data was forced to exit the social media market.

These conducts of Facebook are clearly aimed at harming its competitors.[104] As such, it is possible that these conducts may create obstacles to competition. The fact that they may lead some competitors to leave the relevant market completely evidences this conclusion.

Moreover, Facebook does not create any efficiencies by adopting predatory strategies against its competitors. This is because it only copies the features of its competitors without bringing any novelty. As such, Facebook conducts against its competitors and especially with respect to Facebook Product may be regarded as an atypical exclusionary abuse if it is established that these conducts hinder competition.[105]

4. Exploitative Abuses of Digital Ecosystems

Undertakings in dominant position may also breach Article 102 TFEU by adopting exploitative conducts. Exploitative abuses concern dominant undertakings which gain profit at the expense of consumers.[106] These types of abuses are especially important for digital ecosystems, because they operate in multiple markets in which they seek to maximise their profits.

In contrast, as ecosystems, they also benefit from network effects. For this reason, it is crucial both for competition in general and also for digital ecosystems that they find a balance between gaining

[102] Miguel Sousa Ferro, 'De Gratis Non Curat Lex: Abuse of Dominance in Online Free Services' (2017) 12(2) CompLRev 153 at 169.
[103] Lina M. Khan, 'The Separation of Platforms and Commerce' (2019) 119 CLR 973 at 1001.
[104] Wen Wen & FengZhu, 'Threat of Platform-Owner Entry and Complementor Responses: Evidence from the Mobile App Market' (2019) NET Institute Working Paper No. 16-10, at 8, <https://ssrn.com/abstract=2848533> accessed 19 May 2021.
[105] Dina Srinivasan, 'The Antitrust Case Against Facebook: A Monopolist's Journey Towards Pervasive Surveillance in Spite of Consumers' Preference for Privacy' (2019) 16(1) Berkeley Business Law Journal 39 at 97–98.
[106] Richard Whish & David Bailey, *Competition Law* (7th edn, OUP 2012) at 202.

profit and protecting the consumer welfare. Otherwise, digital ecosystems risk dangering the very source of their growth and profit: the consumers.

Conducts such as (3.1.) excessive pricing, (3.2.) price discrimination and (3.3.) self-preferencing are considered to be exploitative abuses. This Section provides a brief explanation of these three types of exploitative abuses before assessing whether they apply to the above-mentioned case studies.

4.1. Excessive Pricing and IAP Systems

Article 102(a) TFEU prohibits dominant undertakings to 'directly or indirectly [impose] unfair purchase or selling prices or other unfair trading conditions'.[107] Since excessive pricing under Article 102(a) TFEU harms consumer welfare directly, it is considered as an exclusionary abuse.[108]

In order to establish whether a practice amounts to excessive pricing, a two-step test has been proposed in *United Brands*. First, one must determine whether the profit margin of the dominant undertaking is excessive and secondly if the price, in itself or when compared to other competitors, is unfair.[109] It should be noted that these steps are not necessarily cumulative.[110]

In this context, the 30% commission fee applied by Apple for IAP services explained under Case Study N° 3 is of interest. Without having access to Apple's undisclosed financial information, it would be challenging to establish the existence of a high profit margin. The attention thus should be paid to its fairness by itself and against other competitors.

Apple applies the 30% commission fee only for transactions realised through its IAP system. As a result, only 16% of the apps available on App Store contribute financially to its operation.[111] The remaining 84% of the apps get a 'free ride' to be displayed on App Store.

However, it should be noted that these remaining apps also comprise apps which offer physical *paid* services, as opposed to online *paid* services.[112] For instance, if Netflix as a video streaming service uses Apple's IAP system for its subscription fees, it is obliged to pay 30% of the subscription fees to Apple. In contrast, Uber as a car ride service is allowed to use another payment

[107] *Upstream Gas Supplies in Central and Eastern Europe* (Case AT.39816) Commission Decision C(2018) 3106 [2018] OJ C258/07.

[108] Robert O'Donoghue & Jorge Padilla, 'Excessive Pricing' in Robert O'Donoghue and Jorge Padilla (eds.), *The Law and Economics of Article 102 TFEU* (3rd edn, Hart Publishing 2020) at 733.

[109] Case 27/76 *United Brands Company and United Brands Continentaal BV v Commission of the European Communities* [1978] 207, para 252.

[110] Case 27/76 *United Brands Company and United Brands Continentaal BV v Commission of the European Communities* [1978] 207, para 253.

[111] House Committee on the Judiciary, 'Apple Responses to Steube Questions for the Record' (Online Platforms and Market Power, Part 2: Innovation and Entrepreneurship, 16 July 2019) available at <https://judiciary.house.gov/calendar/eventsingle.aspx?EventID=2258> (accessed 7 November 2020)

[112] Damien Geradin & Dimitrios Katsifis, 'The Antitrust Case Against the Apple App Store' (2020) <https://ssrn.com/abstract=3583029> accessed 19 May 2021.

system since the service is conducted physically. As a result, Uber is not required to pay a 30% cut to Apple. This shows that the two paid services are treated differently by Apple on the basis that one is physical, and the other is online.

Moreover, it should be noted that some companies such as Amazon are not required to pay the standard 30% commission fee to Apple, but rather have special deals with Apple on commission fees. These two factors combined may suffice to establish that Apple's 30% commission fee applied for IAP transactions is unfair in itself.[113]

Concerning a comparison with the prices of the competitors, it should be remembered that Apple holds a monopoly in the app stores for iOS devices market. Thus, a reference should be made to similar markets such as app stores for Android devices and game stores for computers. On the market of app stores for Android devices, Google applies the same 30% commission for IAPs. By the same token, Stream – the leading game store – also adopts a 30% commission fee.

One exception is the Epic Games Store which charges 12% for IAPs. This price difference could be explained by quality differences or security concerns.[114] As such, it is very unlikely to conclude that Apple's 30% commission fee is excessive when compared to similar products.

4.2. Price Discrimination and IAP Systems

It is prohibited for dominant undertakings under Article 102(c) TFEU to apply 'dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage'. This prohibition should be understood to mean that an undertaking holding a dominant position is not allowed to sell the same product to different consumers at different prices where the conditions of transactions are similar and given that the cost of sale stays the same.[115]

This category of exploitative abuse concerns Apple's IAP system as explained in Case Study N° 3. This is because Apple applies the requirement to use its own IAP system and its standard 30% commission fee to online service providers with most of which Apple competes with in the relevant downstream markets (e.g., Netflix and iTunes), whereas these obligations are not imposed on physical services against which Apple does not compete. Although the product in general is the same – i.e., payment services – certain customers are obliged to pay a 30% fixed fee to Apple as

[113] Bapu Kotapati, Simon Mutungi, Melissa Newham, Jeff Schroeder, Shili Shao & Melody Wang, 'The Antitrust Case Against Apple' (2020) Yale University Thurman Arnold Project 2 <https://ssrn.com/abstract=3606073> accessed 19 May 2021.

[114] Damien Geradin & Dimitrios Katsifis, 'The Antitrust Case Against the Apple App Store' (2020) <https://ssrn.com/abstract=3583029> accessed 19 May 2021.

[115] Richard Posner, *Antitrust Law* (2nd edn, University of Chicago Press 2001) at 79–80.

the operator of the App Store and IAP service, but others may choose to use any payment service they want, escaping from a standard 30% cut.

In addition, and perhaps even more strikingly, Apple suggests that it applies a fixed 30% commission fee for all IAP transactions of 'big' app developers. However, practice shows that certain companies such as Amazon for its video streaming service Amazon Prime Video benefit from a discount for no apparent reasons.[116]

Furthermore, as a result of the recent decision taken by Apply to apply 15% commission fee to the 'small' app developers which do not gain more than USD 1 million in a year, there is now a discrepancy in terms of the IAP commission fees applied to the actors in the same market.

These instances show that Apple holding a monopoly in the IAP systems for iOS devices market offers different prices to different companies for the same service. Netflix as a video streaming service is required to pay a 30% fee, but Amazon Prime Video gets a discount. Similarly, 'big' app developers are required to pay a doubled price. This practice may constitute a very clear case of price discrimination and violate Article 102(c) TFEU as an abuse of dominant position.

4.3. Self-Preferencing and App Store Search

Self-preferencing occurs when a dominant undertaking uses its dominance in the upstream market to leverage its position in the downstream market when compared to other competitors.[117] The European Commission noted in *Google Search (Shopping)* decision that 'conduct consisting in the use of a dominant position on one market to extend that dominant position to one or more adjacent markets […] constitutes a well-established, independent, form of abuse falling outside the scope of competition on the merits'.[118]

It should be noted that this form or category of abuse is highly relevant in the context of digital ecosystems.[119] This is because as part of a digital ecosystem, a single company operates in multiple markets often including vertical markets. As a result, digital economies tend to favour their presence in the downstream market by using their dominance in the upstream market.[120] This situation may very well be the cornerstone of competition law with respect to digital ecosystems. For many conducts of digital ecosystems can be classified as self-preferencing, great importance should be given to antitrust investigations in this regard.

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[116] Henk Don, Michiel Van Dijk & Femke Nagelhoud–De Jong, 'Taking Stock of App Stores' (2019) 47(3) InterMEDIA 33 at 35.

[117] Friso Bostoen & Daniel Mândrescu, 'Assessing Abuse of Dominance in the Platform Economy: A Case Study of App Stores' (2020) <https://ssrn.com/abstract=3629118> accessed 19 May 2021.

[118] *Google Search (Shopping)* (Case AT.39740) Commission Decision C(2017) 4444 [2017] OJ C9/08, para 649.

[119] Jacques Crémer, Yves-Alexandre de Montjoye & Heike Schweitzer, *Competition Policy for the digital era* (2019) at 66–67; Nicolas Petit, *Big Tech and the Digital Economy: The Moligopoly Scenario* (1st edn, OUP 2020) at 12.

[120] Bostoen at 13–14

One interesting example in this respect concerns Case Study N° 6 on App Store search.[121] Consumers often conduct searches on app stores before downloading an app on their smartphones. Hence, the results of that search are a determinant factor for the consumer to decide on the app he/she wants to download. As such, this issue is very similar to European Commission's *Google Search (Shopping)* decision which imposed a heavy fine on Google for abusing its dominant position.[122]

Apple as the operator of the App Store favours its own apps in the search results. This favouring is not only limited to giving priority to relevant apps developed by Apple, but it goes so far to show unrelated apps developed by Apple before showing a relevant app developed by a third-party which might be a competitor to Apple's services.

In this instance, Apple acts as the gatekeeper of the upstream market,[123] which is the app store for iOS devices market. At the same time, it operates in various downstream markets, such as music streaming, podcast providers and video streaming. By putting its services in higher rankings at the search results of the App Store, Apple incentivises consumers to use apps developed by itself rather than those apps developed by third-party app developers. As such, it uses its dominant position in the app store market to leverage its position in downstream markets. If anticompetitive effects of such conduct could be proven, Apple would presumably be in violation of Article 102 TFEU for reasons of self-preferencing.

As a final note, it should be noted that the digital ecosystem dilemma is also present in this example. On one hand, Apple needs more apps to be present in its App Store so that it gains more profits from that business. On the other hand, Apple also favours its own services competing with other apps in the App Store leading to a possible elimination of competitors which could in turn harm Apple's business in terms of its app store power – for instance when compared to that of the Android devices. Therefore, a balance between the horizontal conducts of digital ecosystems and competition rules is beneficial both for digital ecosystems as well as consumer welfare.

5. Are There Any Possible Justifications?

Not all *prima facie* abusive conducts of dominant undertakings will violate Article 102 TFEU. Indeed, as explained by the European Commission 'by demonstrating that its conduct is objectively necessary or […] produces substantial efficiencies which outweigh any anti-competitive effects on consumers', undertakings in a dominant position may justify their abusive practices.[124]

[121] This can also be considered as an exclusionary abuse.
[122] *Google Search (Shopping)* (Case AT.39740) Commission Decision C(2017) 4444 [2017] OJ C9/08.
[123] Austrian Regulatory Authority for Broadcasting and Telecommunications (RTR), *The Open Internet: OS, Apps and App Stores* (2019) <https://www.rtr.at/en/inf/OffenesInternetApps2019> accessed 19 May 2021.
[124] TFEU Article 102 Communication para 28.

In order to justify its abuse, the concerned undertaking must show that 'the conduct in question is indispensable and proportionate to the goal allegedly pursued by the dominant undertaking.'.[125] In that regard, it has to be determined whether the exclusionary effect arising from such an abusive practice, which is disadvantageous for competition, may be counterbalanced or outweighed, by efficiency advantages which serve to customer welfare.[126] If the exclusionary effect of an abuse is not advantageous for the market and consumers or if it goes beyond what is necessary in order to attain those advantages, that practice must be considered as an abuse violating Article 102 TFEU.[127] In particular, a dominant undertaking may try to justify its abuse by demonstrating either that its conduct is objectively necessary or that the exclusionary effect produced may be counterbalanced or outweighed by advantages in terms of efficiency.[128]

Turning to the case studies analysed above, each of them should be examined in terms of the efficiencies they create for consumers. For Case Study N° 1 (Apple's Closed Ecosystem) and Case Study N° 3 (IAP Systems), Apple alleges that its conduct can be justified on security and privacy grounds.[129] It argues that by not allowing third-party app developers to use the Apple Ecosystem's advanced interoperability features, it is able to create a system where the user data is more secure. As for IAP systems, it is true that the security of payment information is very important to users. However, as App Store has detailed policies on security and privacy which require apps to comply with these rules if they want to appear on the App Store, third-party app developers are already barred from adopting unsecure IAP systems. For this reason, it would be difficult to argue that Apple's monopoly of IAP systems for iOS devices is necessary.

As for Case Study N° 6 (App Store Search), it could be said that its similarities with *Google Search (Shopping)* decision are striking. In that regard, it is very hard to find any justification which could justify Apple's self-preferencing conduct in the search results of the App Store.[130]

A similar approach can also be adopted for Case Study N° 4 (Google Search). One difference in that regard is that the integration of Google's services offers a better experience to its users. Market studies also show that consumers find integrated services much easier to use. Therefore, it could be argued that Google's conduct creates efficiencies in terms of a better user experience.

[125] TFEU Article 102 Communication para 28.
[126] Case C-280/08 P *Deutsche Telekom AG v European Commission* [2010] ECR I-9555, paras 196–202; Case C-52/09 *Konkurrensverket v TeliaSonera Sverige AB* [2011] ECR I-564, para 76.
[127] Case C-95/04 P *British Airways v Commission* [2007] ECR I-2331, para 86.
[128] Case C-209/10 *Post Danmark A/S v Konkurrencerådet* [2012], para 41.
[129] Friso Bostoen & Daniel Mândrescu, 'Assessing Abuse of Dominance in the Platform Economy: A Case Study of App Stores' (2020) <https://ssrn.com/abstract=3629118> accessed 19 May 2021.
[130] ibid at 41.

Concerning Case Study N° 2 (AmazonBasics), Amazon is able to offer lower priced products by having access to a larger data pool when compared to its competitors.[131] When combined with good data processing abilities, Amazon is able to determine what is more important for consumers. By focusing on these areas, it becomes able to produce cheaper products. This mechanism demonstrates that Amazon's conduct is more efficient than other sellers operating on Amazon Marketplace.[132] Hence, it could be concluded that efficiency gains from Amazon's conduct may justify a potential abusive practice.[133]

Finally, Case Study N° 5 (Facebook Products) focuses on Facebook's aggressive attitude against its competitors.[134] It is not possible to determine any efficiency gain for consumers or any objective necessity for such conduct. Thus, it is very unlikely that Facebook would be able to justify a potential breach of Article 102 TFEU by relying on an objective justification.

Overall, it should be recalled that digital ecosystems create new opportunities for consumers. As such, they both serve innovation as well as consumer welfare. For this reason, competition policies should only be applied when the abusive conducts of digital ecosystems go beyond their gains. It is therefore crucial to conduct a review for possible justifications once a *prima facie* violation of TFEU Article 102 is established.

6. What Should be the Appropriate Remedies?

The last two decades has seen a constant debate in competition law which revolves around technology enabled markets. It is disputed whether a traditional understanding of competition policies is appropriate to address the challenges that technology giants may create with respect to the distortion of competition.[135] A definitive answer to that question is hard to provide.

Nevertheless, antitrust proceedings conducted against Microsoft and Google in this time period proves that it is challenging to determine the right form of remedy against the abuse of dominant tech-firms. This is for two reasons. First, a soft or late remedy risks creating more monopolies in different markets which could harm innovation and consumers in the long term. Secondly, harsh or early remedies may constitute a barrier on innovation and competition by the merits. As such, it is crucial for competition authorities to decide on remedies which would prevent technology

[131] Andrew McAfee & Erik Brynjolfsson, 'Big Data: The Management Revolution' (2012) Harvard Business Review 10 at 63.

[132] Einer Elhauge, 'Tying, Bundled Discounts, and the Death of the Single Monopoly Profit Theory' (2009) 123(2) Harv. L. Rev. 397 at 470.

[133] Désirée Klingler, Jonathan Bokemeyer, Benjamin Della Rocca & Rafael Bezzera Nunes, 'Amazon's Theory of Harm' (2020) Yale University Thurman Arnold Project 1 at 11.

[134] Patrick F. Todd, 'Digital Platforms and the Leverage Problem' (2019) 98(2) Neb. L. Rev. 486 at 502.

[135] Ariel Ezrachi & Maurice E. Stucke, *Virtual Competition: The Promise and Perils of the Algorithm-Driven Economy* (1st edn, Harvard University Press 2016) at 218.

companies, including digital ecosystems from engaging in anticompetitive practices, but at the same time allow them to continue to contribute further to development.

One possibility to address the abusive conducts of dominant digital ecosystems is to adopt *ex ante* remedies.[136] This means that the conduct of digital ecosystems would be regulated by specific statutes or law.[137] Moreover, soft law documents such as those adopted by the European Commission may further provide guidance on how digital ecosystems could escape from anticompetitive practices.

In this respect, the Digital Markets Act proposed in the European Union is an important step.[138] It provides that digital platforms acting as gatekeepers should have specific obligations with respect to their relationship with their users and allowing access to interoperability features.[139] As such, it has the potential to address several threats that digital ecosystems may pose. A similar approach is also taken by the United Kingdom's Competition & Markets Authority which advised UK regulators to adopt a regulatory approach to preserve the prosperity created by digital ecosystems while maintaining a healthy competition.[140]

The other solution is to adopt *ex post* remedies.[141] This includes imposing fines on dominant digital ecosystems which abuse their position. However, *Microsoft* and *Google* cases have shown that they may not be appropriate in this context. For once, *Microsoft* showed us that antitrust proceedings may have significant effects on a company's growth and innovation strategies. Moreover, after *Google*, most competition authorities have realised that imposing big fines may not be a solution,[142] as dominant technology companies have the potential to grow bigger than the imposed fines.

Another possibility as an *ex post* remedy may be found in old practices of competition law. Structural remedies have been long abandoned in competition practice; however, a revival may be needed for the purposes of digital ecosystems.[143] This is because digital ecosystems operate in multiple markets, competing both in an upstream and a downstream market. This situation creates many risks for competition since digital ecosystems tend to use their wide reach to leverage their position in every market. They may use potentially abusive conducts based on price, or they may

[136] Nicolas Petit, *Big Tech and the Digital Economy: The Moligopoly Scenario* (1st edn, OUP 2020) at 25.4

[137] Friso Bostoen & Daniel Mândrescu, 'Assessing Abuse of Dominance in the Platform Economy: A Case Study of App Stores' (2020) <https://ssrn.com/abstract=3629118> accessed 19 May 2021.

[138] See, Proposal for a Regulation of the European Parliament and of the Council COM/2020/842 final of 15 December 2020 on contestable and fair markets in the digital sector (Digital Markets Act) [2020].

[139] Meredith Broadbent 'The Digital Services Act, the Digital Markets Act, and the New Competition Tool' (2020) Center for Strategic and International Studies at 4–5.

[140] CMA, Advice of the Digital Markets Taskforce: 'A new pro-competition regime for digital markets' dated 8 December 2020.

[141] Fiona M. Scott Morton & David C. Dinielliat 'Roadmap for a Monopolization Case Against Google Regarding the Search Market' (2020) Omidyar Network at 39–40.

[142] Thomas Höppner, 'Duty to Treat Downstream Rivals Equally: (Merely) a Natural Remedy to Google's Monopoly Leveraging Abuse' (2017) 1 European Competition and Regulatory Law Review (CoRe) Issue 3/2017 208 at 220

[143] Nicolas Petit, *Big Tech and the Digital Economy: The Moligopoly Scenario* (1st edn, OUP 2020) at 17.

refer to exploit the information they have which may not be available to their competitors. For these reasons, a resurrection of the idea of structural remedies may be useful for preventing abusive practices of dominant digital ecosystems.[144] If structural remedies enable digital ecosystems to continue to provide interoperability of their products to consumers, whilst preventing them to leverage their positions in different markets, this would enable consumers to benefit from the conveniences of digital ecosystems on one hand and a real and effective competition in different product markets on the other.[145] However, it should be noted that structural remedies may cause consumer harm, rather than contributing to a healthy competition policy. As such, one should always approach these solutions with a grain of salt.

7. Conclusion

In the near future, technology-based companies will only get bigger. This is because they offer products and services which many consumers consider as indispensable at the moment. This growth, however, also attracts the interest of antitrust and competition authorities. Indeed, the number of anti-competitive investigations against technology-based companies continue to grow as we see with Apple and Amazon in the European Union and with Google and Facebook in the United States.

So far, the discussion around the scrutiny of the conducts of technology-based companies has revolved around their roles as platforms and the network effect from which they benefit.[146] Although these concepts are indeed helpful to assess whether these undertakings abuse their dominant position, they are not sufficient.

The trend for technology-based companies is to evolve to digital ecosystems. In this way, they can offer a 'complete package' of products and services to consumers and guarantee that by engaging with a single customer in different markets, they gain the most profits. Customers also prefer digital ecosystems, because they provide new features and opportunities to customers which would not be possible without the existence of the necessary level of integration and interoperability to create a digital ecosystem comprised of different products and services. As such, digital economies are beneficial both for technology-based companies as they create more revenues and also for consumers as they offer a better overall experience.

However, these positive sides of digital ecosystems should not overshadow the threats they may pose. Digital ecosystems operate in multiple markets. As evidenced by the case studies mentioned

[144] Lina M. Khan, 'The Separation of Platforms and Commerce' (2019) 119 CLR 973 at 1052–1065.
[145] Nicholas Economides, 'Competition Policy in Network Industries: An Introduction' (2004) NET Institute Working Paper No 04-24 at 14.
[146] See, Jonathan B Baker, *The Antitrust Paradigm: Restoring a Competitive Economy* (1st edn, Harvard University Press 2019).

above, they often act as a gatekeeper in the upstream market and a competitor in the downstream market. This dual role is susceptible to create anticompetitive problems both in terms of exclusionary and exploitative abuses of dominant position.

Concerning the upstream market, they benefit from the great number of users. However, from the point of view of their operations in the downstream market, digital ecosystems try to leverage their market share. In order to achieve success in the downstream market, they may have recourse to adopt exclusionary or exploitative conducts as the gatekeeper in the upstream market against their competitors in the downstream market.

At first glance, this approach may be seen as profitable from the perspective of digital ecosystems. Enhancing their position in the downstream market would create better revenues for them. In turn, these conducts of digital ecosystems may in long turn damage their profits in the upstream market. By engaging in abusive conducts, digital ecosystems may hinder competition in the downstream market, and this would result in a decrease of their revenues in the upstream market as the (middle) consumers of the upstream market are the actors of the downstream market.

For this reason, it is crucial – both in terms of consumer welfare and their own economic viability – for technology-based companies operating as digital ecosystems to adopt a balanced approach. This was they would create more profits while also contributing to the consumer welfare in general. However, a reverse approach would result in creating long term damages for the financial situation of technology-based companies and also hinder competition.

The six case studies discussed in this article show that there are reasonable concerns in terms of possible abusive conducts of different digital ecosystems. It is very likely that most of the technology-based companies hold a dominant position. In turn, a legal analysis based on competition law shows that most of these practices are more likely not to be considered as an abuse within the meaning of TFEU Article 102. Moreover, as digital ecosystems primarily aim to contribute to the consumer experience, a *prima facie* abuse of dominant position may be justified in terms of efficiency gains and consumer welfare.

Finally, it is evident that *ex post* remedies in the form of fines imposed upon antitrust and competition investigations are not effective to address the concerns raised by technology-based companies. Regulations and laws in this regard are very much needed. In addition, soft law documents may also be helpful for digital ecosystems to better assess their own conducts. A last possibility to is to revert back to a traditional concept of competition law which is structural remedies. As most of the concerns about digital ecosystems relate to their dual role in upstream and downstream markets, they may be addressed by structural remedies. However, they should

nevertheless be approached with a grain of salt, as their ineffectiveness has been proven in many instances.

SUSTAINABILITY AND GREEN INNOVATION IN COMPETITION POLICY

Nida Nur YILMAZ*

Abstract

Competition policies have often been regarded as a barrier for competitors in delivering sustainability goals. Nevertheless, this situation appears to be evolving. Corporations across industries are putting efforts to achieve sustainability initiatives. However, The European Commission has embraced the consumer welfare standard in its competition policy. Thus, economic efficiency has become the paramount goal of EU competition policy and, non-economic concerns are not involved while assessing anti-competitive initiatives. Therefore, broad consumer welfare standards should be examined. This approach is crucial for the structure of Article 101 TFEU. To reach these initiatives, corporations may need to collaborate. Through the new standards and environmental integration, Article 101 TFEU needs clarity within the scope of sustainability agreements. If this is achieved, unlike the Chicken of Tomorrow Case, companies can join sustainable collaborations without getting caught under cartel prohibition. To provide the required further guidance, the Netherlands Authority for Consumers and Markets (ACM) published its draft sustainability guidelines on 9 July 2020 and revised it on 26 January 2021. Hence, ACM proposes a method to the European Commission for assessing the compatibility of sustainability initiatives with competition law.

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1. Introduction

A nations' improvement cannot be accomplished merely by Gross Domestic Product (GDP) development; instead, it can be reached by integrated aims on environmental, social, and economic policies as well. This issue is laid out in the Synthesis Report of the Secretary-General on the post-2015 sustainable development agenda. So, the United Nations General Assembly introduced Sustainable Development Goals (SDGs) in 2015. They are expected to be accomplished by the year 2030 and involved in UN Resolution called Agenda 2030.[147] Sustainable Development Goals (SDG's) are a group of interlinked goals to attain a sustainable future.[148] These goals are aimed at human improvement via education as well as sustaining the capacity of natural systems such as ecosystems and natural resources. Through this, resources and living circumstances are used to maintain to answer human requirements without impairing the integrity and balance of the natural system. Additionally, sustainable consumption and production elaborate resource efficiency and diminish pollution, which is regarded as a promise to challenges such as pollution, and exhaustion of resources. The 1994 Oslo Symposium on Sustainable Consumption specifies sustainable consumption as not to depreciate the usage of natural resources and toxic substances but to put first the needs of future generations.[149] With these aims, numerous governments already support SDGs by conducting various policies through performance standards, labelling, subsidies, and taxes.[150]

Competition improves efficiency, boosts innovation, and leads to more extensive product choices and better quality, through developing consumer welfare.[151] As the Paris We-are-Competition Conference 'Competition Law and Sustainability Conference 2019 and Brussels Conference 'Sustainability and Competition Policy: Bridging two Worlds to Enable a Fairer Economy' represented that there is concern about competition law's inability to address sustainability objectives.[152] Meanwhile, sustainable development is carrying the post-2015 sustainable development agenda and introduces the notion of economic transformation. Thus, competition law and regulatory policies are also included in this sustainable integration approach. In this framework, governments, corporations in the private sector, and specific markets are required to penetrate these certain goals into their policies and take appropriate measures towards attaining

[147] UNCTAD, 'Trade and Development Report 2020' (2020).
[148] Markus Gehring, 'Competition Law and Sustainable Development' [2003] CISDL 1.
[149] Maarten Pieter Schinkel and Yossi Spiegel, 'Can collusion promote sustainable consumption and production?' (2017) 53 International Journal of Industrial Organization 371.
[150] Nordic Competition Authorities, 'Competition Policy and Green Growth' (2010).
[151] Tomaso Ferrando, 'Addressing the Broken Links' [2019] EU Competition Law and Sustainability in Food Systems 1.
[152] Julian Nowag, 'Competition Law's Sustainability Gap? Tools for an Examination and a Brief Overview' [2019] Lund University Legal Research Paper Series 3.

them. By reducing market failures, effective competition policies may guide corporations to become more efficient, improve innovation, and broaden consumer choice and quality of the products. Additionally, these requirements may also supervise firms for producing healthier, environmentally engaged, ethical, and equitable products.[153] Consequently, the term sustainable competition law arises in the early years, since the competition policy is a crucial system and complements other policies in attaining sustainable development. This movement must address public interests such as environmental matters. It cannot merely concentrate on economic matters. In order to achieve this purpose, there is a necessity for appropriate grounds to develop objectives without infringing the international competition rules and the national mechanisms.[154] Accordingly, it is perceived by some governments that sustainable environmental objectives challenge well-established competition policy implementation, that does not endorse businesses to abuse their market power or diminish competition to achieve innovation, but for the sake of sustainable development undertakes like horizontal or vertical agreements between firms can be practice though the afresh interpreted competition policy.

In this article, first, a discussion will be made about the scope of the consumer welfare standard, which is one of the objectives of competition law. According to this, whether the narrow or wide consumer welfare standard meets the sustainability objectives will be examined. In this sense, case law will be used, and the necessity of alternative principles will be discussed. In the second part, the argument that the consumer welfare standard carries only economic concern will be tried to be refuted with the principle of integration and policy linkage. In this sense, the Treaty on the Functioning of the European Union policies and the 2001-2010 Horizontal Cooperation Guidelines will be examined in detail on the basis of sustainability agreements. The composition of Article 101 (1)-(3) TFEU, which lays the foundation for sustainability agreements and regulates the cartel ban, will be discussed. There are also detailed recommendations and analyses on which agreements may be valid under the title. As an extra, standardization agreements organized under the 2010 Horizontal Cooperation Guidelines were examined to guide new sustainability initiatives. Under the last heading, examples of the reorganization of specific competition regulations, which have recently been on the agenda of countries, according to sustainability objectives will be given. In this sense, the effect of the Chicken of Tomorrow incident on the Dutch competition structure will be examined and the draft regulation issued by ACM in June 2020 will be reviewed and revised.

[153] Jacqueline M. Bos, Henk van den Belt and Peter H. Feindt, 'Animal welfare, consumer welfare, and competition law: The Dutch debate on the Chicken of Tomorrow' (2018) 8 Animal Frontiers 20.

[154] Muzaffer Eroğlu, 'How to Achieve Sustainable Companies: Soft Law (Corporate Social Responsibility And Sustainable Investment) Or Hard Law (Company Law)' (2014) 2 Kadir Has Üniversitesi Hukuk Fakültesi Dergisi 89.

1. The Framework of Environmental Integration

The constitutional requirements of the EU Treaties require environmental protection to be taken into consideration while executing all the EU's policies. According to the TFEU, the European Union should protect the environment and ensure fair competition in the market concurrently. Although in 1986 the Single European Act was signed to introduce Article 130 which pointed out environmental protections as a component of the Union's other policies, these protections must have been integrated into EU policies as The Maastricht Treaty of 1992 suggested.[155] As suggested, an important factor that excludes sustainability agreements from cartel prohibition is environmental integration. Therefore, Article 11 of the Treaty on the Functioning of the European Union, points to the environmental integration principle, giving that the environmental considerations must be integrated into the implementation of all policies to encourage sustainable development. This article mandates that 'Environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities to support sustainable development.'[156] Such integration must be involved in the area of competition law since the competition is a union policy. To highlight this connection, this article can be read per the general policy-linking clause, Article 7 TFEU, which ensures consistency between policies and activities.[157] Hence, Article 11 TFEU poses a concrete obligation for all EU decision-makers to integrate environmental protection requirements. This has been supported by the Court of Justice in PreussenElektra, concerning the free movement rules in Article 34 TFEU. In this case, the court held that due to the integration policy, environmental objectives must be integrated into the interpretation and implementation of other Community policies. Preserving the environment was a 'priority objective' for the Community, and the requirement to obtain renewable energy was not acknowledged as a prohibitive measure inconsistent with Article 34 TFEU.[158] So, the purpose of the integration is to attain equilibrium between environmental protection and competition to create sustainable competition law.

3. Consumer Welfare Standard Constraint on Non-Economic Interests

Environmental and competition policies developed to remedy market failures. These failures occur because of a lack of incentives to preserve the environment and companies engaging in anti-

[155] Anna Gerbrandy and Ruther Claassen, 'Rethinking European Competition Law: From a Consumer Welfare to a Capability Approach' (2016) 12(1) Utrecht Law Review 1.
[156] Consolidated version of the Treaty on the Functioning of the European Union [2016] OJ C 202/53.
[157] Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C 326/1.
[158] Case C- 379/98 Preussen Elektra AG v Schleswag AG [2001] ECR I-02099.

competitive. They have the joint purpose of maintaining welfare.[159] So, these policies should reinforce each other's effectiveness. Nevertheless, the guidelines on Article 101(3) TFEU articulates that the objective of Article 101 is to protect competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources. Thus, the European Commission puts objective economic benefits at first for the exemption under Article 101(3) TFEU and embraced the consumer welfare approach in its competition policies.[160] This procedure concentrates on the outcomes of market exchanges and their impacts on consumer welfare. The losses and gains are computed through the notion of consumer welfare for enabling an agreement between businesses. And, if costs are more prominent than benefits, this agreement is against competition law. Under the narrow consumer welfare procedure, agreements among undertakings that increase the price are banned.[161] This notion forms a tension within the consumer welfare approach and sustainability concerns. In this regard, non-economic interests are excluded from the consumer welfare approach. On the contrary, the broad consumer welfare model is welcoming to the non-economic benefits indirectly. Still, it is difficult to take sustainability benefits that cannot be expressed in terms of consumer welfare into account as these benefits are uncertain.[162] Due to this lack of clarity of the guidelines and due to the resulting interpretation by NCAs, undertakings have been hesitant to set up new sustainability agreements out of fear of competition rules.[163]

3.1. Advantages of Broad Consumer Welfare

There are two reasons to expect that the Commission applies a broad consumer welfare standard. First of all, The Commission acknowledges the role that dynamic efficiencies can play in evaluating sustainability agreements. Dynamic efficiency involves improving allocative and productive efficiency. This can be done by developing new products and finding better ways of producing goods and services.[164] Thus, sustainability agreements can achieve dynamic efficiency when they yield lower-cost or higher-quality outputs to the benefit of total welfare. This means that anti-

[159] Joseph F Brodley, 'The Economic Goals of Antitrust: Efficiency, Consumer Welfare, and Technological Progress' (1987) 62 NYU L Rev 1020.
[160] Anna Gerbrandy and Ruther Claassen, 'Rethinking European Competition Law: From a Consumer Welfare to a Capability Approach' (2016) 12(1) Utrecht Law Review 1.
[161] Anna Gerbrandy and Ruther Claassen, 'Rethinking European Competition Law: From a Consumer Welfare to a Capability Approach' (2016) 12(1) Utrecht Law Review 1.
[162] Anna Gerbrandy, Willem Janssen, Lyndsey Thomsin, 'Shaping the Social Market Economy After the Lisbon Treaty: How 'Social' is Public Economic Law?' (2019) 15(2) Utrecht Law Review 32.
[163] Eva van der Zee, 'Quantifying Benefits of Sustainability Agreements Under Article 101 TFEU' [2020] SSRN Electronic Journal 5.
[164] Jacqueline M. Bos, Henk van den Belt and Peter H. Feindt, 'Animal welfare, consumer welfare, and competition law: The Dutch debate on the Chicken of Tomorrow' (2018) 8 Animal Frontiers 20.

competitive agreements that may raise prices but improve quality, may still be justified under Article 101 (3) TFEU according to the Commission when increased quality benefits the consumer. (See; 3.3.1 Sustainability Benefits as Economic Benefits) Secondly, the Commission argues in its Better Regulation Guidelines (2015) that not every situation calls for a narrow assessment to measure consumers because of the amount a consumer is willing to pay (WTP) is particularly difficult to measure for goods.[165] The Commission argues that sometimes it is difficult to quantify impacts and sometimes further information is needed on how consumer welfare may change over time. The Commission accepts the weakness of resorting solely to price considerations to assess consumer welfare by emphasizing the importance of using behavioural insights in the assessment of consumer welfare, acknowledging that consumers' limited, potentially biased, and socially influenced decision-making affects how they make choices.[166]

3.2. Limits of The Broad Consumer Welfare

The Dutch Energy Agreement (Energieakkoord) aimed at sustainable energy in the Netherlands in 2020 is a relevant case to examine the limits of the consumer welfare approach.[167] The agreement is concerning closing down five coal-fired power, that drive lower emissions of NOx, SOx, and particulate matter. As supply decreases by ending production, prices will rise. Consumers are affected by the increased price but also benefit from avoided healthcare costs. Under the narrow consumer welfare procedure, this agreement would be rejected right away as only direct effects on the consumers are considered. However, the ACM calculated the healthcare benefits and balanced them against the welfare loss. The agreement was declared to be against competition law as the welfare loss weighed heavier.[168] Thus, the energy case reveals how the broad consumer welfare method can take non-economic objects into account by comparing avoided healthcare costs. At the same time, the limits of the broad consumer welfare approach become apparent in the non-consideration by the ACM of the long-term ecological effects of the Energy Agreement. Since the reduction of emissions results in a flourishing of future generations, because of the expected long-term environmental effects. Thus, a consumer welfare standard in competition law generally has difficulty with long-term effects and favours short-term consumer benefits.

[165] Niamh Dunne, 'Public Interest And EU Competition Law'(2020) 65 The Antitrust Bulletin 7.
[166] Anna Gerbrandy and Ruther Claassen, 'Rethinking European Competition Law: From a Consumer Welfare to a Capability Approach' (2016) 12(1) Utrecht Law Review 1.
[167] Murco Mijnlieff, 'Notitie ACM over sluiting 5 kolencentrales in SER Energieakkoord' (Auteriteit Consument & Markt) <https://www.acm.nl/nl/publicaties/publicatie/12033/Notitie-ACM> accessed 10 October 2020.
[168] Anna Gerbrandy and Ruther Claassen, 'Rethinking European Competition Law: From a Consumer Welfare to a Capability Approach' (2016) 12(1) Utrecht Law Review 1.

4. Sustainability Agreements Under Cartel Prohibition

It has been observed that the consumer welfare standard does not meet the sustainable development goals in agreements among undertakings. However, companies can also make specific agreements on sustainability to achieve these goals and to avoid first-mover disadvantage.[169] These agreements are called sustainability agreements. Due to this lack of clarity of the guidelines and interpretation of NCAs, undertakings have been hesitant to set up new sustainability agreements out of fear of competition rules. Thus, companies do not want to risk violating Article 101 TFEU, which regulates the cartel prohibition.

4.1. Assessment of Sustainability Agreements Under Article 101 (1) TFEU

Agreements concerning sustainability are structured within the framework of sustainability integration and are regulated in Article 101 (1) TFEU. Article 101 (1) TFEU schemes to prevent agreements among undertakings that have an object or effect of restrictive competition.[170] Though, the notion of 'restriction of competition' remains unclear to perceive while there is still a debate as to what this concept involves. The Commission's view, which appears in Article 101(3) rules applying to undertakings, is that for Article 101(1) TFEU to be infringed, the agreement in question must decrease consumer welfare. The purpose of Article 101 (1) TFEU is to protect competition as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources. As described in Chapter 2, consumer welfare is equated with consumer surplus and is to reduce the prices that had been raised above a competitive level.[171] (See 2. Consumer Welfare Standard Constraint on Non-Economic Interests) These negative effects are likely to occur only when the companies maintain market power. So, the agreement is restrictive by its nature when it concerns price-fixing, market sharing, or output constraints. Just because an agreement has public interest purposes does not exclude it from being regarded to restrict competition by object, which was concluded in GlaxoSmithKline case.[172] Consequently, an agreement in question that is considered restrictive would not be saved from falling under Article 101(1) TFEU, even though it

[169] Simon Holmes, 'Climate Change, Sustainability, And Competition Law' (2020) 8 Journal of Antitrust Enforcement 17.
[170] Victor Sand Holmberg, 'EU Competition Law and Environmental Protection – Integrate or Isolate?' (LAGM01, Lund University 2014).
[171] Joseph F Brodley, 'The Economic Goals of Antitrust: Efficiency, Consumer Welfare, and Technological Progress' (1987) 62 NYU L Rev 1020.
[172] Court of Justice of the European Union, 'The Court of Justice Clarifies The Criteria Governing Whether A Settlement Agreement With Respect To A Dispute Between The Holder Of A Pharmaceutical Patent And A Manufacturer Of Generic Medicines Is Contrary To EU Competition Law' (2020) <https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-01/cp200008en.pdf> accessed 5 November 2020.

provides environmental interests. Conversely, an agreement that has as an object to cause environmental damage, but otherwise is not restrictive of competition, does not fall under Article 101(1) TFEU. Even though the EU Courts have in several cases accepted restrictive agreements under Article 101(1) TFEU because of their beneficial intentions.[173] (See: 3.2.3 Ancillary Restraint Doctrine)

The main type of environmental protection instrument that might infringe Article 101 TFEU is the called voluntary environmental agreement. These voluntary sustainability initiatives may lead to cartel-like behaviour. This may restrict competition and consequently fall within the scope of Article 101 (1) TFEU. The 2001 Horizontal Cooperation Guidelines, published by the Directorate General Competition, comprised a separate section dealing with certain environmental agreements.[174] It detailed the conditions for an environmental agreement, and how these were assessed under Article 101 TFEU. This chapter was excluded from the new 2010 Horizontal Cooperation Guidelines. The 2010 Horizontal Cooperation Guidelines solely contributes some supervision on how to evaluate environmental standard agreements.[175] Nevertheless, the Commission has asserted that the removal of the environmental section does not indicate any downgrading for the appraisal of environmental agreements. Thus, the 2001 Horizontal Cooperation Guidelines can still address some guidance on how to analyse environmental agreements in the absence of the EU courts' jurisdiction.[176] Lastly, the 2001 Horizontal Cooperation Guidelines separated environmental agreements into three sections: those that never fall under, those that may fall under, and those that always fall under Article 101(1) TFEU.

4.1.1. Those That Unlikely to Fall Under Article 101 (1)

An environmental agreement will not infringe Article 101(1) TFEU in three situations called the 'safe harbour' thresholds specified in the 2001 Horizontal Guidelines.[177] First, if the agreement does not place any specific necessities upon any of the parties, or if the parties are merely loosely dedicated to obtaining a sector-wide environmental objective, Article 101(1) TFEU is not violated. This is subordinate to what degree of discretion the parties have to attain environmental

[173] Victor Sand Holmberg, 'EU Competition Law And Environmental Protection – Integrate Or Isolate?' (LAGM01, Lund University 2014).
[174] Guidelines on the Applicability of Article 81 of the EC Treaty to Horizontal Cooperation Agreements [2001] OJ C 3/02.
[175] European Commission, 'Competition: Commission Adopts Revised Competition Rules on Horizontal Co-Operation Agreements' (2010) <https://ec.europa.eu/commission/presscorner/detail/en/IP_10_1702> accessed 12 November 2020.
[176] Miriam Lenz, 'The Interplay between the Environment and Competition Law in the EU' [2019] Publications Office of the EU 1.
[177] Victor Sand Holmberg, 'EU Competition Law And Environmental Protection – Integrate Or Isolate?' (LAGM01, Lund University 2014)

purposes.[178] In the European Automobile Manufacturers' Association ACEA case, the Commission determined that an agreement amongst automobile manufacturers to decrease the amount of CO2 from its cars did not infringe Article 101(1) TFEU. The parties had only agreed upon a sector-wide emissions aim, and the parties were free to determine how to accomplish this purpose exclusively. The Commission found that this would encourage ACEA's affiliates to promote and introduce new CO2-efficient technologies autonomously.[179] This approach presents beneficial supervision for several contemporary industry enterprises where rivals are committed to achieving a given objective. To illustrate, the 'New Plastics Economy' Global Commitment of 2018[180] or sugar, calorie industries.

Secondly, Article 101(1) TFEU should not be infringed if the agreement involves products whose importance is minimal for influencing purchase decisions on the market.[181] In 2008, the ACM did not complain to an agreement between organizations at various levels of the food supply chain, which resulted in a supermarket trade organization solely selling fresh pork meat from pigs with anaesthesia.[182] This case is known as Chicken of Tomorrow. (See 4.1 Draft Guidelines in The Light of Chicken of Tomorrow) This involved a temporary tolerable improvement in the wholesale price, yet supermarkets continued free to set their retail price. Butcheries could still acquire pork meat from pigs castrated outwardly anaesthesia for equipment to other sales channels. Likewise, companies can significantly diminish packaging supplies by agreeing on higher than lawfully required fill levels like shampoo bottles. Repeatedly, customers get better goods than before, and negative effects can be outwards. Additional cases where the cost influence on final outputs is likely to be minimal include: Engagements to value labour law standards such as migrant workers where current regulations lack enforcement. (e.g., on hazelnut plantations in Turkey, to name a commonly evoked example)[183]

Thirdly, if the agreement causes dynamic efficiencies, which could not have been attained outwardly by the agreement, Article 101(1) TFEU should not be applicable.[184] Dynamic efficiencies are generated if the agreement gives rise to a new market or output. The most effective sustainability efforts are often only economically viable if competitors jointly create resources and demand, be it (i) for R&D needed for goods innovation, (ii) the collective desire for the

[178] Unilever, 'Sustainability Cooperations Between Competitors & Art. 101 TFEU' (2020).
[179] European Commision, 'Commission and ACEA Agree on CO2 Emissions from Cars' <https://ec.europa.eu/commission/presscorner/detail/en/IP_98_734> accessed November 12, 2020.
[180] Ellen Macarthur Foundation, 'Global Commitment - New Plastics Economy (En-GB)' (2020) <https://www.newplasticseconomy.org/projects/global-commitment> accessed 16 November 2020.
[181] Unilever, 'Sustainability Cooperations Between Competitors & Art. 101 TFEU' (2020).
[182] Jacqueline M. Bos, Henk van den Belt and Peter H. Feindt, 'Animal welfare, consumer welfare, and competition law: The Dutch debate on the Chicken of Tomorrow' (2018) 8 Animal Frontiers 20.
[183] Unilever, 'Sustainability Cooperations Between Competitors & Art. 101 TFEU' (2020).
[184] Unilever, 'Sustainability Cooperations Between Competitors & Art. 101 TFEU' (2020).

improvement of a product mature enough and facilities sizeable enough for scaled production, or (iii) logistics infrastructures that, too, depending on the scale. In such instances of new market creation, there will generally be no restriction of competition if the parties would not be capable of conducting the activities in isolation and there are no alternatives available. The 2010 Horizontal Cooperation Guidelines expressed that if the agreement enables the parties to launch a new product or service, which the parties would not otherwise have been able to do.[185] There have been some cases where the Commission confirmed the cooperation agreements in the light of developing a new market such as the DSD case.[186]

4.1.2. Those That Come Under Article 101 (1)

The environmental agreement will always fall under Article 101(1) TFEU where the cooperation does not truly concern environmental objectives but serves only as a front to a disguised cartel. An example is the IAZ case, where the Belgian Association Nationale des Service d'Eau agreed with all manufacturers and importers of washing machines to use a conformity label for certain environmental requirements.[187] The Court of Justice found that the real objective was to hinder parallel imports by creating entry barriers. Furthermore, agreements that fix prices, reduce output, or allocate market shares, always fall under Article 101(1) TFEU, even where the expressed objective is environmentally friendly. This was the case in VOTOB, where an agreement between six Dutch companies fell under Article 101(1) TFEU. The Commission found that the agreement to pass on a fixed environmental surcharge to consumers due to the cost of storing used chemicals constituted horizontal price-fixing.[188] There are three categories for such arrangements that might have restrictive effects on competition. Firstly, the phasing-out of non-sustainable products with relevant cost increases.[189] The Commission's CECED case (concerted outsourcing of less energy-efficient washing machines), as well as the ACM's Energieakkoord case (about a deal between four electricity producers to close older coal-fired power plants to cut CO2 emissions), were deemed to fall under Article 101 (1) TFEU. Secondly, the setting of sustainability standards and standards is stricter than the law. Voluntary standardization agreements can benefit from the safe harbour rule in the Horizontal Cooperation Guidelines and are unlikely to bring about appreciable effects

[185] European Competition Lawyers Forum ,'Comments On The Draft Guidelines On The Applicability Of Article 101 Of The Treaty On The Functioning Of The European Union To Horizontal Co-Operation Agreements' (2010) 6 European Competition Journal 507.
[186] Commission Decision of 20 April 2001 relating to a proceeding pursuant to Article 82 of the EC Treaty [2001] OJ L 166.
[187] Case C-96-102, 104, 105, 108 and 110/82 *International Belgium and others v Commission of the European Communities* EU:C:1983:310.
[188] Philip Kienapfel, 'Competition Issues in Waste Management Systems' (2016) 1 Antitrust 52.
[189] Victor Sand Holmberg, 'EU Competition Law And Environmental Protection – Integrate Or Isolate?' (LAGM01, Lund University 2014).

on competition.[190] However, mandatory standards in the following areas are covered by Article 101 (1) TFEU. Like the agreements to impose stricter than legally required integrity standards on supply chain partners. For example, labour living conditions. Thirdly, joint voluntary investments or payments to offset the negative environmental or social impact.

4.1.3. Ancillary Restraints Doctrine

The Court of Justice, in various judgments, regarded that even if an agreement comprises critical restraints on competition, it still might not violate Article 101(1) TFEU. The condition for this is if the restraints do not go beyond what is essential for achieving a consistent objective. These are called ancillary restraints, or objectively necessary.[191] This type of judgment is based on the milestone decision of Wouters and Albany. The Court of Justice, in Albany and Wouters, have proceeded its judgments with this kind of analysis when assessing agreements in question. In the case of Wouters, there was a Dutch attorney who was prohibited to practice as a lawyer in a firm of accountants because of an adopted rule of the Dutch Bar Council. This rule precludes lawyers from entering into a partnership with individuals who are not lawyers.[192] In its judgments, the Court of Justice confirmed that this sort of practice was prohibitive in the meaning of Article 101(1) TFEU. When the objectives of the rule are examined, the main purpose is to preserve the integrity and professionalism of legal service providers in the Netherlands. Conclusively, even though the rules utilized by the ACM were considered anti-competitive, in this case, the Court of Justice settled that the agreement did not violate Article 101(1) TFEU. Since the restrictions were essential for the proper practice of the legal profession.[193] In addition, in the case of Albany, the Court of Justice regarded that collective bargaining among associations representing employers and employees falls outside the scope of Article 101(1) TFEU.[194] The Court of Justice concluded that the European Union's motions covered not solely competition policy, but also a policy based on social needs. Consequently, both judgments of the Court of Justice show us that in particular cases, it is permissible to evaluate non-competition purposes against restrictions of competition. When the non-competition purposes can outweigh the restraint, the outcome will not violate Article 101(1) TFEU.[195] While it is significant to assess these types of cases in a case-by-case method, this permissible approach can be considered in the case of sustainability agreements. This

[190] Unilever, 'Sustainability Cooperations Between Competitors & Art. 101 TFEU' (2020).
[191] Philip Kienapfel, 'Competition Issues in Waste Management Systems' (2016) 1 Antitrust 52.
[192] Case C-309/99, *Wouters v Algemene Raad van de Nederlandse Orde van Advocaten* [2002] ECR I - 1653
[193] Sophie van der Velden, 'The application of EU competition law to Dutch private sustainability initiatives' (LLM, Tilburg University 2018).
[194] Case C-67/96, *Albany International BV v Stichting edrijfspensioenfonds Textielindustrie* [1999] ECR I - 5863
[195] Philip Kienapfel, 'Competition Issues in Waste Management Systems' (2016) 1 Antitrust 52.

consideration required detailed and proportionate analysis, but when it is reached restrictions can be crucial to carry out sustainability agreements that would fall outside Article 101(1) completely.

4.2. Admissibility of Sustainability Agreements Under Article 101 (3) TFEU

The overall assessment of Article 101 TFEU is split into two parts. If it has been established that an agreement is restrictive of competition in the meaning of Article 101(1) TFEU; it can be allowed under the scope of Article 101 (3), if it can be justified that the agreement in question presents benefits that outweigh the anti-competitive consequences. That means if the overall consequences are beneficial for customers, the sustainability agreement should be kept fit with Article 101 TFEU. Before 1 May 2004, the Commission had a sole right to grant an exception under Article 101(3) TFEU if companies informed the Commission concerning the agreement, however, the method of notification was removed by Council Regulation 1/2003. Since then, Article 101(3) TFEU has been immediately appropriate to all agreements.[196] Consequently, it is not feasible to notify the Commission regarding an agreement; even if this specific agreement meets Article 101(3) TFEU or it does not. Ever since the designated agreements carry the probability of constituting a breach of Article 101(1) TFEU. On the other hand, the second part of Article 101 TFEU, Article 101(3) TFEU, thereby displays a legal exception to the prohibition of anti-competitive agreements. To meet Article 101(3) TFEU, the agreement in question must satisfy four cumulative conditions. While Article 2 of Regulation 1/2003 conditions that the burden of proof proceeds on the Commission or competition authority of a specific nation to confirm that the agreement in question violates Article 101(1) TFEU. Nevertheless, once a violation has been settled, the burden of proof turns to the undertaking to prove that the agreement fills the four conditions in Article 101(3).[197] With respect to sustainability agreements, Article 81(3) TFEU Rules Applying to Undertakings state that the way that the agreement is implemented may exhibit a restraint by purpose even where the formal agreement does not contain an express provision to that effect.[198] Henceforth, even though sustainability initiatives do not have a restriction of competition as their main purpose, they do tend to have a restriction of competition as their object. Therefore, sustainability initiatives should be evaluated under Article 101 TFEU. In assessing whether or not a sustainability initiative meets the four cumulative conditions in Article 101(3) TFEU competition authorities are faced with certain challenges.

[196] Christopher Townley 'Which Goals Count in Article 101 TFEU?' [2011] European Competition Law Review 441.
[197] Eva van der Zee, 'Quantifying Benefits Of Sustainability Agreements Under Article 101 TFEU' [2020] SSRN Electronic Journal 5.
[198] Consolidated version of the Treaty on the Functioning of the European Union [2016] OJ C 202/78.

4.2.1. Sustainability Benefits as Economic Benefits

The matter of how environmental factors should be considered under Article 101(3) TFEU comes down to the interpretation of the first condition of Article 101(3) TFEU. The fundamental question is whether environmental advantages constitute promoting the 'production or distribution of goods' or promoting 'technical or economic progress.'[199] If the beneficial effects of the agreement outweigh the anticompetitive effects, the agreement is said to contribute to improving the production or distribution of goods or to promoting technical or economic progress and the first condition of Article 101(3) TFEU is met. The 2001 Horizontal Cooperation Guidelines immediately addressed the case where environmental benefits arising from an agreement could be evaluated economically. It continued that the presumed economic interests must outweigh the costs.[200] Yet, the difficulty with agreements compared to sustainability is often that these efficiency gains are not quantifiable. Besides, it is unclear whether the proposed efficiency accumulations will truly be realized in the future. (See 2.1 Limits of The Broad Consumer Welfare) Consequently, it is difficult to decide whether the beneficial consequences outweigh the anti-competitive results, and it is not apparent whether the agreement satisfies the first condition of Article 101(3) TFEU. If environmental benefits can be calculated into actual economic benefits, the Commission's 2001 Horizontal Guidelines maintain that they should be taken into account. From a customer viewpoint, a more sustainable product is often a better product so that product sustainability itself is a qualitative benefit. The CECED Case is a suitable example for this section.[201] The purpose of the agreement was to seek a collective energy efficiency target and to develop more environmentally friendly products. The agreement was deemed restrictive of competition in the meaning of Article 101(1) TFEU as the companies attached themselves to cease producing and importing several kinds of washing machines. This would serve anticompetitive consequences with regards to price increases and diminished technical availability for customers. The Commission also wrote that the agreement would include information exchange and cooperation between the rivals. Nevertheless, the Commission gave an exception under Article 101(3) TFEU as the environmental benefits for the society outweighed the costs.[202]

[199] Consolidated version of the Treaty on the Functioning of the European Union [2008] OJ 115.
[200] European Competition Lawyers Forum, 'Comments on The Draft Guidelines On The Applicability Of Article 101 Of The Treaty On The Functioning Of The European Union To Horizontal Co-Operation Agreements' (2010) 6 European Competition Journal 507.
[201] Commission Decision of 24 January 1999 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement [2000] OJ L 187.
[202] W.M.G Swelsen, 'Sustainability and Article 101 TFEU an Economic Approach' (LLM, Tilburg University 2012).

4.2.2. Fair Share for Consumers

To satisfy the second condition, termed 'the pass-on condition', the undertaking must confirm that a fair share of the benefits will accumulate to the customers in the related market. In the case of environmental benefits, these are scattered and cannot particularly direct the customers in the related market immediately since the advantageous effects cannot occur right away.[203] However, Article 101 (3) dictates that the notion of customers comprises direct or indirect users such as producers, wholesalers, retailers, and final customers.[204] Article 101(3) TFEU also asserts that the evaluation made under Article 101(3) should be made within the confines of each relevant market. At the first sight, one might assume that this description omits the connection of customers outside the related market. What is missing is whether the benefits emerging from sustainability initiatives are directed at the corresponding customers as the non-consumers. In the case of CECED discussed above, the Commission considered the 'collective environmental benefits', asserting that the environmental benefits emerging from the agreement would sufficiently provide customers with a fair share of the benefits even if no benefits accumulated to individual buyers of machines.[205] What can be understood from this case is that the overall influence on all markets can be taken into reckoning in the economic evaluation. This opinion is maintained by Vedder, who supports a broad definition of 'customers' as a broad consumer welfare standard. He states that the policy-linking clause in Article 11 TFEU supports the environmental benefits as a whole to be taken into account.[206] This interpretation of the second condition of Article 101(3) TFEU can be problematic for sustainability agreements as the efficiency gains of sustainability initiatives are expected to become visible in the future. Sustainable production of exhaustible resources suggests higher prices now but prevents the resources from becoming exhausted in the future. Therefore, the costs of sustainable production are imposed on consumers today, whereas the benefits of this sustainable production occur on consumers tomorrow. Benefits of sustainability agreements may be more challenging to integrate into the narrow interpretation of Article 101 (3) TFEU.[207] This could imply that the consumers that are hurt by sustainability initiatives are not the same consumers as the consumers that benefit. In some cases, a certain period may be required before

[203] W.M.G Swelsen, 'Sustainability and Article 101 TFEU an Economic Approach' (LLM, Tilburg University 2012).
[204] Julian Nowag, *Environmental Integration in Competition and Free-Movement Laws* (Oxford University Press 2017) 216.
[205] Commission Decision of 24 January 1999 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement [2000] OJ L 187.
[206] Anna Gerbrandy and Ruther Claassen, 'Rethinking European Competition Law: From a Consumer Welfare to a Capability Approach' (2016) 12(1) Utrecht Law Review 1.
[207] Unilever, 'Sustainability Cooperations Between Competitors & Art. 101 TFEU' (2020).

the efficiencies materialize. The more the time interval, the more comprehensive must be the effectiveness to neutralize also for the loss to customers throughout the period.[208]

4.2.3. Indispensability

The requirement in Article 101(3) that the limitations in an agreement should be no more limiting than is an explanation of the proportionality principle in EU law. The agreement should be indispensable and that the limitations imposed by the agreement should be indispensable for the achievement of the purposes of the agreement.[209] The indispensability test is applied to an environmental agreement in the same method as to any other type of prohibitory agreement. Many environmental agreements have failed to satisfy this standard since even though the environmental objective was genuine, the agreement's provisions were found disproportionately prohibitive. It is unlikely that hardcore restrictions are considered indispensable. The condition also encourages consideration of less prohibitive methods of achieving sustainability goals.[210] This means that not only the collective features of the agreement should be required but also the constraints of competition in the agreement must be necessary to accomplish the purposes of the agreement. Moreover, it is true to say that customers recognize sustainability to be a component of the quality condition of a product in question. Therefore, a further sustainable product presents a competitive advantage to businesses if customers are willing to spend a mark-up on the costs.[211] Thus, joint action may be indispensable where willingness-to-pay examinations cannot obtain awareness of the sustainability of production. Further, most of the sustainability initiatives proposed by firms involve the cooperation of the entire sector. Firms may have incentives to overestimate the beneficial effects, the necessity of the agreement, and the restrictions of competition that follow from the agreement. Competition authorities may not be in the best position to evaluate the indispensability of the agreement and the restrictions of competition that flow from the agreement as they may lack the expertise to do so.[212] So, competition authorities face the risk of blocking agreements for the wrong reasons and jeopardizing their independent position.

[208] Victor Sand Holmberg, 'EU Competition Law And Environmental Protection – Integrate Or Isolate?' (LAGM01, Lund University 2014).
[209] The Netherlands Authority for Consumers & Markets, 'Vision Document Competition & Sustainability' [2014].
[210] Victor Sand Holmberg, 'EU Competition Law And Environmental Protection – Integrate Or Isolate?' (LAGM01, Lund University 2014).
[211] Unilever, 'Sustainability Cooperations Between Competitors & Art. 101 TFEU' (2020).
[212] Victor Sand Holmberg, 'EU Competition Law And Environmental Protection – Integrate Or Isolate?' (LAGM01, Lund University 2014).

4.2.4. No Elimination of Competition

The fourth condition of Article 101(3) TFEU argues that an adequate level of competition should prevail. This condition is designed to assure that active competition continues in the market in question.[213] Whether or not this requirement is satisfied depends on the market circumstances before and after the agreement and on the conditions of the agreement. Yet overall, sustainability agreements should not point to the elimination of competition through product differentiation, technological innovation, or market entry.[214] Although a lot of the sustainability initiatives imply cooperation of the entire sector this does not necessarily mean that competition is restricted. Undertakings which solely embrace a poor part of the related market are unable to eliminate competition. And even broader undertakings with more than a negligible influence on costs and price do not eliminate competition provided that the combination does not completely settle retail prices.[215] The reason why such an agreement is unlikely to restrict competition lies in the fact that the agreement merely reduces competition on the part of the production costs relating to the residual production elements. Therefore, the firms can remain to compete on the rest of the costs or prices. In other words, they should be totally free to compete in every other parameter of competition. Any agreement to reach sustainability goals should be rigidly narrowed to that which is essential for those goals, and shields must be placed to guarantee agreement does not spill over into remaining processes. Some scholars say that eliminating competition can even put innovation enterprises at risk, which can ruin the advancement of environmentally more reliable technology in the long run.[216]

4.3. The Standardisation Approach

Unlike the 2001 Horizontal Guidelines, the concept of sustainability agreement was included in the 2010 Horizontal Cooperation Guidelines as standardization agreements. The chief goal of standardization agreements is the regulation of current or forthcoming products, quality conditions to which production processes can comply. These agreements: the standardization of specific products may include several subjects like technical stipulations.[217] Such a regulation would exclude the prohibitions of the cartels. Since the Commission has envisaged this application to

[213] Victor Sand Holmberg, 'EU Competition Law And Environmental Protection – Integrate Or Isolate?' (LAGM01, Lund University 2014).
[214] Unilever, 'Sustainability Cooperations Between Competitors & Art. 101 TFEU' (2020).
[215] Unilever, 'Sustainability Cooperations Between Competitors & Art. 101 TFEU' (2020).
[216] Victor Sand Holmberg, 'EU Competition Law And Environmental Protection – Integrate Or Isolate?' (LAGM01, Lund University 2014).
[217] Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings [2004] *OJ C 31/03.*

constitute an exception to Article 101 (3).[218] Thus, these agreements will fall outside the scope of Article 101 TFEU. Besides, there are cost advantages and these benefits are expected to be carried on to customers. Thus, it is possible to still have sufficient competition. Additionally, standards can maintain and improve quality, provide information, and ensure interoperability and compliance. In its Guidelines, the Commission proposes the example of standardized product packaging from an environmental point of view encouraging the usage of standardized packaging that can be reused many times by crates, trolleys or bottles.[219] Even the conclusion of the Dutch Authority for Consumers and Markets in the 'Chicken of Tomorrow' case suggested that the case could have been settled otherwise if the parties composed as standardisation agreement under the Horizontal Guidance in Article 101.[220] Once the standard is utilized, it is permissible to enter and withdraw the standard.[221] On 21 August 2020, the UK Competition and Markets Authority (CMA), issued guidelines on standardization processes in accordance with the conditions of the British Standards Institution (BSI). CMA concludes that standards encourage many government policies such as competitiveness, fair trading, protection of consumer interests, the environment and sustainability regulatory compliance. Furthermore, it will provide productivity since it can boost productivity by enhancing processes and it can decrease cost by reducing waste and the time wasted on trial and error.[222]

5. A New Approach for Sustainability Agreement

Increasing sustainability concerns have not only been found in theoretical discussions, but they are also now found in practice. As a fruit of theoretical debates, a sustainability movement internalized by competition law surrounds the world. Paris, We-are-Competition conference 'Competition Law and Sustainability Conference 2019' and Brussels conference 'Sustainability and Competition Policy: Bridging two Worlds to Enable a Fairer Economy', have pointed that there is a debate concerning EU competition law's inadequacy to address sustainability.[223] As another example under the project of Greening the European Union, the European Union and member states

[218] Julian Nowag, 'Competition Law's Sustainability Gap? Tools for an Examination and a Brief Overview' [2019] Lund University Legal Research Paper Series 3.
[219] The Netherlands Authority for Consumers & Markets, 'The assessment of anticompetitive practices as a result of sustainability initiatives in practice' [2013].
[220] Tomaso Ferrando, 'Addressing the Broken Links' [2019] EU Competition Law and Sustainability in Food Systems 1.
[221] Giorgio Monti and Jotte Mulder, 'Escaping the clutches of EU competition law: pathways to assess private sustainability initiatives' (2017) 42 European Law Review 635.
[222] UK Office for Product Safety and Standards and Department for Business, Energy & Industrial Strategy, 'Standardisation' [2020].
[223] Julian Nowag, 'Competition Law's Sustainability Gap? Tools for an Examination and a Brief Overview' [2019] Lund University Legal Research Paper Series 3.

provided EUR 9.5 billion in grants and loans to support climate change action in developing countries in 2013. However, it does not seem to follow the same environmental approach when it comes to its internal policies.[224] The fact that companies and open markets take steps towards sustainability agreements to meet these objectives causes countries to have economic concerns within the scope of the consumer welfare standard and to prohibit these initiatives. As explained at the beginning of the article, the grounds for this shortcoming in domestic law stem from the adoption of a narrow consumer welfare standard. (See; See; 2.1 Advantages of Broad Consumer Welfare) Nevertheless, it is observed that some countries have made a change in regulation on this issue recently. In this section, the attitude of the Netherlands, which is the pioneer of these new domestic law regulations, is examined.

5.1. Revised Draft Guidelines in the light of Tomorrow's Chicken

If both businesses are willing to collaborate, sometimes necessarily so since the first-mover disadvantage, but authorities put such market-led enterprises in a challenging situation. In the Netherlands, in a group of cases, numerous sustainability agreements have been carried by the competition authority to be anticompetitive.[225] In 2013, chicken suppliers and retailers engaged in a settlement under which they agreed to enhance the living conditions of broilers bought by supermarkets. Regulations involve the entire replacement of constantly offered chicken meat with a further sustainable one from 2020. The parties even agreed on the slower growth of chickens and the maintenance conditions of the chickens in the barn. This undertaking was deemed against Article 101 (1) TFEU by ACM.[226] This topic is important for the consumer welfare standard discussed at the beginning of the article. For this purpose, the willingness of the customers regarding animal welfare standards had to be sought. The analysis showed that consumers were willing to pay an extra 0.82 per kilo for these various benefits.[227] As can be understood from here, consumers are willing to pay extra for certain sustainability measures. If willingness to pay surpasses the costs, it can be said that customers will not be worse off, but will rather benefit from the agreement by filling the second condition under Article 101 (3) TFEU.[228] Besides, studies are

[224] Kevin Coates and Dirk Middelschulte, 'Getting Consumer Welfare Right: The Competition Law Implications Of Market-Driven Sustainability Initiatives' [2019] European Competition Journal 320.
[225] Anna Gerbrandy, Willem Janssen, Lyndsey Thomsin, 'Shaping the Social Market Economy After the Lisbon Treaty: How 'Social' is Public Economic Law?' (2019) 15(2) Utrecht Law Review 32.
[226] Sophie van der Velden, 'The application of EU competition law to Dutch private sustainability initiatives' (LLM, Tilburg University 2018).
[227] Jacqueline M. Bos, Henk van den Belt and Peter H. Feindt, 'Animal welfare, consumer welfare, and competition law: The Dutch debate on the Chicken of Tomorrow' (2018) 8 Animal Frontiers 20.
[228] Veronika Merjavá, 'Competition v. environment under the EU cartel prohibition: How green is the grass on the European Union's front yard?' (VSEHRD) <https://www.vsehrd.cz/clanek/competition-v-environment-under-the-eu-cartel-prohibition-how-green-is-the-grass-on-the-european-union-s-front-yard_3447c2f9-44f8-4490-9764-68feba8c3c44> accessed 10 October 2020.

also surveying consumers' willingness to pay for more sustainable products to quantify the value that customers connect to objectives for which there is no straight market price.[229] But; the ACM found that the initial criteria of Article 101 (3) TFEU were not met because benefits did not outweigh costs. It considered the supermarkets' agreement to withdraw regular broiler meat from shelves as a restriction of competition and decided that although customers planned to spend more for sustainable broiler meat, they would not benefit.[230] At this point, ACM's assessment was criticized. In particular, ACM interprets the event from the perspective of narrow welfare standards; has ignored animal standards.[231] In May 2014 the ACM published its vision document regarding how sustainability initiatives are examined against competition regulations.[232] This provides companies with the means to be able to evaluate for themselves whether or not a proposed collaboration concerning sustainability is permitted under the competition rules. To provide even more insight the ACM has displayed an analysis of the so-called Chicken of Tomorrow.[233] However, the reactions from society have been very much that the administration sought to obtain different resolutions. So, the legislative scheme has been drafted which would provide companies with the possibilities to propose to the appropriate ministries.[234] The Revised Draft Guidelines identify different kinds of sustainability agreements and are directed at providing businesses adequate compensation in composing their sustainability agreements.[235]

5.1.1. Sustainability Agreements Without Restrictions of Competition

Sustainability agreements that scarcely influence the competition will not fall under the cartel prohibition displayed by Article 101 TFEU and its Dutch equivalent. These sustainability agreements may merely affect the essential parameters of the competition.[236] To demonstrate, sustainability agreements are made so that they do not affect the price of the product or service.

[229] Murco Mijnlieff, 'Notitie ACM over sluiting 5 kolencentrales in SER Energieakkoord' (Auteriteit Consument & Markt) <https://www.acm.nl/nl/publicaties/publicatie/12033/Notitie-ACM> accessed 10 October 2020.
[230] Maarten Pieter Schinkel and Yossi Spiegel, 'Can collusion promote sustainable consumption and production?' (2017) 53 International Journal of Industrial Organization 371.
[231] Henk Verhoog, 'The Concept of Intrinsic Value and Transgenic Animals' [1992] ITB 148.
[232] The Netherlands Authority for Consumers & Markets, 'Vision Document Competition & Sustainability' [2014].
[233] The Netherlands Authority for Consumers & Markets, 'ACM's analysis of the sustainability arrangements concerning the 'Chicken of Tomorrow" [2014].
[234] Anna Gerbrandy, Willem Janssen, Lyndsey Thomsin, 'Shaping the Social Market Economy After the Lisbon Treaty: How 'Social' is Public Economic Law?' (2019) 15(2) Utrecht Law Review 32.
[235] Tomaso Ferrando, 'Addressing the Broken Links' [2019] EU Competition Law and Sustainability in Food Systems 1.
[236] Salomé Cisnal De Ugarte, 'Competition Law and Sustainable Growth: The Dutch Competition Authority consults on guidelines that pave the way for more flexibility in the field' [2020] Hogan Lovells 1.

Preferentially, they may not affect the geographical availability of products as well. The Guidelines of the ACM contributes illustrations of such sustainability agreements:[237]

- Codes of conduct for environmentally market behaviour (e.g., certification labels);
- Agreements intended at enhancing the quality of products by no longer selling the less sustainably produced products;
- Undertakings creating new markets and need a joint initiative to satisfy the know-how or the production scale.
- Agreements to assure compliance with legislation in the whole supply chain through noncompetitively sensitive information is shared. (e.g., a ban on illegal logging)

5.1.2. Sustainability Agreements That Balance the Limitation of Competition

Sustainability agreements that restrict competition, but form sustainability efficiencies may be allowed by the ACM. This evaluation requires to complete the four conditions of Article 101(3) TFEU and its Dutch equivalent:[238]

(i) the agreements propose sustainability interests;

(ii) the consumers are allowed a fair share of those interests;

(iii) the restraint of competition is needed to achieve the benefits and does not go beyond what is required, also

(iv) competition is not reduced along with a substantial part of the products.

The most thrilling component of this draft guidelines is that sustainability interests are not assessed through narrow consumer welfare. Consequently, for this proposal, sustainability interests that are significant for future consumers are also considered even if it causes a price increase.[239] Hence, it can be observed that ACM provides a broad consumer welfare standard. (See; 2.1 Advantages of Broad Consumer Welfare) They are correlated with a decline in negative externalities, being the circumstances that do not influence firms but creates costs for the whole society.[240] However, through agreements aimed at reducing the effects of unsustainable products, the issue of compensation for those who suffer from loss of competition due to the use of the products in

[237] Salomé Cisnal De Ugarte, 'Competition Law and Sustainable Growth: The Dutch Competition Authority consults on guidelines that pave the way for more flexibility in the field' [2020] Hogan Lovells 1.
[238] Salomé Cisnal De Ugarte, 'Competition Law and Sustainable Growth: The Dutch Competition Authority consults on guidelines that pave the way for more flexibility in the field' [2020] Hogan Lovells 1.
[239] The Netherlands Authority for Consumers & Markets, 'Guidelines: Sustainability agreements Opportunities within competition law' [2020].
[240] Edmon Oude Elferink, 'Dutch Authority for Consumers and Markets proposes bold guidelines on sustainability' (CMS, 21 July 2020) <https://cms.law/en/nld/publication/dutch-authority-for-consumers-and-markets-proposes-bold-guidelines-on-sustainability> accessed 7 September 2020.

question may arise. According to the European Commission, users should be compensated for any harm provoked by the restraint of competition.[241] For example, with the expenses made to ensure sustainability, the price of the product or service can be expected to increase. Still, sustainability objectives will outweigh in these cases. In these cases, the legal basis of the non-economic interests can be supported by economics as appropriate. The monetary term 'environmental prices' indicates the harm of pollution and greenhouse gas emissions as a result of non-environmental undertakings.[242] This means that costs to society that are limited by the agreements may be incorporated in the investigation. Yet, in the inadequacy of numerical data, the proof will sometimes have to remain qualitative. At this point, The Revised Draft Guidelines declares that if the participants have a joined market share of less than 30% or the disadvantages of the agreement do not outweigh the benefits, the effects of the sustainability agreement need not be measured in a quantitative sense.[243] Overall, this means that if a sustainability agreement points to quality growth, but also requires a price increase, the related consumers will have to assign enough importance to those quality growths to compensate for the price increase.[244] To determine the consumers' given importance in sustainability initiatives the method of 'willingness to pay' can be used. The value that customers assign to these sustainability initiatives is converted into a degree of willingness to pay.[245] At this point, how much value customers will attribute to which sustainability initiative will be determined according to the type of initiative.

5.1.3. ACM's Policy on the Assessment of Sustainability Agreements

The ACM aims to start a dialogue with firms and to get solutions for the achievement of sustainability goals.[246] Therefore, companies are required to self-assess whether the agreements that they form are harmonious with the cartel prohibition. If undertakings are doubtful regarding the reliability of their self-assessments, they are called to communicate ACM at an early stage.

[241] Edmon Oude Elferink, 'Dutch Authority for Consumers and Markets proposes bold guidelines on sustainability' (CMS, 21 July 2020) <https://cms.law/en/nld/publication/dutch-authority-for-consumers-and-markets-proposes-bold-guidelines-on-sustainability> accessed 7 September 2020.
[242] Edmon Oude Elferink, 'Dutch Authority for Consumers and Markets proposes bold guidelines on sustainability' (CMS, 21 July 2020) <https://cms.law/en/nld/publication/dutch-authority-for-consumers-and-markets-proposes-bold-guidelines-on-sustainability> accessed 7 September 2020.
[243] Salomé Cisnal De Ugarte, 'Competition Law and Sustainable Growth: The Dutch Competition Authority consults on guidelines that pave the way for more flexibility in the field' [2020] Hogan Lovells 1.
[244] Edmon Oude Elferink, 'Dutch Authority for Consumers and Markets proposes bold guidelines on sustainability' (CMS, 21 July 2020). <https://cms.law/en/nld/publication/dutch-authority-for-consumers-and-markets-proposes-bold-guidelines-on-sustainability> accessed 7 September 2020.
[245] The Netherlands Authority for Consumers & Markets, 'ACM's analysis of the sustainability arrangements concerning the 'Chicken of Tomorrow" [2014].
[246] Elske Raedts, 'ACM Guidelines on competition law and sustainability, a new dawn for sustainability agreements' [2020] Regulating for Globalization 1.

ACM will then indicate what concerns it may have, and it will help find possible solutions.[247] So, ACM is voluntary to guide these companies from the beginning and encourages companies to be in touch. Additionally, the ACM does not choose strict measures like fines where companies have followed the Guidelines in good faith publicly, or the ACM has contributed previous guidance.[248] Rather than discouraging, the ACM is supporting the initiatives of sustainability. For publicly declared sustainability agreements that are not permitted, an adjustment can be made with the consultation or after interference by the ACM.[249] Nonetheless, these opportunities of the cartel prohibition do not apply to other sustainability agreements (e.g. animal welfare) or to non-environmentalist agreements that have benefits exceeding the standards obliging upon the administration.[250]

6. Conclusion

Competition and antitrust policies have frequently been considered to be a bar for rivals towards achieving sustainability purposes. Nonetheless, this position seems to be developing. Companies among industries are putting attempts to reach sustainable enterprises. Yet, the European Commission has adopted the narrow sense of consumer welfare standard in its competition and antitrust policy. Consequently, the economic capability has enhanced the supreme purpose of EU competition and antitrust policy, and also non-economic interests are not compromised while evaluating anti-competitive enterprises. Consequently, broad consumer welfare standards should be taken into account and this new manner is essential for the permissibility of sustainability agreements under the scope of Article 101 TFEU. To reach these enterprises, companies are required to cooperate. Within the new consumer welfare standards and environmental integration, Article 101 TFEU requires transparency within the scope of sustainability agreements. If this is managed, unlike the Chicken of Tomorrow Case, businesses can enter sustainable corporations without getting trapped under the prohibition of the cartel. Therefore, to accommodate the demand for additional supervision, the Netherlands ACM announced its Draft Guidelines on 9 July 2020 and Revised Draft Guidelines on 16 January 2021. Henceforth, the ACM offers a way for the European Commission for evaluating the compatibility of sustainability enterprises with

[247] The Netherlands Authority for Consumers & Markets, 'Guidelines: Sustainability agreements Opportunities within competition law' [2020].
[248] The Netherlands Authority for Consumers & Markets, 'Guidelines: Sustainability agreements Opportunities within competition law' [2020].
[249] Salomé Cisnal De Ugarte, 'Competition Law and Sustainable Growth: The Dutch Competition Authority consults on guidelines that pave the way for more flexibility in the field' [2020] Hogan Lovells 1.
[250] Elske Raedts, 'ACM Guidelines on competition law and sustainability, a new dawn for sustainability agreements' [2020] Regulating for Globalization 1.

competition law. Thus, there is a sustainability gap within competition law, whether it be Horizontal Guidance or the environmental integration principle for sustainability purposes. Especially the recent conferences and the bills of various countries point out this deficiency.[251] In this case, the guidance of the Netherlands for sustainability agreements will be an example to both the European Union and other countries.

After the ACM published the Draft Sustainability Guidelines, it is possible to say that the expected developments took place. In particular, 'A European Green Deal' mobility has gained momentum. In this sense, with the Green Deal movement, the European Union has actually gone to renew its policies for a sustainable economy. To ensure sustainability, the European Union is pursuing a new growth strategy that will transform it into a modern, resource-efficient and competitive economy by 2050. In fact, the EU with its Just Transition Mechanism, will also provide financial support and technical assistance to help those most affected by the transition to a green economy.[252] In addition, The Greek Competition Authority (HCC) has published a public consultation on how competition law rules might be modified to encourage more further sustainable initiatives. The HCC announced a Staff Discussion Paper and carried a digital conference to begin the consultation process. The enterprise comprises a sustainability sandbox through competition law in which competitors can collaborate to operate upon sustainable initiatives.[253] Furthermore, the 14th Annual Competition Law, Economics and Policy Conference in November 2020, rigorous and transparent and safeguards the sustainability and competitiveness of the fishing industry are discussed.[254] As can be understood from all of these, it is possible to say that the nations have entered a new era with this pioneering movement of the Netherlands and that sustainability objectives will push the effort to create new policies, especially concerning competition.

[251] European Commission, Reflection Paper Towards a Sustainable Europe by 2030 [2019], Commission Report 26.
[252] Hertwich, E., Lifset, R., Pauliuk, S., Heeren, N., Resource Efficiency and Climate Change: Material Efficiency Strategies for a Low-Carbon Future. [2020] IRPReports.
[253] Directorate for Financial and Enterprise Affairs Competition Committee, Sustainability and Competition – Note by Greece. [2020] OECD.
[254] Thando Vilakazi and Stefano Ponte, The Political Economy of Competition, Regulation and Transformation, [2020] A CCRED and CBDS Working Paper, 22.

THE MEETING POINT OF THE COMPETITION LAW AND THE INTELLECTUAL PROPERTY LAW: STANDARD-ESSENTIAL PATENTS (SEPs)

İrem EROĞLU*

Abstract

As a necessity to maintain a balanced and fair environment in the market, standard-essential patents (SEP) have become an important concept being related to both Competition Law and Intellectual Property Law. In order to reflect the role and development of SEPs on a worldwide basis, this article will explain the main goal and insights of these patents, including details from significant cases around Europe.

Licensing of SEPs is the key point in the implementation of the aforementioned purpose of constructing an even and just market since it has been set as a mandatory regulation for the patent holders to license their standard-essential patents. Nevertheless, such a regulation cannot be one-sided. Rather, there must be another side of the rule to equilibrate the benefits of the licensees and the users. That is why, FRAND terms and conditions have been set to limit the power of the patent holder to provide a fair, reasonable and non-discriminatory licensing.

The importance of SEPs has been realized and experienced worldwide because of numerous disputes and cases in which standard-essential patents and their licensing have a dominant role. The European Union decisions regarding standard-essential patents have become guiding by forming significant rules and frameworks about the abuse of dominant position prohibition and the acceptable way of patent licensing. Apart from the European Union, Korea has been the country where important issues and concerns about the application of standard-essential patents started to be discussed. On the other hand, an important decision on SEPs exists in Turkey as well, offering an insight to the other countries.

After analyzing relevant cases related to SEPS, it is clear that SEPs have taken a large part in the Competition Law and the Intellectual Property Law around Europe. It is also obvious that this

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concept will continue to develop, mostly through Court decisions, and become even more distinctive in guiding market economy.

1. Basic Concepts

1.1. Patent

Patent is the monopoly rights granted to the owner of the patent/utility model for a limited time and place to prevent unauthorized production, sale, use or import of the invention by third parties.[255] According to the Turkish Industrial Property Law, a patent is granted for 20 years which starts from the date of the patent application is filed and it is not lawfully permitted to extend this term of protection.[256] Patents are valid only in the borders of the countries from which they are obtained. In Turkey, the authority to consult to obtain patent protection is the Turkish Patent and Trademark Office.

An invention can obtain patent protection only if it matches the patentability requirements. Patentability requirements consist of three basic criteria:

a. The invention must be new.

This means that the invention did not exist worldwide before and have not been demonstrated by means of written or oral presentation anywhere in the world before the application date[257].

b. The invention must involve an 'inventive step'.

It means that the invention is not obviously inferred from the state of the art by a person skilled in the relevant technical field.

c. The invention must be 'susceptible of industrial application'.

It means that the invention can be produced, applied or used in any branch of industry, including agriculture.[258]

1.2. Standards

According to the definition of the International Organization for Standardization, a standard is

[255]Turkish Patent and Trademark Office, 'Patent-Faydalı Model Başvuru Kılavuzu', *Turk Patent*, <https://www.turkpatent.gov.tr/TURKPATENT/resources/temp/522B990B-E529-4378-8287-66E77494B4FA.pdf> accessed 13 August 2020.

[256] See Turkish Industrial Property Law-No 6769 (2016), Article 101.

[257]Çağrı Tosun, 'Patentlerin Standard Haline Gelme Süreci ve Standart için Zorunlu Patentler', (Dissertation, Turkish Patent and Trademark Office Department of Patent Office, Ankara 2019), 3-4.

[258]Turkish Patent and Trademark Office, 'Patent-Faydalı Model Başvuru Kılavuzu', <https://www.turkpatent.gov.tr/TURKPATENT/resources/temp/522B990B-E529-4378-8287-66E77494B4FA.pdf> accessed 13 August 2020.

> *'a document established by a consensus of subject matter experts and approved by a recognized body that provides guidance on the design, use or performance of materials, products, processes, services, systems, or persons'.* [259]

A standard basically refers to technologies which are protected by patents.[260] It is a regulation which is approved by a recognized organization. Standards aim to establish an order at the most appropriate level under current conditions and are necessary for common and recurring uses of an invention. They specify one or more of the characteristics of the product, processing and production methods, related terminology, symbol, packaging, marking, labelling and conformity assessment procedures.[261] Therefore, it is reasonable to argue that standards came out as a result of human needs and exist for the purpose of obtaining an order mostly in the field of economy.

Standards are mostly set by standard-setting organizations (SSOs). One of the most popular organizations in this area is the European Telecommunications Standards Institute (ETSI). ETSI has a big role in setting standards because it alone has set thousands of standards up to the present.[262] According to ETSI, standards are useful and beneficial in many aspects.

a. Safety and Reliability

One of the benefits standards provide is safety and reliability. Building trust raises the confidence of the users and therefore, sales increase as a result of feeling safe to use new technologies.

b. Support of Government Policies and Legislation

Lawmakers frequently refer to standards to protect consumers and industries, and to support government policies. Standards play an important role in the market policies of states.

c. Interoperability

The interoperability of the devices is based on products and services that comply with the standards[263]. Interoperability basically means having the ability to work together.

d. Business Benefits

Standards are important in terms of developing new technologies. On the other hand, standardization has a great impact on improving existing practices.

e. Consumer Choice

A wide variety of products are offered to consumers with mass production based on standards.

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[259] Ankita Tyagi and Sheetal Chopra, 'Standard-Essential Patents (SEP's) - Issues & Challenges in Developing Economies.', *Journal of Intellectual Property Rights*, (2017): 123.

[260] The Competition Directorate General of the European, 'Standard-Essential Patents'*, Competition Policy Brief*, (2014): 2.

[261] See the Law Relating to the Preparation and Implementation of the Technical Legislation on The Products-No 4703 (2001), Article 3.

[262] The Competition Directorate General of the European, 'Standard-Essential Patents', 2.

[263]The European Telecommunications Standards Institute, 'Why Standards', *ETSI*, <https://www.etsi.org/standards/why-standards?jjj=1597842796587> accessed 16 August 2020.

Standards are beneficial for both producers and consumers. The useful nature of standards can be conveyed in many other ways as well. For instance, standards help the production to be carried on according to a certain plan and thus, ensure that production is kept under control. Additionally, standards enable high quality and mass production because they determine the duty of each unit at every stage of production. They reduce the costs and provide safety of life and property.[264] As seen, the benefits and goals of standards can be varied to different branches. That is why, standards have a great importance in production and economic sectors.

2. Standard Essential Patents (SEPS)

2.1. What are SEPs?

A standard-essential patent is a patent which provides protection to a technology essential to a standard.[265] Some patents are compulsory for some standards to be applied and these mandatory patents are called standard-essential patents (SEPs).[266] In other words, a patent is a standard-essential patent if the implementation of the standard is not possible without the practice of the claims of a patent.[267] The European Commission exemplifies the standard-compliant products as smartphones and tablets. According to the Commission, these products are manufactured by using the technologies covered by one or more standard-essential patents.[268]

SEPs are agreed by standard-setting organizations. The basic steps can be listed as following:

1. A patent right is obtained or an application for a patent is made for a new technology.
2. This technology is set as a standard by the standard-setting organization, as a result of the discussion and cooperation of representatives of companies belonging to that sector, national or regional standard-setting organizations, engineers, managers and manufacturers.
3. The patent on this technology becomes a standard-essential patent.[269]

[264] Tosun, *'Patentlerin Standard Haline Gelme Süreci ve Standart için Zorunlu Patentler'*, 13.
[265] The Competition Directorate General of the European, 'Standard-Essential Patents', 2.
[266] Rajendra Kumar Bera, 'Standard-Essential Patents (SEPs) and 'fair, reasonable and non-discriminatory' (FRAND) licensing', (2015), 1.
[267] Tyagi and Chopra, 'Standard-Essential Patents (SEP's) - Issues & Challenges in Developing Economies.', 124.
[268] European Commission, 'Antitrust Decisions on standard essential patents (SEPs) - Motorola Mobility and Samsung Electronics - Frequently Asked Questions', *European Commission,* <https://ec.europa.eu/commission/presscorner/detail/en/MEMO_14_322> accessed 17 July 2020
[269] Tosun, *'Patentlerin Standard Haline Gelme Süreci ve Standart için Zorunlu Patentler'*, 48.

2.2. Examples of Standard-Essential Patents:

Many standards are used in everyday life without the users' notice. It is because standards exist to make life easier by maintaining order in production and consumption.

An example that can be given to standard-essential patents is Universal Serial Bus (USB) technology. USB technology is a form of connection that enables a computer to communicate with external hardware that was developed by Intel in 1996. The mentioned technology was standardized in 2000 and its patent number is CA2202517. It is known that there are currently an estimated 10 billion USB compatible products on the market worldwide. This number is rapidly increasing due to the millions of productions every year. The products manufactured according to the standard prepared in 2000 are produced on a single patent. In other words, the patent numbered CA2202517 is a standard-essential patent.[270]

Another example of standard-essential patents is the 2G-3G-4G-5G technologies. These technologies are patented and have been declared essential to the GSM. They are set as standard-essential patents by ETSI.[271] As a result, these standards of GSM mobile communication technology are needed to be implemented in all smartphones and tablets which are sold in Europe. In addition, even though GSM was envisaged only for Europe, it is seen that these technologies deployed as a solution worldwide. Thus, GSM mobile communication technology became a significant SEP which allows communicating all around the world due to standardization.[272]

2.3. Competition Law Issues in the Context of Standard-Essential Patents

Standardization occurs when undertakings which compete on the same market come to an agreement. Standard-essential patents allow their holders to have a significant market power.[273] It is because a patent *de facto* gains more market power when it becomes a SEP by being linked to a standard. Gaining a significant market power might be problematic in the condition of the patentee's misuse since it might harm the competitive environment in market economy.[274]

The misuse of enhanced market power which may cause some damages in the competition in market economy can be explained with the SEP holder companies' potential anti-competitive behaviour. Such behaviour might be exemplified as requesting unfair and unaffordable amounts of

[270] Tosun, *'Patentlerin Standard Haline Gelme Süreci ve Standart için Zorunlu Patentler'*, 51.
[271] Alison Jones, 'Standard-Essential Patents: FRAND Commitments, Injunctions and the Smartphone Wars.', *European Competition Journal*, (2014): 5.
[272]The European Telecommunications Standards Institute, 'Why Standards', <https://www.etsi.org/standards/why-standards?jjj=1597842796587>. accessed 30 December 2020
[273] European Commission, 'Antitrust Decisions on standard essential patents (SEPs) - Motorola Mobility and Samsung Electronics - Frequently Asked Questions', <https://ec.europa.eu/commission/presscorner/detail/en/MEMO_14_322>. accessed 30 December 2020
[274] Bera, 'Standard-EssentialPatents (SEPs) and 'fair, reasonableandnon-discriminatory' (FRAND) licensing', 6.

royalty fees or excluding competitors from the market by 'holding up' users following the implementation of the standard.[275]

The competition issues and concerns about the application of standard-essential patents in market economy bring the need for a regulation in licensing processes which prevents the misuse of market power by the SEP holders. Such a regulation is implemented as FRAND terms which are designed to provide a more controlled order in competitive market environment.

2.4. FRAND Licensing Terms and Conditions

The patent owner has the right to make a company use its invention under its own control or to prevent unauthorized use of its invention. This right might cause some problematic results since standards include patented technologies. The reason for the problems that may arise from patentee's particular right is that it is obligatory to use the invention for a company who wants to implement standards. Because of this obligatory situation, the patent owner has a great deal of power in requesting a license fee from the user of the invention.[276] Hence, FRAND commitments exist for the purpose of limiting the power of the SEP owner to maintain justice and order in economy.

The ultimate goal of FRAND terms is to ensure that the technologies under intellectual property rights (IPRs) protection which are patented and standardized can be accessed by the users of that standard. While using the standard, FRAND commitments prevent the patent owner who is the IP right holder from causing difficulties such as refusing to license or requesting unfair, unreasonable or discriminatory fees from the implementer of the standard.[277]

FRAND terms basically assure standard-essential patents. FRAND stands for fair, reasonable and non-discriminatory licensing terms and conditions. Standards Developing Organization (SDO) is the creator of FRAND commitments. The purpose of SDO is to prohibit technology to get 'locked up' so that consumers can benefit from the standards and the inventions.[278] According to the FRAND licensing terms, SEP owners are required to license their patents under fair, reasonable and non-discriminatory conditions because otherwise, competition and regulatory agencies take punitive action against any licensing which violates FRAND commitments.[279]

FRAND licensing terms are voluntary declarations signed by the patent holder. In other words, this is not a legal regulation, but a voluntary agreement between standard-setting organizations and

[275] The Competition Directorate General of the European, 'Standard-Essential Patents', 3.
[276] Tosun, *'Patentlerin Standard Haline Gelme Süreci ve Standart için Zorunlu Patentler'*, 58.
[277] Gönenç Gürkaynak, 'Standard-Essential Patents in Turkey', *Lexology*, <https://www.lexology.com/library/detail.aspx?g=8321aa64-ba06-4739-8fae-fa05133aae6c> accessed 20 August 2020.
[278] Tyagi and Chopra, 'Standard-Essential Patents (SEP's) - Issues & Challenges in Developing Economies.', 124.
[279] Bera, 'Standard-EssentialPatents (SEPs) and 'fair, reasonableandnon-discriminatory' (FRAND) licensing', 1.

SEP holders. The purpose of the SEP owner is to make its standard-essential patents accessible to everyone on FRAND commitments.[280]

2.4.1. Fair

Fair in FRAND terms stands for the licensing terms in legal and competitive conditions in the market. For a licensing to be fair, it needs to be competitive and should not involve imposition.[281] The competition in the market is expected to be fair and free which expresses the need for granting license to a third party without the SEP holder's opportunistic behaviour.[282] Thus, any licensing based on the opportunistic behaviour of the patentee is said to be unfair.

It appears to be easier to specify unfair terms than fair. It is because fairness is a subjective concept which is more difficult to define. For instance, requesting to obtain a free patent in return for licensing is an unfair condition for a competitive market. Additionally, requesting privileges from the licensee outside of the license agreement can be cited as another example of an unfair term that contradicts with the goal of FRAND commitments.[283]

2.4.2. Reasonable

Reasonable conditions in licencing basically convey the requirement of the licence fees to be at a certain, acceptable and logical level. For the wage level to be acceptable and logical, the licence fees must be affordable for a company seeking a licence. Affordability points out the condition which is in favour of the licensee. However, reasonableness aims to favour both sides of the licence agreements. Hence, SEP owner's benefits are concerned by FRAND licensing terms and conditions as well. Thereupon the fee determined must be equitable for the SEP owner to be rewarded for its contribution to the technological development. Therefore, the fee should encourage the SEP holder to contribute to the standard and technology in the future.

2.4.3. Non-Discriminatory

FRAND commitments oblige the SEP owners to offer the same conditions to all licensees without any discrimination. The existence of this requirement relates to competition law in a way that offering an equal environment for all producers provides an equality in competition for the

[280] Tyagi and Chopra, 'Standard-Essential Patents (SEP's) - Issues & Challenges in Developing Economies.', 124.
[281] Mark A. Lemley and Carl Shapiro, 'A Simple Approach to Setting Reasonable Royalties for Standard-Essential Patents.' *Berkeley Technology Law Journal*, (2013): 1141.
[282] Jinyul Ju, 'Recent Developments in Korean Antirust Cases concerning FRAND-Encumbered Standard-Essential Patents', *Jindal Global Law Review*, (2017): 2.
[283] John Cassels, 'What is FRAND?', *fieldfisher,* < https://www.fieldfisher.com/en/insights/what-is-frand> accessed 22 August 2020.

companies competing in the same sector. Thanks to this regulation, producers in similar positions may be subject to the same licence fees.[284]

2.5. A Harmful Application of Standard Essential Patents: Patent Ambush

A 'patent ambush' refers to the dishonest and manipulative attitude of a company taking part in the standard-setting process. It is a patent ambush when such a company does not share the realistic information about the patents/patent applications they have over the standard being set. In other words, if a company intentionally hides the fact that it is the holder of essential IPRs over the standard being developed, a patent ambush occurs. In addition, a manipulative manner of the company which is done by manipulating the standard-setting process through asserting its essential Intellectual Property Rights (standard-essential patents) after the standard has been set is also required for a patent ambush. In this way, other companies become obliged to using that company's IPRs.

In regard of competition, a patent ambush appears as a harmful concept. It is because a patent ambush requires intentionally hiding significant information about the cost of one of the competing technologies which results in corrupting the competition between different technologies for incorporation into the standard. Consequently, it would be reasonable to say that such a situation might give the company which hides the important information about IPRs a great power over a standard. Gaining an unfair power harms competition since the gained control over a standard excludes potentially competing technologies from the market.[285]

2.6. Abuse of a Dominant Position

According to the European Court of Justice, a dominant position is a position of economic power which is strong enough to enable a firm to prevent competition among different firms on the relevant market. If a firm has a dominant position in the market, this means that the firm's power in the market is 'reasonably high'.[286]

Abuse of a dominant position/abuse of dominance is one of the fundamental prohibitions in the Competition Law. Article 102 of the EC Treaty might be highlighted as the main source which prohibits abuse of a dominant position in the market. Some exemplary situations have been given

[284] Tosun, *'Patentlerin Standard Haline Gelme Süreci ve Standart için Zorunlu Patentler'*, 59-61.

[285] European Commission, 'Antitrust: Commission accepts commitments from Rambus lowering memory chip royalty rates - frequently asked questions.', *European Commission*, <https://ec.europa.eu/commission/presscorner/detail/en/MEMO_09_544> accessed 23 August 2020

[286] Eric van Damme, Pierre Larouche, Wieland Müller, 'Abuse of a Dominant Position: Cases and Experiments', *TILEC Discussion Paper,* August 2006.

to abuse of a dominant position in Article 102. The listed situations of abuse of dominance in the Article are as follows:

> *'(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;*
> *(b) limiting production, markets or technical development to the prejudice of consumers;*
> *(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;*
> *(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according* to commercial usage, have no connection with the subject of such contracts.'[287]

It is important to note that the circumstances listed in Article 102 are not *numerus clausus* which means that there may be other acts of a firm which constitute abuse of a dominant position. When Article 102 is analysed, it might be argued that it is an abuse of dominance when a firm with the economic power in the relevant market makes competition difficult among different firms in the same market. Such an action can be performed by an undertaking only if it is dominant in a relevant market.

The existence of abuse of a dominant position is tested and inspected by the European Commission (EC). The EC decides if an undertaking is abusing its dominant position by examining whether it has a dominant position in the market and if so, whether that dominant position is abused by the undertaking. It would be reasonable to note that what the EC examines is abuse of dominance, not the holding of dominant position[288]. If the EC detects an abuse of dominance, the infringement of the undertaking has consequences such as financial penalty and/or directions to end the infringement. However, the financial penalty cannot be more than 10 percent of the worldwide turnover of an undertaking for an infringement of abuse of dominance embodied in Article 82.[289]

2.7. The European Union's Policy on Intellectual Property Rights

Today's economy is strongly shaped by intangible assets which can be exemplified as inventions, brands and software. The prices of intangible assets are set by companies with the help of intellectual property rights such as patents, trademarks, designs and copyright. Companies, undertakings and industries which effectively use intellectual properties become significantly

[287] European Union Consolidated Versions of The Treaty on European Union and of The Treaty Establishing The European Community, *Official Journal of the European Communities,* (2002/C 325/01).
[288] Office of Fair Trading, 'Abuse of a Dominant Position: Understanding Competition Law', *Competition Law Guideline,* (2004): 3.
[289] Office of Fair Trading, 'Abuse of a Dominant Position', 6.

powerful in today's economy and influence the conduct of the relevant market. On the other hand, intellectual property is important in terms of competition, since the number of intellectual property filings is increasing world-wide including the European Union and intellectual property is the key concept to compete globally.[290]

The European Union adopts a competitive attitude in terms of the global race for technological leadership. The importance of IP rules is underlined with the current Covid-19 pandemic which showed clearly that innovations and technologies have a great significance for the European Union's place in the competition and economy. That is why, it has been seen necessary to upgrade EU's framework on intellectual property to maintain a more intense competition environment by helping companies -mostly small and medium-sized companies (SMEs)- capitalize on their inventions and ensuring that these inventions serve to the economy. Thus, it is aimed by the EU to remain as a global leader by creating a suitable environment for European innovations to develop and serve to the society.

The European Commission published an Action Plan on November 25, 2020. The Action Plan of the European Union aims to enhance the IP system based on the weaknesses and the challenges in EU's framework. These five challenges can be listed as following:

i. 1. One of the five challenges is that the EU's intellectual property system is too fragmented, with overly complex and expensive procedures. It would be reasonable to say that European patents' validation procedures are too costly for the companies. For instance, the licensing of the standard-essential patents is too expensive for both the patent holders and the implementers which highlights the necessity for a clearer and more predictable IP framework.

ii. 2. The opportunities offered by the IP protection of the European Union are not fully used by numerous companies, mostly SMEs, in the industry. The reason of this weakness is detected by the recent research to be the lack of knowledge of the IP.

iii. 3. Access to IP is not facilitated enough by the EU. The tools to access intellectual property should have been more effectively developed for the companies to access and use IP protection more easily. The significance of innovations and technologies is realized especially after the Covid-19 pandemic which makes it necessary for the European Union to develop sufficient tools to access such innovations and technologies.

iv. 4. Some subversive exercises such as counterfeiting and piracy still take place in the industry. To prevent such actions, recoveries in the EU's framework are essential.

[290] European Commission, 'Making the most of the EU's innovative potential: An intellectual property action plan to support the EU's recovery and resilience', (2020).

v. 5. Fair play is lacking on global bases because of the non-EU countries' non-sufficient protection of IP with the purpose of harming EU companies. To avert such an exercise and create a fair environment in the industry, the European Union needs to use its power to become a global norm-setter. This can be possible by setting up some rules to prevent and fight abusive practices performed by the non-EU companies.[291]

The European Union came up with an action plan to overcome the explained challenges in the IP industry. The plan focuses on five main recoveries: improving the IP protection system, increasing the use of IP by companies (mostly SMEs), facilitating IP sharing, fighting subversive practices like counterfeiting and piracy and lastly, maintaining an environment of global fair play.[292] The aim was to help companies to benefit from their inventions at most level and also positively affect the economy and the society with their creations. Overall, the Action Plan of the EU was published to create a global competition (since recent developments show that intellectual property started to shape the economy worldwide) with most benefits in a fair and non-abusive environment.

3. Standard-Essential Patents on Global Bases

The application of SEPs is being discussed all around the world. It is seen those investigations and litigation involving SEPs have started to be a worldwide issue. A great number of competition authorities worldwide have expressed antitrust concerns about the SEP owners' manipulative and opportunistic behaviour which may damage fair and free competition in the market.[293] Lately, Korea and China have become prominent with their significant litigation processes on standard-essential patents.

3.1. The European Union Decisions

The concepts of standard-essential patents and licensing under FRAND terms are frequently discussed in European Union mostly through the rulings of The Court of Justice of the European Union. In this regard, some decisions given by the Court shaped the applications of standard-essential patents and patent licensing in Europe. Such decisions might be exemplified as the 'Orange Book Standard' defence, the Samsung and Motorola decision and Huawei v. ZTE decision.

[291] European Commission, 'Commission adopts Action Plan on Intellectual Property to strengthen EU's economic resilience and recovery', (2020).
[292] European Commission, 'Making the most of the EU's innovative potential: An intellectual property action plan to support the EU's recovery and resilience', (2020).
[293] Koren W. Wong-Ervin, 'Standard-Essential Patents: The International Landscape', *Intellectual Property Committee*, (2014): 4.

3.1.1. The 'Orange Book Standard' Defence

The Orange Book case was ruled by the German Federal Court of Justice which concerned a *de facto* standard for CD-Rs (Compact Disc-Recordable). In the case, the claimant was Philips, as the patent holder of the standard, which claimed the necessity for the CD-Rs to comply with the expressed requirements in a document called the Orange Book[294]. It was also claimed by Philips that in order to market CD-Rs, a license under the patent of Philips must be obtained. In this context, patent infringement actions were taken as well as the injunction and award of damages applications by Philips against the marketing manufacturers which did not obtain a license for the patent of CD-Rs[295]. Here, a claim of abusing dominant position was made by the defendants with the reasoning that Philips' seeking an injunction for its patent constituted a violation of Article 102 TFEU.

The claim of the defendant was analysed by the German Federal Court of Justice through setting out several steps that should be followed by potential licensees before raising a competition law defence against seeking an injunction by the patent holder. A competition law defence by a potential licensee is lawfully accepted if the potential licensee can prove that its offer to license the patent was unconditional and fair under such terms that the patent holder cannot refuse without any abuse of its dominant position[296]. Additionally, the defendant also needs to behave like a licensee which basically refers to behaving as if the license has already been given to the defendant. The Orange Book Standard is traditionally followed by German courts which resulted for the Courts to take a more favourable position towards the patent holders. It can be seen from the ruling in the Orange Book case that an alleged infringer may face injunctive relief, even if it is willing to obtain a license, unless it has acted in the same way as a licensee would, including paying royalties and complying with the other terms of a regular commercial license.[297]

[294] Simpson and Hidaka, 'The EU Court of Justice Judgment in Huawei v ZTE – important confirmation of practical steps to be taken by Standard Essential Patent holders before seeking injunctions', *Norton Rose Fulbright,* <https://www.nortonrosefulbright.com/en/knowledge/publications/8f90efbd/the-eu-court-of-justice-judgment-in-huawei-v-zte---important-confirmation-of-practical-steps-to-be-taken-by-standard-essential-patent-holders-before-seeking-injunctions> accessed on 17 October 2020.

[295] KZR 39/06, Orange-Book Standard, Judgment of 6 May 2009.

[296] Simpson and Hidaka, 'The EU Court of Justice Judgment in Huawei v ZTE – important confirmation of practical steps to be taken by Standard Essential Patent holders before seeking injunctions', *Norton Rose Fulbright,* <https://www.nortonrosefulbright.com/en/knowledge/publications/8f90efbd/the-eu-court-of-justice-judgment-in-huawei-v-zte---important-confirmation-of-practical-steps-to-be-taken-by-standard-essential-patent-holders-before-seeking-injunctions> accessed on 17 October 2020.

[297] Tsilikas, *'Huawei v. ZTE in Context – EU Competition Policyand Collaborative Standardization in WirelessTelecommunications,* 15.

3.1.2. Samsung and Motorola Decisions

Samsung and Motorola are two SEP-holders of mobile telecoms in the telecommunications sector. In the process of licensing their SEPs, while negotiating with Apple, both companies started patent infringement proceedings, particularly interim injunctions for their standard-essential patents, in German courts which resulted in European Commission to investigate whether Samsung and Motorola abused their dominant positions in the market. Here, the European Commission concluded that it is an abuse of dominant position when a patent holder seeks an injunction within the conditions that it has given a commitment to license its patent under FRAND terms and on the other hand, a potential licensee has a willing attitude to negotiate a license with the SEP holder.[298]

European Commission has given different decisions in Samsung and Motorola cases separately. In the Samsung case, the Commission did not adopt an infringement decision but rather decided to accept Samsung's commitments. The mentioned commitments involve not seeking injunctions for any of its current and future mobile device SEPs against potential licensees for 5 years in the condition that the SEP holder and any potential licensee agree on FRAND terms within the borders of a specific licensing framework. This licensing framework includes:

- A negotiation period up to 12 months, and
- A third party FRAND determination by either a court or arbitrator in the condition of a failure in negotiation.

On the other hand, the Commission has given a different decision in the Motorola case where it has established an infringement. This is because the European Commission decided Motorola's seeking injunction against Apple to be an abuse of dominant position. Here, the Commission has exercised an exception by not imposing a fine against Motorola which was a result of the absence of any European Union case law and Member States' divergent decisions.[299]

3.1.3. Huawei v. ZTE Decision

In the case, the parties stand as Huawei Technologies Co. Ltd. and ZTE Corp. and ZTE Deutschland GmbH. The claimant, Huawei, is the SEP holder of the LTE wireless telecommunication standard whereas the defendant, ZTE, holds several standard-essential patents

[298] Bell, *'Litigation as an Abuse: European Commission and US Courts Draw a Line under 'Patent Wars' while Adopting a Common Approach on Standard Essential Patents',* 257-259.

[299] Simpson and Hidaka, 'The EU Court of Justice Judgment in Huawei v ZTE – important confirmation of practical steps to be taken by Standard Essential Patent holders before seeking injunctions', *Norton Rose Fulbright,* <https://www.nortonrosefulbright.com/en/knowledge/publications/8f90efbd/the-eu-court-of-justice-judgment-in-huawei-v-zte---important-confirmation-of-practical-steps-to-be-taken-by-standard-essential-patent-holders-before-seeking-injunctions> accessed 17 October 2020.

related to the standard of LTE. Huawei committed towards ETSI with the purpose of making the licensing of its patent accessible on FRAND terms and conditions. ZTE, on the other hand, used Huawei's standard-essential patent by only expressing its willingness to license, that is, using the patent without licensing and providing an account. As a result, Huawei sought injunctive relief before the District Court of Dusseldorf, rendering of accounts for past uses, the product recall and an award for damages for patent infringement.[300]

The Court used the German Federal Court of Justice's 'Orange Book' ruling and the European Commission's 'Samsung and Motorola v. Apple' decisions as a background to come to a decision. It was conveyed that these two judicial bodies have presented conflicting views on the conditions when a SEP owner's action for a prohibitory injunction constitutes an abuse of dominant position in violation of Article 102 TFEU.[301]

The Court's reasoning clarified the distinction between cases in which SEPs play a role and other IPR-related cases. The first difference is that, when the patent becomes a SEP, it means that the patent holder can 'prevent products manufactured by competitors from appearing or remaining on the market and, thereby, reserve to itself the manufacture of the products in question'. Secondly, since SEPs' implementation must be in accordance with FRAND terms and commitments, such a commitment results in the patent holder to create 'legitimate expectations' to the implementers of the patent that the SEP will be accessible on FRAND terms.

As a result, some conditions under which a SEP holder can seek a prohibitive injunction without infringing Article 102 TFEU have been set by the Court as listed below:

- Informing the standard-essential patent user about the patent's infringement by 'designating that patent and specifying the way in which it has been infringed'.
- If any willingness to conclude a licensing agreement on FRAND terms and conditions is expressed by the user, the SEP holder needs to 'present to that infringer a specific, written offer for a licence on such terms, specifying, in particular, the royalty and the way in which it is to be calculated'.

On the other hand, there must be a diligent response to the patent-holder's offer by the infringer 'in accordance with recognised commercial practices in the field and in good faith'.

[300] Morrison & Foerster LLP and Pichler, 'FRAND Case Law in Europe After Huawei v. ZTE', *JDSUPRA,* <https://www.jdsupra.com/legalnews/frand-case-law-in-europe-after-huawei-v-59631/#:~:text=ECJ's%20FRAND%20Procedure-,In%20Huawei%20v.,sought%20under%20FRAND%2Dcommitted%20SEPs.&text=The%20alleged%20infringer%20must%20provide,of%20its%20acts%20of%20use>accessed 20 October 2020.

[301] Lundqvist, '*The interface between EU competition law and standard essential patents – from Orange-Book-Standard to the Huawei case*', 368.

After the SEP holder has presented a specific offer to license, there exists some regulations held by the Court if the standard-essential patent user rejects the offer:

- The user must submit a '*promptly and in writing, a specific counter-offer that corresponds to FRAND terms*' to the SEP holder.
- In the condition that the user's counteroffer is rejected, reasonable security to the use of the patent must be provided '*for example by providing a bank guarantee or by placing the amounts necessary on deposit*[302]'.

If it cannot be reached to an agreement between the parties after the counteroffer, it was decided by the Court that an option was given to the parties: Requesting by common agreement that the royalty's amount be determined 'by an independent third party, by decision without delay'.
Lastly, it was also decided that the infringer has the chance to 'challenge the validity and/or the essentiality and/or the actual use of' the patents of the SEP holder during licensing negotiations or even to reserve this right for the future.
In conclusion, the Court has decided that any action to seek prohibitive injunction by a SEP holder does not constitute a violation of dominant position. However, it is important to note that the Court also conveyed that the above framework cannot be used for the SEP holder's claims for rendering of accounts for past uses and claiming an award for damages for patent infringement since these claims do not violate Article 102 TFEU as they do not have an impact on if standard complaint products can appear or remain on the market or not.[303]
The Huawei v. ZTE Decision is a significant ruling since it stands as a regulation for defences against injunctions in Europe. Additionally, this decision applies in all Europe which is important to solve disagreements relating to patent law throughout Europe and all over the world.

3.1.4 Sisvel v. Haier Decision

The case between Sisvel and Haier appears as a significant case in terms of providing important guidelines on technology licensing negotiations of SEPs. Sisvel v. Haier was concluded on May 5, 2020 by the German Federal Supreme Court. Sisvel is a company which manages patent pools of standard-essential patents relating to ICT technologies whereas Haier is a Chinese manufacturing company of electronics products. The matter in dispute is a standard-essential patent named EP 852 885 filed by Nokia in 1995 which was sold in 2012 to Sisvel.

[302] Breydel, 'Case Law post CJEU ruling Huawei v ZTE, *4iP Council EU AISBL,* (2015).
[303] Tsilikas, *'Huawei v. ZTE in Context – EU Competition Policyand Collaborative Standardization in WirelessTelecommunications,* 24.

The dispute started in 2012 when these two parties were unable to agree on the licensing terms of the standard-essential patent and Sisvel sued Haier before the District Court of Düsseldorf. In 2015, a nullity action was filed by Haier before the Federal Patent Court in Munich. In the same year, Sisvel was decided to be the prevailing party in Düsseldorf, since it was found that the patent was valid and infringed and negotiations were delayed by Haier. As a result, Haier lodged an appeal. Moreover, in 2017, it was confirmed by the Higher Regional Court of Düsseldorf that the patent was valid and infringed. However, the Court considered Sisvel's licensing offer at the first place non-compliant with FRAND terms, especially the non-discrimination aspect of it and thus, did not grant the injunction. Then, the patent was upheld by the German Patent Court in an amended form. Subsequently, the decision of the Patent Court was confirmed by the Federal Supreme Court which resulted in the patent to be finally confirmed.[304]

The infringement decision given by the Federal Supreme Court has an importance in giving an insight about specific concepts in licensing of standard-essential patents. Since, according to the Court of Justice of the European Union's judgement in *Huawei v. ZTE* decision, a SEP license must be granted to any implementer who has declared its willingness to take a license, it is necessary to specify the borders of 'willingness'. *Sisvel v. Haier* case in fact serves to enlighten the concept of 'willing licensee' by answering the question 'What level of engagement during negotiations is necessary for an implementer to be considered as willing?'. As a result of this, the German Federal Supreme Court decided that in the licensing negotiation process, an implementer must be actively engaged, indicating a clear and unconditional intention about concluding a license. Therefore, it was held that only a claim about being 'willing' is not sufficient to be considered as willing, but a certain level of active engagement in the negotiation process is important.

On the other hand, the *Sisvel v. Haier* decision is enlightening in terms of specifying dominant position as well. According to the Higher Regional Court, proprietorship of a standard-essential patent does not create a dominant market power automatically, since not all SEPs influence competition among different undertakings in the market. To understand that an undertaking has a dominant position in the market, market dominance should be ascertained in respect to each standard-essential patent individually. That is why, since the patent in question was related to an essential function of the GPRS standard, the Court decided that the claimant held a dominant market power.

Lastly, the Court's decision is explanatory in terms of FRAND terms and conditions as well. According to the decision, an offer on FRAND terms must be made by a claimant only if the defendant's willingness to enter into a licensing agreement is declared. Correlatively, an obligation

[304] Constanze Krenz, 'Sisvel v. Haier – Willingness to license or willingness to negotiate?', 2.

to make a counteroffer for the defendant arises if an offer on FRAND terms is made by the claimant. The Higher Regional Court states that this view of relating offer and counteroffer to each other is a result of the wording of *Huawei v. ZTE* ruling. It was held that being committed to FRAND terms does not mean that dominant undertakings are under the obligation to treat all business partners in the same way. The difference in the treatment is proportional to the license fees that the SEP-owners charge. According to the ruling, such a difference of licensees can be accepted if it can be considered as a result of normal market behaviour.[305]

In this way, apart from the other perspectives in this case, the Court's decision appears as informative and enlightening in terms of explaining the scope of 'willingness' and 'dominant market power'. Additionally, it is seen that this decision refers to FRAND terms and clearly explains the way to be committed to these terms as well.

3.2. Standard-Essential Patent Cases in Korea

The antitrust concerns in Korea are mostly about the intersection between competition law and SEPs which are committed according to FRAND terms. Korea made its name with four antitrust cases concerning FRAND-committed SEPs up to the present.

3.2.1. Samsung v. Apple

The issue of Samsung v. Apple case was Samsung's certain smartphone 3G-related patents. The licensing of the SEPs was given by Samsung in accordance with FRAND commitments. This declaration was submitted to ETSI. Samsung v. Apple case's ground of action was the disagreement between Samsung and Apple about the royalty rate. The royalty rate which Samsung offered was 2.4 percent of Apple's end product's selling price. Nevertheless, Apple did not accept to pay the royalty rate and implemented the SEPs without the presence of a license contract. Hence, Samsung filed suit against Apple in 2000.[306]

When the claims of the parties are examined, it is seen that Samsung demanded injunction from Seoul Central District Court against the importation and sale of iPhones in the borders of Korea. On the other side, Apple claimed that Samsung violated the FRAND commitments and abused its dominant position in the market.

In the concluding process of the case, the Court examined two particular issues about FRAND terms. The first one is whether the royalty rate of 2.4 percent offered by Samsung was 'unreasonably high'. While deciding on the royalty rate of the SEP's reasonableness, the Court used a method of

[305] Rue Breydel, 'Case Law post CJEU ruling Sisvel v Haier, 4iP Council EU AISBL, (2017).
[306] Ju, 'Recent Developments in Korean Antitrust Cases concerning FRAND-Encumbered Standard-Essential Patents', 3.

comparing by considering the rate for 4G and 'Wideband Code Division Multiple Access' (WCDMA) SEPs. Since the royalty rate for 4G SEPs is 0.8 percent to 3.5 percent and the rate for WCDMA SEPs is 1 percent to 2.7 percent, the Court decided that offering a 2.4 percent royalty rate was not a violation of FRAND terms as it cannot evidently be considered as unreasonably high. Secondly, the Court found it necessary to determine whether Samsung's seeking injunction was allowed. At this point the Court's decision about the requirements for being allowed to seek injunction appears as an important viewpoint. According to the Seoul Central District Court, since the SEP owners declare the FRAND commitments unilaterally to standard-setting organizations (SSOs), their negotiating with a potential licensee in good faith is an obligation. In addition, the Court opined that injunction cannot be sought if negotiation is not refused by a potential licensee. Consequently, the Court concluded that the lack of evidence to show that Samsung negotiated in bad faith indicates that Samsung's injunction against Apple did not constitute violation of FRAND terms.[307]

Finally, the Court analysed the competitive side of the case by examining Samsung's behaviour in the market. Since Samsung has a dominant position due to being the SEP holder of 3G-related technology, the Court investigated whether Samsung caused any anti-competitive effect or had any intent to monopolize while inquiring if Samsung abused its dominant position in the market. As a result, the Court concluded that there is no evidence to charge Samsung with causing anticompetitive effect or having an intent to monopolize in the market. Thus, the case result was that Samsung did not abuse its dominant position.[308]

3.2.2. Consent Decision on Microsoft's Acquisition of Nokia

The issue of this decision was Microsoft's SEPs which are required to be used by other companies to run operation system of Android mobile phones and tables. The starting point of the antitrust case was Microsoft's contract which was concluded to acquire the control of Nokia. At that point, Samsung and other competitors of Nokia had some antitrust concerns in the context of competition law about the possible increase in the royalty rates of the standard-essential patents. Korean Fair-Trade Commission (KFTC) raised some competitive concerns about the abuse of standard-essential patents by Microsoft by abusing its dominant position in the market.[309]

Microsoft responded to the antitrust concerns by seeking 'consent decision' from KFTC by submitting a corrective proposal. The corrective proposal was as following:

[307] Ju, 'Recent Developments in Korean Antitrust Cases concerning FRAND-Encumbered Standard-Essential Patents', 4-6.
[308] Byung-Il Kim and Christopher Heath, '*Intellectual Property Law in Korea*', (Wolters Kluwer, 2015).
[309] Kung-Chung Liu, and Reto M. Hilty, *SEPs, SSOs and FRAND Asian and Global Perspectives on Fostering Innovation in Interconnectivity*, (Routledge, 2019).

'(1) Microsoft will license the SEPs on FRAND terms,

(2) Microsoft will not seek any injunctive relief prohibiting the importation and/or sale of mobile phones or tablets produced by manufacturers whose headquarters are in Korea, by reason of the infringement of SEPs,

(3) When giving licenses of the SEPs to a licensee, Microsoft will not ask the licensee to grant license of its patents to Microsoft without royalty,

(4) Microsoft will sell the SEPs to a buyer only when the buyer agrees to license the SEPs on FRAND terms and the buyer may resell the SEP to a third party only when the third party agrees to license the SEPs on FRAND terms.[310]'

The requirements for issuing consent decision are regulated under article 51.2 of Monopoly Regulation and Fair-Trade Act (MRA):

- Voluntary corrective proposal of the undertaking amounts to the corrective measures of KFTC that would be imposed if the conducts in question constitute a violation of the MRA;
- Restoring fair and free competition or fair trade or protecting consumers and/or other undertakings are expected from the proposal.

As a result of examining if Microsoft's voluntary corrective proposal included the regulations under article 51.2 of MRA, KFTC concluded that the two requirements were met and thus, conditionally approved the acquisition of Nokia by Microsoft.[311]

3.2.3. Qualcomm I

The SEPs at issue were patented modem and radio frequency chips of Qualcomm which is a dominant firm in the licensing market. These chips function to connect mobile phones to Code Division Multiple Access (CDMA) wireless communication network.[312] The case started in 2009 by KFTC sanctioning Qualcomm because of Qualcomm's loyalty rebates which Qualcomm offered to all three Korean mobile phone manufacturers. The ground of the sanction was abusing dominant position which was affirmed by Seoul High Court in 2013 with the justification of constituting 'undue price discrimination' and 'undue exclusive dealing'.

Qualcomm denied the Court's decision by alleging that offering loyalty rebates on its CDMA-related SEPs does not constitute any discrimination since it offered the loyalty rebates to all three

[310] Ju, 'Recent Developments in Korean Antitrust Cases concerning FRAND-Encumbered Standard-Essential Patents', 7.

[311] Liu, and Hilty, *SEPs, SSOs and FRAND Asian and Global Perspectives on Fostering Innovation in Interconnectivity*.

[312] Ju, 'Recent Developments in Korean Antitrust Cases concerning FRAND-Encumbered Standard-Essential Patents', 8.

of the Korean mobile phone manufacturers. Nevertheless, Qualcomm's argument was rejected by KFTC and Seoul High Court due to the KFTC's arguments about price discrimination. KFTC clarified its reasoning by arguing that standard-essential patent rebates violate non-discriminatory term of FRAND commitments and thus, constitute abuse of dominant position. This argument of KFTC was also accepted by Seoul High Court. On the other hand, both KFTC and Seoul High Court came to an agreement that the loyalty rebates Qualcomm offered to manufacturers caused anticompetitive effect in the market as such rebates relate to *de facto* coercion to buy the seller's products and therefore, mean exclusive dealing.[313]

A petition was filed in the Supreme Court by Qualcomm since it denies the arguments in the Seoul High Court's decision. However, the case is still not concluded since it is pending in Korean Supreme Court.

3.2.4. Qualcomm II

Some of Qualcomm's standard-essential patents such as 2G-CDMA, 3G-WCDMA, and 4G-Long Term Evolution (LTE) which function to provide the connection between mobile phones and wireless networks are the issue of Qualcomm II case. Korean Fair-Trade Commission imposed various sanctions on Qualcomm with the justification of abusing dominant position by breaching FRAND commitments and constituting unfair trade practice.[314]

Qualcomm has a business model which conveys its conducts in licensing practice:

- Conduct I: Refusal to grant license to chipsets manufacturers. Instead, on the condition that chipset manufacturers sell their chips only to the licensees of Qualcomm which are the mobile phone manufacturers, giving a covenant not to sue.
- Conduct II: Refusing to sell mobile phone manufacturers chipsets except buyers have a SEP license agreement with Qualcomm.
- Conduct III: Determining SEP royalty rates unilaterally and requesting mobile phone manufacturers' patents without royalty.[315]

Considering the business model of Qualcomm, it would be reasonable to argue that each conduct results in anticompetitive effect in all relevant markets. It is because Qualcomm has a monopoly power due to being the SEP owner of 100% market share in 2G-CDMA, 3G-WCDMA, and 4G-LTE standard-essential patents. It also has dominance in modem chipsets markets with holding

[313] Ashish Bharadwaj, Vishwas H. Devaiah, and Indranath Gupta, *Complications and Quandaries in the ICT Sector - Standard Essential Patents and Competition Issues*, (Springer Open, 2018), 164.
[314] Liu, and Hilty, *SEPs, SSOs and FRAND Asian and Global Perspectives on Fostering Innovation in Interconnectivity*.
[315] Bharadwaj, Devaiah, and Gupta, *Complications and Quandaries in the ICT Sector - Standard Essential Patents and Competition Issues*, 168-170.

around 50% market share. That is why, it is concluded by KFTC that Qualcomm breaches FRAND terms by its intent of monopolization and creating anticompetitive effect. Finally, KFTC argued that the business model of Qualcomm constituted 'abuse of superior bargaining position' under MRA Article 23(1)(iv) since Qualcomm's conducts might be evaluated as unfair trade practice.[316]

3.4. Standard-Essential Patents Applications in Turkey

In Turkey, intellectual property law and competition law are regulated separately. IP law is codified in Industrial Property Law No. 6769 and competition law is regulated by Law No. 4054 on the Protection of Competition. When Article 4 which regulates restrictive agreements, Article 5 which regulates individual exemption conditions and Article 6 which regulates dominance in the Competition Law are considered, it might be said that these regulations are also applicable in the field of intellectual property law in terms of the license agreements. Turkey's national competition authority is the Turkish Competition Authority (TCA) which implements the Turkish competition law regime. The enforcement structure of the competition law in Turkey is applicable for intellectual property rights. Therefore, like the domestic legal orders in many other countries, competition law and intellectual property law are complementary in Turkey as well.

The implementation of standard-essential patents in Turkey is similar to the other SEP law regimes in the European Union.

In this regard, The Competition Board published Block Exemption Communiqué on Technology Transfer Agreements (No. 2008/2). Technology Transfer Agreements refer to the agreements in which the licensor gives the licensee permission to use the licensed technology to produce goods or services as explained in the Clause 1 of the 4th article of the Block Exemption Communiqué on Technology Transfer Agreements numbered 2008/2. However, these agreements may also contain elements that restrict competition due to the exclusive powers granted to right holders. For example, the obligation not to use competing technologies may cause the market to be closed to third parties; in this way, competition among licensees may be restricted if the licensor imposes various obligations on the region or customers.

Agreements between undertakings whose purpose or effect is restrictive on competition are prohibited by article 4 of the Act on the Protection of Competition No. 4054 in Turkey. In addition, an exemption regime, which excluded agreements of this nature from the scope of prohibition, was also regulated, considering the competitive aspects and the degree of market forces. The instrument of the block exemption regime regarding technology transfer agreements is the

[316] Ju, 'Recent Developments in Korean Antitrust Cases concerning FRAND-Encumbered Standard-Essential Patents', 12-13.

Communiqué No. 2008/2. In this way, it seen that the implementation of SEPs has a regulation in Turkey as well.[317]

Another regulation about standard-essential patents in Turkey is the licensing under FRAND terms. Guidelines on Horizontal Cooperation Agreements is the relevant source of the description of FRAND commitments in Turkey. The existing purposes and applications of FRAND terms and standard-essential patents are the same as the worldwide regulations. However, a regulation on the royalty rates does not exist in the Competition Law in Turkey. At this point, Guidelines on Horizontal Cooperation Agreements necessitates a fair and reasonable relationship between the fees and the economic value of the IP rights.[318]

3.4.1. The Philips Decision

The decision made by TCA has the significance to be the first investigation by TCA on a SEP holder's conducts regarding abuse of dominant position. As stated before, Article 6 of the Competition Law in Turkey prohibits abuse of dominance in the market which constitutes the bases of the given decision.

Koninklijke Philips N.V (Philips) is the SEP holder of EP 393 and EP 307 patents which are essential to ETSI 300 743 DVB subtitling systems standard. Turkish TV manufacturers are obliged to license Philip's standard-essential patents since there is no other alternative in Turkey. In the case, Vestel, which is a TV manufacturing company in Turkey, is the complainant where Philips is the investigated party. Firstly, it was decided by Mannheim Court due to the patent violation cases initiated by Philips that EP 393 and EP 307 patents were infringed by Vestel. In addition, injunctive relief was ordered by the Court. Following the decision of the Mannheim Court, it was agreed by Vestel to enter into a Licence and Settlement Agreement with Philips. The content of the Licence and Settlement Agreement included some rights given to Philips. For instance, the right to terminate the Settlement Agreement in the case of Vestel initiating a patent invalidity action.

Consequently, Vestel filed an application claiming an abuse of dominant position by Philips. The claims of Vestel against Philips can be summarized as requesting an excessive amount of license fees, breaching the non-discriminatory term of FRAND commitments and violating the dominant position by preventing Vestel from developing its own technologies. As a result of evaluating the case and the claims of Vestel, TCA decided that Philips held a dominant position since it had 100%

[317] Makbule Bekcan, 'The Major Changes in The EU Block Exemption Regime For Technology Transfer Agreements and Turkey's Application', İnönü Üniversitesi Hukuk Fakültesi Dergisi, 186-190.

[318] Gönenç Gürkaynak, 'Chapter 16: Turkey.', *In the Intellectual Property and Antitrust Review*, by Thomas Vinje, (London: Law Business Research Ltd., 2019), 195-202.

market share[319]. The final decision of TCA was that Philips abused its dominant position in the market, approving Vestel's claims about breaching FRAND terms by the unfair, unreasonable and discriminatory conducts Philips has for subtitle technologies. In this context, it has been decided that Philips' failure to announce the license fees was not in accordance with the principle of transparency, although its implementation should have been carried out within the framework of the principle of transparency in order to prove that a SEP owner under the commitment of FRAND terms did not apply to discriminatory or exploitative application in the license fee. Therefore, it was concluded that the behaviour of Philips led to a discriminatory treatment in the market.

Also, it has been further decided that Philips, contrary to the provisions of FRAND terms, did not comply with the step of 'applying to a third independent party in determination of the price' to be able to use its right to request a court order for the licensee, which is the legal right of the SEP owner undertaking, in accordance with competition law. At the same time, it was determined that Philips did not act transparently in determining the patent amount, reversed the general burden of proof, and added a non-validity clause to the contract.

Due to the reasons explained above, it was decided that Philips, which had a dominant position in the relevant market, abused its dominant position by putting forward different conditions to buyers of equal status within the scope of subparagraph (b) of the second paragraph of Article 6 of the Law No. 4054 and by discriminating directly or indirectly. As a result, administrative fines have been imposed to Philips.[320]

4. Conclusion

Standard-essential patents have become a leading concept in IPR-related cases in Europe, especially in the last years. It is being observed through decisions given by various courts in SEP cases that patents which obtained SEP status require some necessities while being implemented. These requirements serve to create and maintain a just and balanced environment in the competitive market. When the cases around Europe are analysed in detail, it is seen clearly that the fair environment in the market depends much on the SEPs since the problems of abuse of a dominant position by the patent-holders and preventing and/or limiting competition among different undertakings by using this power are the main reasons behind the disagreements, subject to the cases in this area. As explained, even though FRAND terms and conditions are set on the purpose of keeping the patent holders' use of power in the market under control, conditions like patent

[319] Barış Yüksel, 'The Turkish Competition Authority publishes its first investigation concerning abuse of dominance by a standard essential patent holder (Philips)', *e-Competitions Antitrust Case Laws e-Bulletin*, (2019).
[320] Competition Authority, 'Selected Justified Decisions', Competition Bulletin, (July 2020): 5.

ambush or abuse of dominance still appear. However, decisions given in the area of SEPs and implementation of patents become guiding for future disagreements since several rules and guidelines for both patent holders and implementers have been and continue to be decided. That is why, it is reasonable to argue that even though it is unavoidable to face disagreements in such a significant and universal concept in both the Competition Law and the Intellectual Property Law, European countries including Turkey -and in Korea in recent years- regulate this issue in a (mostly) successful manner. That is why, it is reasonable to argue that implementation of standard-essential patents is an increasingly common area in which Court decisions have an important place to enlighten the way to successfully practice SEP implementations in the market.

IMPACT OF MOST FAVOURED CUSTOMER CLAUSES ON ABUSE OF DOMINANT POSITION

Hilal ATASOY*

Abstract

As the demand for e-commerce platforms increased in recent years, companies started to apply different strategies. Although most-favoured customer (MFC) clauses are being used for many years, the implication of those clauses for platforms can be deemed as one of those strategies. In terms of competition law, Most Favoured Customer clauses (also known as Most Favoured Nation clauses) can be defined as an agreement whereby a seller agrees that a buyer will benefit from terms that are at least as favourable as those offered by the seller to any other buyer [321]. When the latest investigations considered, it can be seen that undertakings in question are mostly two-sided platforms. For this reason, this paper will review MFC clauses from the perspective of two-sided markets (platforms) and designate the reasons why MFC practices have an impact on the abuse of dominance and why they should be treated under the abuse of dominant position.

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[321]Franciso Enrique Gonzalez-Diaz and Matthew Bennett, 'The Law and Economics of Most-Favoured Nation Clauses' (2015) 1 CLPD 26, p. 27.

1. MFC Clauses in General

Most Favoured Customer clauses reassures that one party will be treated by the other party just as the other parties are treated. Although there are several types and implications of those clauses for the different kinds of sales, recent investigations are mostly related to platform MFC clauses. In this respect, the following sections will delineate the types and implications of MFC clauses (section I), recent decisional practices related to those clauses (section II). After that assessment of MFC clauses in terms of competition law (section III) will be evaluated mentioning types of MFC clauses, how they are being used by the platforms and what effects are occurring; characteristics of the platforms and two-sided markets will be discussed first.

In a two-sided platform, a supplier serves (an intermediary or an agency) as a platform for two different consumer groups for their interaction with each other.[322] For example, Amazon Marketplace is an intermediary that brings together the buyers and the product sellers. One of the most essential characteristics of these platforms is indirect network effects. In other words, the value of one group depends on the value of the other group meaning there is a correlation between those groups of consumers. In line with that, a two-sided platform should gain a minimum critical mass for at least one of those consumer groups to get benefit from the advantages of indirect network effects. Network externalities[323] in the platforms become highly important when a platform who already gained the minimum critical mass and started to gain interest from the consumer groups is enforcing MFC clauses, then it is presumably in a position that is infringement in terms of TFEU 101 or 102.[324]

As mentioned above there are several types of MFC clauses when their way of enforcement is considered. Although some of these divisions vary between some sources,[325] wide-narrow MFCs and wholesale-retail MFCs are the types that are commonly used as defined below.

- Wholesale – Retail MFCs
- Wide – Narrow MFCs
- Price – Non-price MFCs
- True – Pseudo MFC

When considering an MFC clause, the first thing to determine is whether it is a wholesale or retail MFC. Wholesale MFCs are genuinely used between suppliers from different sectors while this type

[322] Daniel Zimmer and Martin Blaschczok, 'MostFavored-customer clauses and two-sided platforms' Journal of European Competition Law & Practice, Vol: 5, No: 4.
[323] Network externalities refer to a situation when demand of a product depends on the demand of others buying that product. In other words, value of a product/service increases as long as number of users increase.
[324] See section III.
[325] For example, True – Pseudo MFC terminology is used by Daniel Zimmer and Martin Blaschczok.

of agreement is common in *mass markets*[326]. Retail MFCs, on the other hand, are mostly seen on online platforms and also referred to as Price Parity Clauses (PPCs).[327]

Although it is not very common, another separation is true MFC and pseudo MFC. According to a true MFC clause one party of the agreement cannot grant better prices or opportunities to third parties than those it has granted to the favoured party[328]. On the other hand, when a pseudo (false) MFC is in enforcement, any favourable conditions granted to a third party will also be (automatically) granted to the favoured party. At first glance, it might be seen that pseudo-MFC clauses do not necessarily restrict the competition while true-MFC restricts the favoured parties' freedom of setting prices for its own product/service. Yet in the end, both clauses have a similar consequence since the party of the pseudo-MFC clause would refrain from lowering the prices would result in an anticompetitive effect.

Correspondingly other classification is narrow MFC clauses and wide MFC Clauses. With the narrow MFC clauses, the undertaking in consideration will be prevented from offering better prices only in on its channel. On the other hand, broad MFC condition the undertaking is prevented from offering better prices/conditions on other platforms such as price comparison websites as well as on its own channel.[329]

To sum up, wide MFCs foresee those better terms that cannot be offered to any party while narrow MFCs foresee better terms cannot be offered via that suppliers' online channel[330]. Additionally, CMA decided that narrow-MFC clauses may be necessary to prevent problems such as the free-riding problem while wide-MFC clauses restrict competition.[331] In this case, CMA described the narrow MFC as correspondingly and the same classification was applied in TCA's YemekSepeti (online food ordering platform) decision.[332] When this concept is considered through the relevant case; narrow MFC model offers the same conditions to the consumers that were offered by the member restaurants while wide MFC refers to a model that includes restaurants' own delivery services to this agreement. Turkish Competition Authority ('TCA') found that wide MFC enforcement has an exclusionary effect on the market.[333]

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[326] Refers to the markets where goods are produced in large quantities.

[327] European Commission, Directorate-General for Competition 'Support studies for the evaluation of the VBER', dated: 08.10.20, p. 18, 96.

[328] Daniel Zimmer and Martin Blaschczok, 'Most Favoured-customer clauses and two-sided platforms' Journal of European Competition Law & Practice, Vol: 5, No: 4 p: 7.

[329] Competition and Market Authority-UK.

[330] European Commission, Directorate-General for Competition 'Support studies for the evaluation of the VBER', dated: 08.10.20, p.93.

[331] Competition and Market Authority, 'Private Motor Insurance Market Investigation', Final Report, 24.09.2014.

[332] See Section II.

[333] Emin Koksal and Sahin Ardiyok, 'Diverging Approaches in Europe for the Most Favoured-Customer Clauses: How Turkish Competition Authority's Decision for the Online Food Ordering Market Contributed' (2018) Journal of European Competition Law & Practice Vol.9 No. 2, p: 120.

While MFC clauses terminology differs among National Competition Authorities ('NCA') or scholars, Price Matching Guarantees ('PMGs') terminology is more consistent which contain guarantees by a seller to match the prices of competitors. The main difference between MFCs and PMGs is that PMG clauses promise to match with the competitor seller's price in other words PMGs are across-sellers guarantees and MFCs are across customers clauses.[334]

After these classifications, the point where online platforms are standing across these classifications should be demonstrated since the latest investigations are mostly concerned with online platforms' MFC enforcements. Although the structure of online platforms has its nature rather than the traditional vertical relationship between a supplier and an intermediary exchanging physical goods, the distinction of wide-narrow MFC emerged from those areas.[335]

As can be seen above there is no clear-cut literature and terminology concerning MFC clauses. As a result of this, different NCAs may give decisions in different directions while the applicable legislations have the most characteristics in common. For this reason, it is crucial to clarify the terminology and MFC practices for future investigations.

2. Assessment of MFC Clauses Under Competition Law

Although MFC practices can lead to several efficiencies and procompetitive effects on the relevant product market, there is no conflict about most of the MFC enforcement could cause restriction of competition. While analysing those practices to determine the legal foundation of the breach will enhance a consistent competition law practice.

2.1. Assessment under TFEU 101

Article 101 of the Treaty on Functioning of the European Union represents the prohibition of the agreements between two or more undertakings that aim to restrict or distort the competition in the relevant product or service market (price-fixing, market-sharing cartels, collusive agreements etc.). The key point of this article is that the prohibition requires agreements among two or more separate undertakings.

Although in the application MFC clauses there are separate two or more undertakings, platforms cannot be regarded as agencies. The reason for that is for the platforms to be considered as agencies, the sellers within the platform must determine the commercial decisions of platforms.[336]

[334] Pınar Akman, 'A competition Law Assessment of Platform Most-Favoured-Customer Clauses' CCP Working Paper 15-12, p. 7-8.

[335] European Commission, 'Support studies for the evaluation of the VBER', Directorate-General on Competition, dated: 08.10.20, p.93.

[336] TCA Board Decision numbered 17-01/12-04, dated 05.01.2017, <https://www.rekabet.gov.tr/Karar?kararId=d2bfb2c8-e517-498a-9542-07e3cad8a419> accessed 28 August 2020.

Additionally, when the online platforms in question are considered, most of them have a dominant position in the relevant market such as Booking.com, Amazon, YemekSepeti. Taking into consideration that these dominant positions and the barriers to entry created by both network externalities and MFC clauses, assessing those agreements under TFEU 101 seem unreasonable.

On some occasions, NCAs can have a dilemma about which article should be applied to the relevant case - TFEU 101 or TFEU 102. According to the FritoLay investigation[337] held by the Turkish Competition Authority, the Board stated that the actions of Frito Lay fell within the scope of Article 4 and Article 6 at the same time.[338] It has been accepted that the agreements made by Frito Lay with the final sales points are within the scope of Article 4, as they prevent Frito Lay's competitors from establishing commercial relations with one of these points. On the other hand, it is stated that the undertaking that has a dominant position should not enter into exclusive relationships that would significantly restrict competition in the market in the context of their special liability arising from their dominance. In the decision, the duration of the agreements and the incentives and sanctions applied for the customer to remain loyal to the agreement were accepted as the condition of exclusive agreements to have an exclusionary effect[339]. This situation significantly resembles the reasoning of MFC violation decisions under the abuse of dominance.

Also, the Board clearly stated that the undertakings that have dominance should not enforce exclusionary behaviours. This is the case in the Yemek Sepeti decision: as discussed above, the main reason for the infringement decision was the exclusionary consequences of MFC enforcements. The FritoLay investigation points out the situation where there is an injunction of TFEU 101 and 102. This can be the case for MFC clauses, however, as will be discussed below it is more appropriate for them to be evaluated under the abuse of dominant position.

2.2. Vertical Block Exemptions – VBER (Vertical Block Exemption Regulation)

Article 1 of Vertical Block Exemption Regulation (VBER) defines the vertical agreements as 'an agreement or concerted practice entered into between two or more undertakings each of which operates, for the agreement or the concerted practice, at a different level of the production or distribution chain, and relating to the conditions under which the parties may purchase, sell or resell certain goods or services'.[340] The first condition to exempt the vertical agreements under

[337] TCA Board Decision dated 04.05.2004 and numbered 04-32/377-95.
[338] Article 4 of Turkish Competition Act is the equivalent of Article 101 of TFEU, and article 6 is the equivalent of article 102 of TFEU.
[339] Mehmet Tokgöz, 'The issue of evaluating exclusive vertical agreements within the scope of article 4 or 6 of Turkish Competition act numbered 4054' Turkish Competition Authority Dissertation Series No: 148, p. 49.
[340] European Commission, 'Guidelines on Vertical Restraints' Brussels, SEC(2010) 411, p. 10.

VBER is that the market share of the undertakings should not excess %30.[341] However, there are several arguments whether or not platform MFC practices fall into the scope of Vertical Block Exemption Regulation.

On the other hand, according to the Article 2(1) of VBER this exemption does not apply to the hard-core restrictions. Hard-core restrictions defined in the Article 4 of VBER as when a vertical agreement directly or indirectly, alone or in combination with the other factors intends the restriction of the buyer's ability to determine its sale price.

Although MFC clauses include obligations favouring the customer in terms of non-price related opportunities then these agreements can be exempted because freedom of price-setting is not restricted, it is still an issue that should be scrutinised on a case-by-case basis.

European Commission started a revising process of the VBER[342] to make sure that the Guidelines on VBER is still efficient, effective, relevant and coherent with the current conjecture of the new market developments because there has been ever-increasing importance of online sales in the recent years version which answers the latest problems concerning vertical agreements, as well as MFC clauses, is expected to be published in 2021. The European Commission stated that new provisions will be included to VBER special to the MFC clauses. Although, the evaluation of the MFC clauses under VBER is not appropriate because the platforms do not necessarily 'resell' the product or service, the European Commission clearly indicates its position and examined the MFC clauses under VBER. When most of the decisions concerning price parity clauses are considered, it is expected that the new regulations will prohibit wide-MFC clauses while allowing narrow-MFC clauses under certain conditions.

2.3. Assessment under TFEU 102 – Abuse of Dominant Position

Article 102 of TFEU prohibits an undertaking that has a dominant position in a relevant market to abuse this dominance by, for example, fixing prices, exclusionary actions, preventing new entries to the relevant product/service market. Although most of the investigations related to MFC application is being evaluated under article 101 of TFEU, because of the reasons which will be discussed in this section treatment under Article 102 of TFEU would be more appropriate.

When assessing a dominant position in the relevant market several factors that should be considered. First, does the undertaking in question have the market power/dominant position in the market? Second if so, is this undertaking abusing its dominant position?

[341] Article 3(1) of the Vertical Block Exemption Regulation/European Commission.

[342] European Commission, Directorate-General for Competition 'Support studies for the evaluation of the VBER', dated: 08.10.20.

Dominance is defined as the power of one or more undertakings in a particular market to act independently of their competitors and customers, and to determine economic parameters such as price, supply, production and distribution amount.[343] Within the scope of this definition, it is accepted that an undertaking that has the power to act significantly independent from competitive pressures is in a dominant position. When detecting dominance in the relevant market one of the most crucial indicators is the market share (if an undertaking has a 40% or higher market share in the relevant market this means the possibility of dominance is high). Naturally, market share is being calculated according to the relevant market and to do that Competition Authorities define the relevant market.[344] If the relevant market would be defined too wide then the market share will be low but if the market would be defined too narrow, then the market share will be unnecessarily too high. For this reason, the relevant market definition is the crucial point when assessing dominance. There are several techniques to define the relevant market. One of them is applying SSNIP (Small but Significant and Non-transitory Increase in Price) also called the hypothetical monopolist test.[345] In this test it is presumed that there is a hypothetical monopoly, and this company implements a 'small but significant and permanent' increase in its product price. In such a case, if the company's customers are shifting to other substitute products, these substitute products are also included in the product group and the same analysis continues. This analysis is terminated when the hypothetical monopoly cannot raise prices. Due to the reason that MFC clauses should be treated under the abuse of dominance in these investigations SSNIP test should be applied to define the relevant market properly and determine the specific undertaking's market share. For instance, there are several criticisms of NCAs that do not apply this test to define relevant market when investigating the MFC practices.

One of the reasons why MFC practices should be assessed under TFEU 102 -abuse of dominant position- is that MFC becomes anti-competitive when the market share is high. In other words when the undertaking in question has a dominant position.[346] For example, in the TCA decision concerning Yemek Sepeti, the undertaking was imposing sanctions on the restaurants that offer better prices both on their own websites and other online food ordering platforms.[347] Those sanctions were meant expelling the restaurants from Yemek Sepeti or applying those better prices to Yemek Sepeti as well. If Yemek Sepeti did not have a dominant position in the relevant market,

[343] Turkish Competition Act, Article 3.
[344] Turkish Competition Authority, 'Guidelines on Exclusionary Behaviours of the Dominant Undertakings' 14-05/97-RM(1), 29.1.2014. European Commission, 'Antitrust procedures in abuse of dominance (Article 102 TFEU Cases)', <https://ec.europa.eu/competition/antitrust/procedures_102_en.html> accessed 20 August 2020.
[345] US Department of Justice and the Federal Trade Commission, 'Horizontal Merger Guidelines' August 2010, p. 9.
[346] Booking and Expedia had roughly 90% market share in Germany.
[347] This refers to the wide-MFC practices of Yemek Sepeti.

why would the restaurants put that much effort to stay on the website? This situation illustrates the reason why MFC practices should be assessed under the abuse of dominant position. In line with these activities, dominant platforms use their market power to bind the sellers to their platform and prevent the new entries to the market with both indirect network externalities and MFC practices. Network externalities caused by the market structure[348] or being in a dominant position is not a per se violation according to competition law because a platform or an undertaking may have a dominant position thanks to their quality or efficiencies. However, abusing this dominant position constitutes a violation.

Also, exclusionary actions are a significant signal of abuse of dominant position. Exclusionary behaviours often point out the situations where the dominant undertaking's behaviour towards rival undertakings will result in the exclusion of competitors from the market.[349] For example, as examined in section 3.2, the German HRS's MFC enforcements prevented consumers from accessing cheaper offers through other platforms or hotel's websites which excluded competitors from the market.

While determining whether an undertaking holds the dominance in the relevant market especially for platforms, network externalities and first entrant advantage should be considered. For instance, Booking.com is one of the largest online hotel reservation platforms in the world. When it reached the minimum critical mass[350] in terms of customers, more hotels would want to appear on the website to reach more potential customer. On the other hand, as the number of hotels on the website increase, more customers will start using the site because more hotels can be reviewed for booking at the same time. This is the reflection of positive externalities to the MFN enforcements. Positive externalities are defined as: larger-sized market on one side increases the utility of agents on the other side, as a larger network provides a greater chance of finding a partner with whom to interact.[351] The effect of network externalities on the platforms is clear. It assists them to hold the larger market share and when the price parity clauses included it becomes even harder for new entrants and other undertakings in the relevant market to operate. Abusing this dominant position accompanied by MFC clauses with exclusionary actions and blocking the new entries to the market will cause abuse of dominance which is an infringement under TFEU 102.

Alternatively, a joint dominant position can be in question. An economic link is required for independent economic entities to hold a dominant position together. According to the European

[348] See section I.

[349] Turkish Competition Authority, 'Guidelines on Exclusionary Behaviours of the Dominant Undertakings' 14-05/97-RM(1), 29.1.2014 p 5.

[350] See section 1 for the explanation of minimum critical mass.

[351],Gokce Kurucu.' Negative network externalities in two-sided markets: A competition approach'. 2007.MPRA paper, p. 2.

Commission, this kind of collectiveness may also be caused by the oligopolistic structure of the market.[352] When the investigations related to MFC practices are considered, it can be seen that all of those markets are oligopolistic such as online travel agencies or online food ordering market. Also, most of the undertakings in these markets have similar MFC clauses. For instance, most online travel agencies give the best price guarantee to the customers. So, these clauses and the market structure point out the possible collective dominance in those markets.

In the light of the explanations above, MFC clauses are both the reason and the cause of the dominant position and its anticompetitive effects. Therefore, assessing them under TFEU 102 and the relevant articles examining from the perspective of abuse of dominance will result in a reasonably.

2.4. Procompetitive effects of MFC Clauses – Objective Justifications

The final step of assessing abuse of dominant position is to evaluate objective justification in the relevant investigation. Some of these objective justifications were accepted by the Authorities which will be discussed below.

First of all, MFC clauses can diminish the free-riding problems. Freeriding refers to a situation when an undertaking gets an advantage from another platform or economic entity without paying it. This can also be applied to the platforms; a seller may sign-up to a fully functioning platform to promote its product or service and allow customers find out about its products/services, but then motivate the users to go to a platform/website which offers lower costs to buy the product/service.[353]

In this context, Booking.com also has given feedback to the review of VBER. Booking.com highlighted the free-riding problem which is the pro-competitive effect of price parity clauses[354] while stating MFN enforcements prevent free-riding problems and VBER should make it clear that narrow MFC clauses do not carry any anti-competitive effects. Most of the NCAs in Europe are taking commitments from platforms for abolishing the wide MFC enforcements meaning implicitly accepting the enforcement of narrow price parity clauses.[355]

Accordingly, Booking offers a high-quality website and service to its customers, if Booking does not have an MFC clause then a hotel that offers lower prices to the customers may get an advantage from the high-quality website of Booking.com to attract the customers to its website or another

[352] European Commission, 'Notice on the application of the competition rules to access agreements in the telecommunications sector' Official Journal of the European Communities, OJ C265/2, 1998, (79).
[353] Francisco Enrique Gonzalez-Diaz and Matthew Bennett, 'The Law and Economics of Most-Favoured Nation Clauses' (2015) 1 CLPD 26, p. 35.
[354] See section 3.4.
[355] See section 2.4

platform. The essentiality of MFC practices for free-riding problems has been accepted by numerous competition authorities as an objective justification while some of them do not – Bundeskartellamt rejected these efficiency reasons.[356]

Also, MFC clauses can reduce transaction costs while enabling a buyer to get access to the most favourable options from a seller without having to carry out extensive and long-term research to find the best options.[357]

Another argument that favours MFC practices to enhance the competition is that MFC clauses improve both Intrabrand and Interbrand competitionÇ[358] According to that view, MFC practices are a guarantee for the buyers to benefit from developments inefficiencies (such as the decrease in prices thank to the manufacturing innovations) especially when there is an information asymmetry between buyer and seller, and this is an improvement of intrabrand competition. MFC clauses also contribute to the inter-brand competition: according to a study conducted by Chen and Liu from Journal of Industrial Economics, after a large-scale retailer started to enforce MFC clauses other platforms in the market lowered their prices.

2.5. Anticompetitive effects of MFC Clauses

Besides the procompetitive effects discussed above, when the latest assessments and investigation of MFN practices considered; anticompetitive effects outweigh the procompetitive effects.

Firstly, a distinction should be made between narrow and wide MFCs in terms of anticompetitive effects. As stated above a platform that is in a narrow MFC agreement with a supplier will be aware of the fact that the supplier can list its products or services at lower prices on other platforms. This will create an incentive to compete on commission fees among platforms.[359] Whilst wide MFC clauses completely prohibit suppliers to list lower prices on other platforms. For this reason, some investigations resulted in the conclusion that wide MFCs violate the competition law whilst narrow MFCs do not.[360]

One of the anticompetitive effects is that MFC practices prevent sellers' freedom to set prices and the risk of losing other customers since they cannot offer better options or prices on other platforms or websites. If sellers offer a better price on other channels, they will automatically apply

[356] Pınar Akman, 'A competition Law Assessment of Platform Most-Favoured-Customer Clauses' CCP Working Paper 15-12, p. 48.

[357] Jenniffer D. Lee, 'Post US V Apple: How Should Most-Favoured-Nation Clauses be Treated Now?' Cardozo Arts & Entertainment, Volume 33, Issue 1, p. 252

[358] Stephen Dnes, 'Most Favoured Customer Clauses: Abuse of Dominance or Abuse of Discretion?' (2012), Kluwer Competition Law Blog, <http://competitionlawblog.kluwercompetitionlaw.com/2012/07/13/most-favoured-customer-clauses-abuse-of-dominance-or-abuse-of-discretion/> accessed 1 September 2020.

[359] European Commission, 'Support studies for the evaluation of the VBER', Directorate-General for Competition, dated: 08.10.20, p. 103.

[360] TCA Board Decision, numbered, 16-20/347-156 dated 09.06.2016.

these opportunities on the channel in which they are exposed to MFN clauses. At the end, incentive to offer discounts or lower prices will hand in hand go away.

In addition to these, there is a risk of cumulative effects of MFC clauses in the relevant market: If MFC clauses become widely used in the market, the anti-competitive effects caused by these clauses are more likely to increase cumulatively.[361]

One may think that if a platform or an agency has a price parity clause then, this is the lowest price that a customer can find, and it is a benefit for the customers. Unfortunately, this is not true. Since price parity clauses limit the competition between undertakings on commission rate, higher prices will be charged to the customers. Moreover, if a wide parity clause is being used, the supplier, for example, a hotel, will set the same price on all channels as well as on its own direct channel. Finally, each platform will increase the commission that it takes from the suppliers above the competitive level[362] so, it will not lose its market share.[363] In the long term, neither suppliers nor consumers will benefit from the MFN enforcements.

At this point, 'the theory of harm' should be mentioned because it was used in several theoretical papers to indicate the economic effects of the MFN enforcements. According to the several empirical evidences applied to Online Travel Agencies that enforce MFN Clauses, price parity clauses drive commission rates up and consequently increase final prices.[364] However, the results of the abolishment of MFC clauses should be examined case by case. The different approaches towards MFN clauses among different NCAs were indicated above. Accordingly, France and Germany prohibited the MFN enforcements completely regardless of them being wide or narrow while the Swedish Competition authority took commitments from the undertakings in question. According to the empirical evidence given by Mantovani, Piga and Reggiani[365], after 2015 due to the antitrust investigations and several commitments made by Booking.com, prices had been decreased as a result of eliminating wide price parity clauses. This data leads to the conclusion of elimination of wide price parity clauses reduced commission rates and final hotel prices in the Online Travel Agencies (OTA) market which both hotels and customers can benefit. Therefore, price parity clauses can be seen as beneficial for the customers in the short term, but the situation is vice versa in the long term.

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361 Hasan Adıyaman, 'Price Parity Agreements in Competition Law: Most Favoured Nation/Customer Clauses', Dissertation Series No: 50, p. 41.

362 'competetive level' refers to a certain price for a product or a service that reached a level of equilibrium in the relevant market.

363 Thibaud Verge, 'Are Price Parity Clauses Necessarily Anticompetitive?' Competition Policy International Antitrust Chronicle, January 2018, p. 3.

364 Andrea Mantovani, Claudio Piga, Carlo Reggiani, 'On the Economic Effects pf Price Parity Clauses – What Do we Know Three Years Later?' 2018] 9(10) Journal of European Competition Law & Practice (JECLAP) p. 651.

365 Andrea Mantovani, Claudio Piga, Carlo Reggiani, 'On the Economic Effects pf Price Parity Clauses – What Do we Know Three Years Later?' 2018] 9(10) Journal of European Competition Law & Practice (JECLAP) p. 653.

Related to abuse of dominance, MFC enforcement creates barriers to entry to the relevant product/service market which refers to the exclusionary abuse. Especially if the platform that enforces MFC clause is in a position where sellers cannot give up, offering lower prices to other buyers will decrease the profit maximization of the seller, so other buyers can mostly obtain products at higher prices. The most important way for a new undertaking to enter the market, maintain its presence in the market and attract customers from other undertakings is to sell its products/services at a lower price than other undertakings.[366]

3. Recent Decisional Practises

3.1. Apple (E-Books)

3.1.1. U.S. Department of Justice (DOJ)

In 2013, Southern District Court of New York ruled upon request by the Antitrust Division of the Department of justice that the agreements between Apple and the five publisher companies are violating Section 1 of the Sherman Act.[367] Apple was promising to the users that they will not buy the e-books from iBookstore higher than other agencies such as Amazon. In the litigation brought by the Department of Justice, allegations were about raising and fixing the prices in the e-book market because of the price guarantee clauses.[368] The agreements that Apple executed with the publishers also included MFC clauses requiring that publishers match their prices in iBookstore with any lower retail price of an e-book offered by any other e-book retailer.[369] Besides these allegations, Apple's defence was related to the market structure at that time. Apple claimed, since they are newly entering the market, without the MFC clauses they could not survive while Amazon was practically a monopoly in the e-book market. However, the Court decided that Apple's strategies created anti-competitive effects, exceeding the 'surviving in the market' purpose. In conclusion, the Department of Justice found that Apple used MFCs as an instrument to execute collusive agreement to increase prices for e-books.[370]

The defence of Apple shows the oligopolistic structure of the e-Book market. When the oligopolistic structure of the market combines with the MFC practices this constitutes a

366 TCA Board Decision, numbered 17-01/12-04, dated 05.01.2017.
367 This section mainly prohibits agreements between two or more undertakings that restrain trade.
368United States v. Apple Inc., 952 F. Supp. 2d 638, 645 (S.D.N.Y. 2013).
369 United States v. Apple Inc., 952 F. Supp. 2d 638, 645 (S.D.N.Y. 2013). Also see Pınar Akman, 'A Competition Law Assesment of Platform Most-Favored-Customer Clauses' (2016) Journal of Competition Law & Economica 12(4) 781-833, p. 795.
370 Spyros Droukopoulos and Avantika Chowdhury and Matthew Jhonson, 'Most-Favored-Nation Clauses in the E-Commerce Sector: An Economist's Point of View' (2015) 14 Competition LJ 153, p 154.

presumption of joint dominance. For this reason, this investigation should have been assessed under abuse of dominant position, not Section 1 of Sherman Act.

3.1.2. European Commission Decision

In 2012, related to the same practices mentioned above Commission brought an investigation to Apple and five publishing groups (Hachette, Harper Collins, Holtzbrinck/Macmillan, Simon & Schuster and Penguin) based on Article 9 of the EU's Council Regulation.[371] The investigation ended up with commitments to end their agency agreements and in 2013 enjoined Apple from executing MFC clauses with the publishers.

3.2. Online Hotel Booking Platforms - Germany (Bundeskartellamt, OLG Düsseldorf)

3.2.1. HRS

HRS is an online hotel reservation platform that has been offering 'best price' hotels to customers. As a result of this clause hotels that have an agreement with this platform cannot offer lower prices and better opportunities to another platform as well as at their websites. The Düsseldorf High Regional Court dismissed the appeal in 2015 against the Bundeskartellamt decision of 2013 by ruling that 'best price' clause restricts the competition among online travel agencies. Andreas Mundt, president of the Bundeskartellamt, stated that: 'Booking portals which demand lower commission from the hotels cannot offer lower hotel prices. The clauses also make the entry of new platforms to the market more difficult. Consumers, therefore, benefit directly from the court's decision.'[372] Mundt highlighted that ending the enforcement of MFC clauses will be beneficial for the customers since lower prices can be found on other online reservation platforms after ending the obligation of offering the lowest price to HRS.

The best price clauses that had been applied by HRS was wide-price parity clauses. Since HRS had a market share over %30, it could not benefit from VBER because there is a condition under VBER for having a market share below %30 in the relevant market.[373] Even though the decision

[371] See Case European Commission, Decision of 12.12.2012 in the case COMP/AT.39847 – E-Books. - 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.

[372] Bundeskartellamt, 'HRS's 'best price' clauses violate German and European competition law – Düsseldorf Higher Regional Court confirms Bundeskartellamt's prohibiton decision' <https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2015/09_01_2015_hrs.html> accessed 28 August 2020.

[373] Mark-Oliver Mackenrodt, 'Price and Condition Clauses in Contracts Between Hotel Booking Platforms and Hotels' *IC* 50, 1131–1143 (2019), p. 1134.

brought to the OLG Düsseldorf, the result did not change and it was stated that the HRS's price parity clauses restrain competition under TFEU 101.

3.2.2. Expedia

Expedia is also an online hotel booking platform. Although, the OLG Düsseldorf in its final instance found out that the price parity clause enforcement constitutes infringement under TFEU 101, since the market share was under %30 the enforcements were justified under VBER.

3.2.3. Booking.com

In the Booking case unlike Expedia and HRS *narrow MFC* clauses were in enforcement. Nevertheless, Bundeskartellamt decided that the narrow best price clauses violate TFEU 101.[374] After that OLG Düsseldorf overturned the decision held that these clauses do not violate Art. 101 of TFEU. Federal Court of Justice allowed Authority to appeal this decision. Therefore, whether narrow the MFC clauses constitutes an infringement remains unanswered. On the other hand, Bundeskartellamt published series of papers[375] concerning online hotel booking platforms investigations and the view of the Authority can be seen clearly from there.

The arguments of the Düsseldorf Court mainly rely on the 'free-riding problem'. For the booking platforms, the problem can be summarized as follows: in the scenario when there is no best price agreement between the online booking platform and the hotel, hotels can be viewed at the platforms' page and still offer better prices on their websites. In this way, hotels would use the platforms' website to make their advertisements and offer lower prices on their own webpage. This problem is called the free-riding problem and the Düsseldorf court of Appeal relied on this argument while stating narrow MFC clauses prevent free-riding problems. Therefore, it did not make an assessment under TFEU 101(3) and VBER and concluded narrow MFCs are valid under Article 101 of TFEU.

On the other hand, Bundeskartellamt argues this view while stating there is no empirical evidence (or at least there is no evidence that has been published) for narrow MFC clauses preventing free-riding problem.[376] For this reason, the Authority published the investigation results for the Booking.com case. According to this, elimination of the narrow price parity clauses (for the period from 2015 until the summer of 2018) has not harmed Booking.com's sales success and for the

[374] Mark-Oliver Mackenrodt, 'Price and Condition Clauses in Contracts Between Hotel Booking Platforms and Hotels' *IC* 50, 1131–1143 (2019), p. 1134.

[375] Bundeskartellamt 'The effects of narrow price parity clauses on online sales – Investigation results from the Bundeskartellamt's Booking proceeding' August 2020.

[376] Bundeskartellamt 'The effects of narrow price parity clauses on online sales – Investigation results from the Bundeskartellamt's Booking proceeding' August 2020. P.2

whole period, Booking.com consolidated its position in the relevant market as the leading platform in Germany.[377]

Although these findings of Bundeskartellamt seem to be convincing, this strict point of view against price parity clauses remains contradictive with most of the Competition Authorities' perspective. For example, the Booking investigations in Sweden, France and Italy ended up with commitments and protect the pro-competitive effects of MFC clauses. Additionally, the Swedish Court of Appeal stated that the oligopolistic character and the barriers to entry to the online platform markets were not due to the narrow MFC clauses but a common characteristic of platform markets.[378] The same argument can also be applied to the Booking.com case in Germany. Düsseldorf Court of Appeal adopted this view while deciding narrow best price clauses are valid under TFEU 101. However, the final decision for this case will show the prevailing argument for the narrow MFCs for the Booking case.

3.3. Booking, Expedia, IHG (InterContinental Hotels Group Inc.) - Office of Fair Trading (OFT) (UK)

OFT opened an investigation against IHG and the arrangements IHG made with Booking and Expedia. This investigation ended up with several commitments given by the parties.[379] Even though MFC clauses were not the main focus of the investigation, the impact of those clauses on the OTAs capability of providing discounts was examined. After that Skyscanner (a price comparison website) brought the case to the Competition Appeals Tribunal (CAT), CAT remitted the case back to the CMA (Competition and Markets Authority).[380] CMA closed the investigation back in 2015 with the reconsideration of the latest pricing updates made by Booking.com both in the UK and across Europe.

The latest changes made by Booking foresee the abandonment of its price, availability and booking parity provisions with respect to other OTAs (online travel agencies) for both in the UK and across Europe. Alternatively, price and booking availability clauses with respect to the hotel's own websites will remain.[381] This practice is defined as a narrow-MFC clause and most of the NCAs

[377] Bundeskartellamt 'The effects of narrow price parity clauses on online sales – Investigation results from the Bundeskartellamt's Booking proceeding' August 2020. P.3

[378] Mark-Oliver Mackenrodt, 'Price and Condition Clauses in Contracts Between Hotel Booking Platforms and Hotels' *IC* 50, 1131–1143 (2019), p. 1137.

[379] 'CMA Closes hotel online booking investigation' accessed: 26.08.20 https://www.gov.uk/government/news/cma-closes-hotel-online-booking-investigation

[380] OFT established in 1973 and CMA established in 2014 combining many functions in OFT and Competition Commission in UK.

[381] Franciso Enrique Gonzalez-Diaz and Matthew Bennett, 'The Law and Economics of Most-Favoured Nation Clauses' (2015) 1 CLPD 26, p. 30.

accepted that a narrow-MFC clause is compatible with competition law legislation. When this investigation examined under the abuse of dominant position, enforcing best price guarantees for both hotel's own selling channels and other OTAs is called exclusionary behaviour because this will prevent new entries to the market and weaken the sales of other OTAs.

3.4. Booking.com - Italy, Sweden, France

Italian, Swedish and French Competition Authorities (NCAs) were investigating Booking.com's MFC applications and as a result, Booking.com offered commitments. At first, these commitments were to abolish price parity clauses. After the market testing period, amendments to this commitment seem to be unreasonable. In fact, Booking.com will abandon the practice of MFC clauses with respect to other online travel agencies and hotels' offline sales; meaning Booking can still practice price parity clauses among hotels' own websites. [382] These commitments are now accepted, and the investigation is closed. What is odd with this result is that if customers want better prices or opportunities, they need to seek offline ways to make reservations. When these investigations are compared to HRS decision mentioned above, even though the applicable legislations, platforms in question and market structure are quite the same, results are different. While Bundeskartellamt's HRS decision may prevent the possible efficiencies of MFC clauses,[383] NCA's booking decision would induce high prices and decrease consumer's advantages when making reservations.

3.5. Booking.com – TCA

In 2017 Turkish Competition Authority published the final decision related to Booking.com's MFC applications and decided wide-MFC applications caused a breach of the Article 4 of Turkish Competition Act.[384] Although TCA's former infringement decision concerning MFC enforcements of Yemek Sepeti was concluded with abuse of dominant position (article 6 of Turkish Competition Act, article 102 of TFEU), TCA's view, in this case, was in the same direction as the other investigations in Europe and gave an infringement decision according to the Article 4 which foresees the prohibition of agreements and concerted practices among undertakings.

It was stated that in the European Commission decisions MFC clauses were evaluated as vertical agreements, so the MFC clauses were assessed under TFEU 101. Moreover, exclusive agreements fall both into the scope of TFEU 101 and 102. For this reason, MFC clauses can be assessed under

[382] Pınar Akman, 'A competition Law Assessment of Platform Most-Favoured-Customer Clauses' CCP Working Paper 15-12, p. 17-18.

[383] See section III.

[384] TCA Board Decision numbered 17-01/12-04, dated 05.01.2017 <https://www.rekabet.gov.tr/Karar?kararId=d2bfb2c8-e517-498a-9542-07e3cad8a419> accessed 28 August 2020.

both articles. According to the decision, the anti-competitive effects of the MFC enforcements are closely related to their market power and no matter which article is being applied to the relevant case the evaluations (such as, barriers to entry, network externalities, exclusionary behaviours) resemble each other. However, there is no concrete reason why TCA assessed this case under Article 4 of the Turkish Competition Act rather than stating the common practice conducted in the European Commission.

Since the market structure and exclusionary behaviours of these undertakings are similar to each other, rather than following the common practise (assessment under article 101 for MFC clauses) it would be more convenient if the TCA assessed Booking.com's MFC enforcements under abuse of the dominant position like YemekSepeti.com.

Counterview of one of the board members of the TCA points out that other investigations against Booking across Europe ended up with the commitment which involves the abandonment of MFC practices while the TCA decision ended up with infringement and TRY 2,543,992 fine.

3.6. Yemek Sepeti – TCA

Yemek Sepeti is an online food ordering platform that operates in Turkey.[385] TCA has opened an investigation against the platform with respect to the Articles 4 and 6 of the Competition Act which is in parallel with Articles 101 and 102 of the TFEU. There are several sections when detecting an abuse of dominance which will be discussed below[386] such as defining relevant product/geographic market, time dimension, barriers to entry, advantage of the first entrant. TCA elaboratively investigated all these factors. After defining relevant product and geographic market and taking into consideration of time dimension the Board found out that Yemek Sepeti holds dominance in the online food ordering market. However, as is known, holding the dominance is not a breach in terms of competition law. For this reason, whether this dominance is abused was evaluated. It was concluded that abuse was caused by exclusionary activities caused by the MFC enforcements. According to the investigation, the market share of Yemek Sepeti, the network externalities provided by the advantage of the first entrant to the market, and barriers to entry prove the strength of the dominant position and the difficulty of entering the market for other undertakings. In addition, the documents indicating the duration of their exclusionary behaviours and the applications of MFC clauses that exceed the contract clauses obtained in on-site inspection (wide MFC) also show other factors that are considered when determining the anti-competitive market closure.

[385] TCA Board Decision, numbered, 16-20/347-156 dated 09.06.2016.
[386] See section 3.3

The Board dropped all the allegations related to Article 4 and the case ended up with the infringement decision related to abuse of dominant position claiming MFC practices have an exclusionary effect on the online food ordering market. This investigation has a different approach when compared to other MFC investigations because TCA gave the infringement decision according to article 6 of Competition Law – abuse of dominant position caused by wide MFC enforcement. The relevant market in the investigation – online food ordering market is likely to have intense indirect network externalities.[387] For this reason, this case is one of the most appropriate decisions in terms of TCA's evaluations.

3.7. E-Books (Amazon Marketplace) – European Commission

After the investigation of Bundeskartellamt in Germany, Amazon Marketplace also came under the scrutiny of the European Commission.[388] The reason for the investigation is mainly the price parity clause enforced by Amazon. The commission stated that they have concerns that price parity clauses included in Amazon's contracts with publishers concerning such e-books could cause a breach of EU antitrust rules that prohibit the abuse of a dominant market position and restrictive business practices. The price parity clauses (also called MFC clauses) foresee publishers to offer Amazon similar (or better) terms and conditions as those offered to its competitors and/or to inform Amazon about more favourable or alternative terms given to Amazon's competitors. In 2017 Commission closed the investigation with the commitments offered by Amazon which require to abolishing the price parity clauses from their contracts.[389] Commission clarified that Amazon's MFC practices have an exclusionary impact on the e-books market. In this case, the Commission used the right tool to evaluate whether there is an infringement of TFEU due to Amazon's price parity clauses while assessing the case under TFEU 102 – abuse of dominant position.

3.8. Travel Agencies Decision – Turkish Competition Authority

In 2018, the Turkish Competition Authority initiated an investigation against several leading tourism agencies such as ETS Tur, Tatilbudur and Club Jolly. It was alleged that travel agencies agreed on the marketing of hotels, shared their customers, determined the room prices of the hotels, and finally prevented other travel platforms from entering the market by introducing exclusive working conditions for the hotels.

[387] See section 1.
[388] European Commission 'Commission opens formal investigation into Amazon's e-book distribution arrangements' (2015), <https://ec.europa.eu/commission/presscorner/detail/en/IP_15_5166> accessed 29 August 2020.
[389] European Commission, 'Antitrust:. Commission Accepts Commitments from Amazon on e-books' (2017), <https://ec.europa.eu/commission/presscorner/detail/en/IP_17_1223> accessed 29 August 2020.

One of the complaints about the preliminary investigation is that in the contracts signed between travel agencies and hotels, better prices and conditions cannot be provided given to the agency in any marketing channel other than the contracting agency.[390] According to the Vertical Agreement Guideline published by the Turkish Competition Authority, MFC enforcements do not constitute a per se violence, it should be examined under specific conditions. However, if the market share of the undertaking is above %40 then, it cannot get benefit from a block exemption.[391] In this context, TCA examined the case under the Vertical Agreements and whether or not the agencies fell into the scope of Vertical Block Exemption regulations. Since the undertakings in question comply with the conditions of Vertical Block Exemption, it has been decided that there is no need to start an investigation against the travel agencies under Article 4 of the Competition Act which prohibits the cartels, agreements and concerted practices within undertakings.

It is interesting that, even though the Board examined the exclusionary behaviours and the market share (whether or not the market share exceeds the 40% in the relevant service market), the investigation proceeded under Article 4 the of Competition Act (which is similar to TFEU 101) rather than examining the case under abuse of dominant position.

3.9. Compare the Market - Competition & Markets Authority (United Kingdom)

CMA gave an infringement decision against BGL Group, Compare the Market Limited related to section 2 of Competition Act and the Article 101 of TFEU concerning wide MFC enforcements in the Price Comparison Websites (PCW) market. The investigation had been concluded with an extreme penalty of £17,910,062. One of the reasons given by the CMA was 'Restricting the ability of CTM's rival PCWs to expand, enabling CTM to maintain or strengthen its market power'.[392] This decision has significant importance because it was CMA's first fining decision against wide MFN enforcements. As well as other undertakings, Compare the Market also highlighted the free-riding problem that has been ensured by MFN enforcements.

4. Conclusion

MFC practices is still an ongoing issue for both Europe and the US. However, there is no principled approach in terms of literature and tackling the cases concerning those practices. Moreover,

[390] Travel Agencies, Turkish Competition Authority [2018], 18-40/645-315.
[391] Turkish Competition Authority, Guidelines on Vertical Block Exemptions, 2018, p. 53.
[392] Competition & Markets Authority, *Compare the Market (PCW) Investigation*, [2020].

according to the latest evaluation of the VBER by the European Commission states that the effects of MFN clauses are closely related to the characteristics of the specific market and for this reason, a case-by-case analysis should be made.[393] At the same time, different NCAs around the world is trying to adopt the most appropriate approach to those investigations because the use of MFN conditions in contracts does not always have the same results in terms of competition law. Some NCAs give importance to the pro-competitive effects of price parity clauses and take commitments from the undertakings to eliminate wide MFN clauses, while some member states that banned these completely. Whether or not eliminating them completely, the most important issue is how to assess those clauses because the starting point of the assessment can lead to different conclusions as can be seen from the recent decisional practices.

As discussed above most of the NCAs as well as Commission investigated the platforms that enforce MFN clauses under TFEU 101 or corresponding articles in their national legislation. However, when there is no allegation that there is horizontal collusion between platforms or between the suppliers, assessment under TFEU 101 in these cases seem to be unreasonable.[394] The impact of MFC clauses on abuse of dominance is undeniable when the market shares of the undertakings who enforce MFC clauses impact the relevant market with these clauses. In line with that assessment under TFEU 102 -abuse of dominant position- is more appropriate to interpret the MFC practices of the platforms and investigate the competition law problems caused by those clauses.

[393] European Commission, Directorate-General for Competition 'Support studies for the evaluation of the VBER', dated: 08.10.20, p. 145.

[394] Pınar Akman, 'A competition Law Assessment of Platform Most-Favoured-Customer Clauses' CCP Working Paper 15-12, p. 50.

DE MINIMIS IN THE EUROPEAN UNION COMPETITION POLICY & ITS COMPARISON WITH THE TURKISH COMPETITION LAW IN THE LIGHT OF THE RECENT AMENDMENTS TO THE ACT ON PROTECTION OF COMPETITION (LAW NO. 4054) AND THE PAST DECISIONS OF THE TURKISH COMPETITION AUTHORITY

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Abstract

The law regulating the amendment to the Act on Protection of Competition No. 4045 ('Competition Act') was published in the Official Gazette dated 24th June 2020 and numbered 31165 and entered into force as of its publication date. Significant steps have been taken with this amendment on the purpose of harmonising the Turkish Competition Act with the EU acquis. One of the remarkable steps is de minimis principle which has just been introduced in the amendment law.

De minimis principle was implemented in Article 41 of the Competition Act and this implementation brought a possibility for restrictions, which have not appreciable effect on competition, not to be subject to investigation. Under this article, the agreements, concerted practices and decisions of associations of undertakings that are not exceeding the certain threshold to be determined by taking into consideration the criterions such as market share and turnover thresholds, may not be subject to investigations unless they are not explicit and gross infringements, such as price-fixing between competitors, territory or customer sharing and restriction of supply.

Within this scope, de minimis policy adopted in the Competition Act has been assessed and discussed thoroughly in an effort to answer first expectable questions, such as how de minimis can be applied, how the Turkish Competition Authority (TCA) was approaching to de minimis principle before the amendment and how the authority may tend to approach to the cases under renewed Article 41 in the light of the previous decisions of both the Turkish Competition Authority and of Council of State of Turkey.

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Before the amendment, in cases where the agreement restricting the competition does not have an appreciable effect on competition, the TCA was relying on Art 9(3) of the Competition Act to not make the case a subject of an investigation. Although there was no stability in the TCA's decisions due to lack of an explicit regulation on the same purpose with de minimis principle, the TCA had diverse decisions in the line of this view since 1997. At this point, besides the various views in the doctrine on this subject which are handled in this article, the Council of State was pointing out that the TCA can decide to not investigate relying on Art 9(3) only if the case was sufficiently enlightened with the findings during preliminary investigation.

Following the amendment, in order to regulate the procedure of application of the new-adopted de minimis rule, the TCA presented a communiqué on the agreements, concerted practices, acts and conduct of association of undertakings that do not have an appreciable effect on competition. According to the communiqué, de minimis principle is not applicable for the cases where a hard-core infringement is in question. The infringements which will be considered hard-core violations are counted in communiqué. Thus, considering the cases where we can come across with the infringements counted as hard-core, it seems that the opportunity to not be a subject to an investigation under Art 9(3) might remain valid for them.

Moreover, as distinct from the EU de minimis policy, the implemented article to the Competition Act and the communiqué of the TCA prevents applying de minimis principle when there is a hard-core restriction that is counted to be considered by the communiqué, in the case. However, in the EU policy, restrictions of competition 'by object' (rather than hard-core restrictions) is out of the scope to the benefit from de minimis, and in a guidance the agreements may benefit from the de minimis principle exceptionally for certain situations are also defined.

On the other hand, it is also assessed whether de minimis rule is a reason for the compliance and whether it can be possible to demand compensation based on the infringement relying on tort law. Even though it seems possible regarding the general rules of tort law in theory, it is not likely to demand it as Turkish Supreme Court (*Yargıtay*) seeks a negative declaratory decision by the TCA for compensation. Like these points, the possible aspects of new-adopted de minimis principle, predictions and expectations are discussed thoroughly and presented in this article.

1. Introduction

After the publication of the law regulating the amendment to the Competition Act in the Official Gazette, it is required to re-assess the Competition Act regarding these new amendments. In this respect, the principle of de minimis which has just been adopted to the Competition Act has special importance, and it is handled in detail in this article. Thus, the beginning of this principle, legislation on this subject in the EU, how it has been applied by the Court of Justice of the European Union (CJEU) and the Member States' Competition Authorities are discussed here thoroughly and what the reflection of this principle was in Turkey, what it might be able to change in the application of Turkish Competition Authority (TCA) and certain predictions based on the amendments are aimed to assess here.

In the following parts, case law and legislation on de minimis in the EU are deeply examined and are benefited to foresee the possible practice in Turkey. At this point, the characteristic of being soft law of the notices of the European Commission is considered a critical point to touch on in the article as well, so the bindingness of the regulations, notices and guidance is especially discussed in part 2.2. Since to comprehend the de minimis principle in a clear mind is quite significant in terms of the evaluation of Turkish competition policy, certain confusable terms with 'de minimis' under competition terminology are also aimed to clarify in the article. Following to the assessments on the relation and the key points between de minimis and restrictions by object, de minimis which is a new-adopted competition instrument in Turkish competition policy is focused on in the 3. section of the article. TCA's, before this adoption, a kind of 'sui generis' application of the Article 9 (3) of the Competition Act on the same purpose with de minimis principle is another subject that is considered must be examined. In addition, the decisions of the Council of State in Turkey, towards the decisions of the TCA relying on Article 9 (3) to not investigate, can be also found in this section. Within the scope of the new-adopted de minimis policy, demands of compensation due to the infringement of competition rules in the case where de minimis exist is another objective wished to evaluate in the article.

2. De Minimis Under the Competition Law

De minimis, a long-established principle in law meaning 'about minimal things' in Latin expression, arises from the legal doctrine namely 'de minimis non-curat praetor' ('The praetor does not concern himself with trifles') and 'de minimis non-curat lex' ('The law does not concern itself with trifles'). Relying on this doctrine, the court may refuse to consider trifling matters in cases. Besides encountering it in diverse civil matters, de minimis has a particular significance in competition law. As it will be explained in detail as follows by this article, in accordance with 'de minimis' principle

modelled on the EU competition law; agreements, decisions by associations of undertakings and concerted practices are required to have an appreciable effect in restricting competition for being considered competition infringements.

Article 101 of the Treaty on the Functioning of the European Union (TFEU) prohibits the agreements between undertakings which have as their object or effect to restrict competition within the single market. CJEU has consistently held that Article 101 TFEU is not applicable where the impact of an agreement on competition is not 'appreciable'. In the line of this jurisprudence, the European Commission ('Commission') sets out in the De Minimis Notice how it determines, with the help of market share thresholds, which agreements have no appreciable effect on competition and are, thus, outside the scope of Article 101 TFEU. This provides a 'safe harbour' for minor agreements between companies below a certain market share threshold.[395]

The main reason behind the adoption of de minimis in competition law is to be able to focus on the infringements which can have appreciable effects on trade and competition disregarding the ones which have minor and non-appreciable.[396] In this way, it is aimed to raise the efficiency of competition rules and the regulations in cases and to secure the procedural economy. Indeed, it is sometimes possible to coincide with the cases that negligence of minor infringements by small undertakings or undertakings holding a share in the market can set going the competition in the market.[397] Negligence like this can be reasonable since it affects the competition in a positive way when the criterions, regarded by the Court of Justice of the European Union (CJEU) and mentioned in the following parts, are met. In order to keep the balance and proportionality between negligence and infringements, the CJEU put forward the significant points and criterions in its diverse cases to take account in its historic process. Since the criterions are not included in a written source but created through the decisions and court practices of the CJEU, the European Commission published those notices on de minimis during the process.

Despite the long-time existence of de minimis principle in the EU competition law, it had not been adopted to Turkish competition policy and law before the recent amendment. Although it is known that the TCA held decisions in the direction of a kind of 'appreciable' policy by relying on Article 9 (3), de minimis has had a more important role in Turkish Competition Law.

[395] European Commission, 'Antitrust: Commission adopts revised safe harbours for minor agreements ('De Minimis Notice') and provides guidance on 'by object' restrictions of competition - Frequently asked questions' (2014) <https://ec.europa.eu/commission/presscorner/detail/en/MEMO_14_440> accessed 5 November 2020.
[396] Zekerriya Arı, *Danışıklılık* (2004) p 133.
[397] Zekerriya Arı, '*Rekabet Hukukunda de Minimis Kuralları (Hissedilir Etki)*' [2002] 21(4) Banka ve Ticaret Hukuku Dergisi p 69-97.

3. De Minimis Policy and The Application of the European Union

3.1. Naissance of De Minimis Policy and The Application in the European Union

The historical process making de minimis a considerable measure in the EU Competition Law and the fundamental sources to rely on such as case law, regulations and notices by the European Commission are worth touching on. At this point, before the required elements were written in any source, the 'appreciability' requirement that the Commission seeks in a restrictive or anti-competitive act or agreement has first arisen in the case Grosfillix[398] as '*faussée d'une manière sensible*' ('appreciably distorted'). Following Grosfillix, In Société Technique Minière[399], the Court explained that restrictions by the objects or effect in the Article 85(1) (of the EEC Treaty) are not cumulative conditions but alternative. In determining the object of the agreement, the precise purpose of all or some clauses has to be considered in the economic context in which the agreement is to be applied. Where the clauses do not display a sufficient degree of harm to competition, then the effects of the agreement should be considered. To refer to an agreement which falls into Article 85, it has to be shown that competition has been restricted to 'an appreciable extent' (*de façon sensible*).

In Völk v. Vervaecke[400], the OLG Munich asked the CJEU in a preliminary reference whether exclusive dealing contracts with absolute territorial protection could escape the prohibition laid down in Article 85(1) (Article 101 of the TFEU) where the producer of washing machine has a relatively unknown brand and a market share below one percent and produced a few hundred of machines. The court answered to this in Völk by taking into account the market share of Völk. The court held that the restriction of Völk, that has 0.08 percent of market shares in its internal market in 1963, is not in the appreciable extent and hence is negligible in terms of trade and competition. Thus, the fact that an agreement restricting competition by an object or by effect is not in the scope of Article 85 (1) in case of minor and insignificant market shares, was held by the court. In other words, following the statements in Völk, it was taken for granted that appreciability criterion would

[398] *Grosfillex v Fillistorf* [1964] OJ 58/915-916

[399] *Société Technique Minière (L.T.M.) v Maschinenbau Ulm GmbH (M.B.U.)* [1966], Judgment of the Court of Justice, Case 56-65. ECLI: ECLI:EU:C:1966:38.

[400] *Franz Völk v Establisshements J. Vervaecke* [1969], Judgement of the Court of Justice, 9 July 1969, Case 5/69 ECLI: EU:C:1969:35.

apply to both object and effect restrictions, even though it was acknowledged that the thresholds applied to finding appreciability would not necessarily be the same.[401]

The Commission published its first notice on de minimis in 1970 and it was followed by the notices in 1977, 1986, 1994, 1997, 2001 and lastly 2014. After Völk (but before turning point decision of Expedia and the current notice[402], application of de minimis was depending on whether the restriction is between competitors or non-competitors. The Commission, in the notice, settled on the criterions of market share and turnover thresholds to determine the appreciability in a case. In this way, the Commission served on the purpose of concentration on the restrictions that are considered more important within competition.[403] At this point, it should be noted that exceeding these thresholds does not directly mean a restrictive conduct. In other words, an agreement may not appreciably influence the trade between undertakings in the Member States even though the thresholds are exceeded. Just like this, it is also possible to come across a case that thresholds are not exceeded but the competition is appreciably affected. For instance, in Distillers Company[404], the Court of Justice indicated by considering the structure of the market that there is an appreciable impact on the internal market although the market share of the undertaking is lower than the thresholds. Furthermore, in Papiers Prints[405], even though the agreement is executed and performed in only one Member State, it can be enough to impact the trade in internal market. As it seemed here, the term 'appreciability' was needed to be clarified and regulated in a Notice in 1986 by the Commission, rather than staying in only case law. After a while, with the Notice in 1997, the turnover threshold was extracted from the needed criterions.

The view in Völk that object restrictions may fall outside Article 101 (1) TFEU if they are de minimis was also the assumption underlying the Commission's 2001 De Minimis Notice. Compared to the 1997 Notice, the 2001 Notice raised the safe harbour thresholds for horizontal agreements from 5 to 10 per cent, and for vertical agreements from 10 to 15 percent, and noted that these safe harbour thresholds appreciability would have to be examined on a case by case. From safe harbour thresholds, it is excluded only certain hardcore restrictions, but did not go so

[401] Florian Wagner-von papp, 'Preface: De Minimis (May 2, 2015)' [5 Jun 2015] Art N° 72780 Forthcoming Bulletin e-Competitions De minimis <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2613979> accessed 9 September 2020.

[402] 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 1 291/1-4.

[403] Barry Rodger Band Angus Macculloch, *Competition Law* (2001) 144.

[404] *Distillers Company Limited v Commission of the European Communities* [1980], Judgement of the Court, 10 July 1980, Case 30/70, ECLI:EU:C:1980:186.

[405] Commission Decision of 23 July 1974 relating to a proceeding under Article 85 of the EEC Treaty (IV/426 - Papiers peints de Belgique) [1974] OJ 2 237/3-11.

far as to exclude all object restrictions.[406] (At this point, it should be remembered that the Notices are not binding on the courts and national authorities.[407] This subject is also clarified in section 3.2) The judgement Expedia held in 2012 can be regarded as a turning point with respect to the subject of this article. In Expedia, two questions were raised as a basis; the first is whether de minimis criterion applies to only effects restrictions, or to also object restrictions. The second is whether national competition authorities are bound to apply de minimis thresholds provided for in the Commission's notice.

Expedia is about an agreement, aiming to establish a joint subsidiary that operated as an online travel agency, between French State railway company (SNFC) and a company specialized in the sale of travel services through the Internet. French competition authority decided that the agreement was against Article 101 TFEU (81 TEC) as well as against national legislation. This is because it constituted a restriction by object. After Expedia and SNCF were fined, Expedia challenged the decision before French courts with the argument that the agreement was falling below the de minimis thresholds established by the European Commission Notice 2001. As a result, Expedia case was brought to the CJEU as a preliminary ruling.

In respect of the second question on binding of the 2001 Notice, the CJEU advised a negative answer. As the second question is associated with the soft law characteristic of the EU instruments, more detailed information is provided in part 3.2. of this article. On the other hand, in terms of the first question; under paragraph 37 of the Expedia 'an agreement that may affect trade between Member States and that has an anti-competitive object constitutes, by its nature and independently of any concrete effect that it may have, an appreciable restriction under Article 101 unless they are objectively justified and being understood that in principle they may be deemed compatible under Article 101 (1)' This statement allowed several interpretations and views in competition law.

The first view claimed that Expedia overruled Völk decision. According to this view, if the agreement has restriction by object, then the market share thresholds are not taken into account even when they were exceeded. Another point of view was that object restriction cannot benefit from de minimis principle only if it is a hardcore restriction. This is because in the EU, the object box contains a broad variety of agreements and practice, including for instance resale price

406 Florian Wagner-von papp, 'Preface: De Minimis (May 2, 2015)' [5 Jun 2015] Art N° 72780 Forthcoming Bulletin e-Competitions De minimis <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2613979> accessed 9 September 2020.

407 e.g., *Expedia Inc. v. Authorite de la Concurrence and others*, Judgement of the Court (Second Chamber), 13 December 2012, ECLI:EU:C:2012:795; see also point 4 of the 2001 Notice and point 5 of 2014 Notice which indicate that the Notice are not binding on authorities and courts, but it strives to give guidance to them.

maintenance or prohibition on internet sales in a selective distribution system.[408] In this case, it would be an infringement of freedom of enterprise. Another interpretation is that if Expedia would have wanted to overrule Völk, the court would not have just implied it in the case but would have asserted all arguments explicitly. Thus, according to this view, Expedia did not overrule Völk, but suggests how to use the restriction by object tool in the presence of very weak market.[409]

After glancing at the whole historic process of de minimis and its case law, the current application of de minimis can be comprehended easier. Article 101(1) of the Treaty on the Functioning of the European Union is not applicable where the impact of the agreement on trade between Member States or on competition is not appreciable. An agreement that has as its object the prevention, restriction or distortion of competition within the internal market constitutes an appreciable restriction of competition. Therefore, the current Notice also does not cover the agreements that have as their object the prevention, restriction or distortion of competition within the internal market. In order to determine whether or not a restriction of competition is appreciable, the competition authorities and the courts of Member States may take into account the thresholds established in the Notice but are not required to do so.

To sum up, according to the current Notice, where;

(i) aggregate market share held by the parties of the agreement does not exceed 10% on any of the relevant markets affected by the agreement and the agreement is between competitors, agreements are not considered appreciably restricting competition.

(ii) aggregate market share held by the parties of the agreement does not exceed 15% on any of the relevant markets affected by the agreement and the agreement is between non-competitors, agreements are not considered appreciably restricting competition.

(iii) it is difficult to classify the agreement as either an agreement between competitors or an agreement between non-competitors, the 10% threshold is required for this restriction on competition to benefit from de minimis.

De minimis exemption cannot be applied to agreements containing restrictions which, directly or indirectly, have as their object: a) the fixing of prices when selling products to third parties; b) the limitation of output or sales; or c) the allocation of markets or customers.

[408] Ginevra bruzzone and Sara Capozzi, *'Restrictions by Object in the Case Law of the Court of Justice: In Search of a Systematic Approach'* [2015], G Benacchio- M Carpagnano (eds), Editoriale scientifica, 2015 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2753521> accessed 16 September 2020.
[409] ibid.

3.2. Legislation, Regulations and Notices as The Soft Law of EU

Instruments deprived of legally binding force according to Article 288 TFEU, such as notices and guidelines, have been issued in EU Competition Law since the 1960s.[410] In spite of this, giving a clear definition of soft law is still difficult because of the heterogeneity of the legal instruments that can be covered.[411]

Therefore, some authors describe soft law as an umbrella concept, and EU soft law as part of another umbrella, the acquis Communautaire.[412] There is also a discourse in legal literature which asserts that the term itself is self-contradictory since law is either binding or not at all, so non-binding law, which may be the primary definition of soft law, is a contradiction that should not exist.[413] According to another point of view, recommendations, opinions and other instruments not mentioned in article 288 TFEU (previously Article 249 TEC/189 EC) - such as communications, notices or guidelines - are basically and generally referred to in the academic literature as 'soft law', even though this term is not used to a large extent in the case law of the European Courts.[414] The most frequently quoted definition is the one by Snyder, according to whom soft law instruments are 'rules of conduct which, in principle, have no legally binding force but which nevertheless may have practical effects.'[415]

First mentions of the Commission's notices on 'soft law' are found in several opinions of the Advocates General. These opinions, which display us the advocate general's unwillingness on recommendation to the Court to use this type of instruments in the judgements, dealt with the de minimis notice.

First notice was enacted on 27 May 1970 by the Commission as a follow up to the judgments in Völk, and it proclaimed that agreements that have 'an insignificant effect on trade' between Member States and competition escape from the prohibition under Article 81 EC (Article 101

410 Oana Stefan, 'Relying on EU Soft Law Before National Competition Authorities: Hope for the Best, Expect the Worst' [2013] Competition Policy International (CPI) <https://www.competitionpolicyinternational.com/relying-on-eu-soft-law-before-national-competition-authorities-hope-for-the-best-expect-the-worst/> accessed 10 October 2020.

411 András Kovács, Tihamér Tóth, Anna Forgács, 'The Legal Effects of European Soft Law and Their Recognition at National Administrative Courts' [2016], ELTE Law Journal

412 L. Senden, 'Soft law, self-regulation, and Co-Regulation in European Law: Where Do They Meet' (2005) 9.1. Electronic Journal of Comparative Law 23. <http://www.ejcl.org/> accessed: 6 September 2015.; L. Senden, 'Soft law and its implication for institutional balance in the EC' (2005)1 Utrecht Law Review 2, 79, 81 similarly M. Medelson, 'Formation of Customary International Law' (1998) 272 Hague Academy of International Law, Collected Courses 155-410, 360. in L. Blutmann (n 5) 610.

413 L. Senden, Soft law in European Community Law (Hart Publishing 2004, Oxford) 109, O. Stefan (n 1) 117., H. Hillgenberg, 'A Fresh look at soft law' (1999)10 European Journal of International Law 500. or L. Blutmann (n 5) 609-

414 Oana Andreea Stefan, 'European Competition Soft Law in European Courts: A Matter of Hard Principles?' [2008] 14(6) European Law Journal <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1284013> accessed 20 October 2020

415 Francis Snyder, Chapter 10: Soft Law and Institutional Practice in the European Community, Martin S (ed), The Construction of Europe [1994]

TFEU). The principle that the interpretation of hard provisions lies only with the European Court was restated in section 'I' of the notice. Relying on this principle, in *Cadillon v Firma Hoss Maschinenbau*[416], Advocate General Dutheillet de Lamothe claimed that the Court should not refer to the de minimis notice in its judgment, since it was meant only for guidance and did not have a normative value. In 1975, Advocate General Jean-Pierre Warner also expressed a similar view, emphasising the fact that the Notice did not have a legally binding effect.[417] In his opinion in another case, Miller, he suggested that 'In a case where an undertaking had, in bona fide reliance on the terms of the Notice, proceeded on the assumption that an agreement to which it was a party was outside the prohibition in Article 85(1), it may be that a sort of estoppel would arise precluding the Commission from subsequently fining that undertaking on the ground that the agreement was in fact within the prohibition.'[418]

In certain cases, the court provides that the opinion expressed by the Commission in soft law instruments in the form of comfort letters constitutes a factor that the national court may take into account when considering whether an agreement complies with competition rules. It is also the position expressed by Advocate General Van Gerven in 1990 with regards to the de minimis notice.[419]

In 1991, in Delimitis, AG van Gerven expounded on the legal status of the de minimis notice as;[420] 'Without wishing to express a view on the exact legal force of such a notice, which constitutes in any event a declaration of intention from which it is possible to deduce the Commission's policy on implementation and confers on the individuals for whom it is intended certain legitimate expectations, the national court may nevertheless find therein guidance as to how the Commission is applying Article 85.1 (now Article 101.1 TFEU), which may be of assistance in its assessment.'

Following the Council Regulation 1/2003 On the Implementation of The Rules on Competition Laid Down in Articles 81 and 82 of the Treaty ('the Regulation 1/2003'), the enforcement of the EU competition law occurred in a multi-level setting with cases dealt with at national or at European level by authorities organized within the European Competition Network (ECN). After being called of national competition authorities, courts and European Commission to apply EU

[416] Opinion of Mr Advocate General Dutheillet de Lamothe delivered on 4 May 1971 in Société anonyme *Cadillon v Firma Höss, Maschinenbau KG*., Judgment of the Court of Justice, May 1971, Case 1-71, ECLI:EU:C:1971:47

[417] Opinion of Advocate General Warner delivered on 11 March 1975 in *Kali und Salz AG and Kali-Chemie AG v Commission of the European Communities*, Judgement of the Court of Justice, 11 March 1975, Case:19-74, ECLI:EU:C:1975:58

[418] Opinion of Advocate General Jean-Pierre Warner delivered on 10 January 1978 in *Miller International Schallplatten GmbH v Commission of the European Communities*, Judgement of the Court of Justice, 10 January 1978, Case 19/77, ECLI:EU:C:1978:1.

[419] Opinion of Advocate General Van Gerven Stergios in *Delimitis v Henninger Bräu AG*, Judgement of the Court of Justice, 1991, Case C-234/89, ECLI:EU:C:1990:358.

[420] *Delimitis v. Henninger Brtu AG* [1991], CJEU Case C-234/89, 1991 E.C.R. 1-00935, para. 22.

Treaty provisions and secondary legislation to competition cases, there was (-and is still-) no obligation to observe the EU notices or guidelines for national authorities or courts, however, there was (-and is still-) a requirement for following the notices or guidelines for the EU Commission.

As mentioned in the facts of Expedia above, it was claimed that the agreement the parties concluded, was falling below the de minimis thresholds, established by the European Commission as 10 percent to not exceed in the notice (Notice 2001). Under French competition law, there was not such threshold criterion, so it was discussed in Expedia that under the Article 3 (2) of the Regulation 1/2003, the application of national competition law may not cause to the prohibition of agreements which do not restrict competition within the meaning of 101 TFEU. Thus, this topic was brought to the CJEU as a preliminary ruling. CJEU stressed that national authorities are not bound to apply EU soft law instruments and they have complete discretion to take into consideration the thresholds introduced in de minimis notice.[421] At this point, the arguments of the CJEU in Expedia were;

(i) the thresholds in the notice are not absolute, there is also possible that an agreement exceeding these thresholds may not restrict the competition in certain cases,
(ii) notices and guidelines are published in the C section, not L of the Official Journal, and;
(iii) the notice does not contain any reference to declarations of national authorities agreeing to abide by provisions thereof.[422] [423]

The court also pointed out that the notice is intended to give guidance to national authorities and courts in the application of Article 101 TFEU.[424] The court added that soft law can bind national authorities only if the latter expressly endorse the text of a certain instrument.[425]

In this context, some opinions believe that the grounds and intensity of soft law effects vary in accordance with the level where they are invoked. This creates important concerns with respect to individual rights. The fact that individuals have different identities and belong to multiple polities seems to translate in a weakening of their rights as they move away from the center.[426] Here, it can

[421] *Expedia Inc. v. Authorite de la Concurrence and others*, Judgement of the Court (Second Chamber), 13 December 2012, ECLI:EU:C:2012:795, section 31.
[422] ibid para. 30.
[423] AG Kokott also argued that although national courts are not obliged to apply soft law, they should nevertheless consider the Commission's assessment and give reasons for any divergence. Expedia opinion, EU:C:2012:544 para 39. For a similar argument see: Oana Andreea Stefan, 'Relying on EU Soft Law Before National Competition Authorities: Hope for the Best, Expect the Worst' (2013). CPI Antitrust Chronicle July 2013 (1).
[424] *Expedia Inc. v. Authorite de la Concurrence and others*, Judgement of the Court (Second Chamber), 13 December 2012, ECLI:EU:C:2012:795, para 28.
[425] ibid para 26. For instance, Notice on Cooperation Within the Network of Competiton Authorities.
[426] Oana Stefan, 'Relying on EU Soft Law Before National Competition Authorities: Hope for the Best, Expect the Worst' [2013] Competition Policy International (CPI) <https://www.competitionpolicyinternational.com/relying-on-eu-soft-law-before-national-competition-authorities-hope-for-the-best-expect-the-worst/> accessed 10 October 2020, 6.

be also noted that, in Expedia, Advocate General Kokott raised a sort of solution on this issue. She considered that the guidance offered by the notice to national authorities is decisive to ensure effectiveness, uniformity, and legal certainty in the multi-level system of enforcement of EU competition law.[427] AG also mentions the grounds justifying any departure of national competition authorities and courts from the text of Commission's notices, such as particular economic circumstances that need to be assessed on a case-by-case basis, and national specifics.[428]

Finally, in respect of deviation, in a Dutch telecommunication case, which might be counted as a recent case, referred to preliminary ruling; the Advocate General's opinion stressed that judicial deviation from a recommendation must be exceptional and the judge must be excessively cautious and can only deviate from the recommendation based on serious reasons.[429] At this point, according to a point of view, soft law instruments have a soft binding effect: law enforcers should do their best to follow them, but can deviate as long as it is explained in the decision and does not infringe general principles of EU law. [430]

3.3. What Is Not De Minimis: Confusion Between Related Competition Terms

In reading this article, to eliminate the indistinctness between competition terms, a few terms which have the potential of confusion with de minimis are aimed to clarify. Exemptions in the EU competition law are regulated under the TFEU 101 (3). Accordingly, any agreement, any decision by associations of undertakings and any concerted practice which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, does not constitute an infringement under Article 101 (1) in cases that (i) they do not impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; or (ii) does not afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question. Therefore, it can be noted that the existence of these conditions makes the agreements or behaviours compatible with Article 101 (1) TFEU and the European competition law in turn. De minimis, however, is the situation where there is an anti-competitive behaviour or agreement under Article 101 (1) TFEU, but no need to apply that article. In other words, a restriction/infringement still exist in de minimis situation but not impermissible since it has not sufficient effects on competition and the market for which it is applied. Thus, de minimis is simply

[427] Opinion in Expedia, para 37.
[428] Judgement in Expedia, para 41 and 42.
[429] Koninklijke KPN and Others C-28/15, EU:C:2016:310, para 53, 64 and 66.
[430] András Kovács, Tihamér Tóth, Anna Forgács, 'The Legal Effects of European Soft Law and Their Recognition at National Administrative Courts' [2015] ELTE Law Journal

a quantitative material which can exclude the agreement or the act from Article 101, but not a qualitative material.[431]

Although per se doctrine mostly belongs to antitrust law rather than the European competition law, to make de minimis clearer and differentiate while reading the article, and to comprehend its influence on the Turkish competition law, it should also be explained. Under per se doctrine, the infringement is obviously apparent, so there is no need to analyse if it restricts the competition or if it has an impact on competition, so in such case, competition authority directly determines that that action or agreement is a reason for an infringement within the competition. To illustrate, explicit and gross infringements are considered a per se infringement. On the other hand, it should be also noted that the practice or act of undertakings may not always directly constitute a per se restriction.[432] Similarly, restrictions by objects may not directly constitute a per se infringement. In contrast to object restrictions, per se infringements are always non-permissible. Object restrictions, however, can theoretically benefit from the exemption clause if the requirements under Article 101 (3) TFEU (or Article 5 under the Competition Act) are met. In contrast to per se restrictions, if it is a de minimis case, negligence of the restriction is possible.

Regarding hardcore restriction, for the purposes of the application of the De Minimis Notice 2014 ('Notice 2014'), hardcore restrictions listed in the Commission block exemption regulations are generally considered to constitute restrictions by object.[433] Nevertheless, this safe harbour (de minimis principle) cannot be applied to the cases where those hardcore restrictions exist despite counting as a restriction by object.

3.4. Assessment of the Restrictions by Object in Relation To De Minimis

As long as it can be demonstrated that an agreement has object restriction to competition, competition law prohibits this agreement as a rule regardless of its effects on the market. The competition authority also does not need to determine and examine the current or potential effects of the agreement on the market.[434] The burden of proof here is shifting, and in order to put the agreement into practice, the requirements in 101 (3) TFEU (corresponds to Article 5 of the Competition Act), must be proved by the parties so they can benefit from exemption protection. According to the Court of Justice, in order to assess if an agreement is restrictive by object, it is

[431] Zekerriya Arı, 'Rekabet Hukukunda de Minimis Kuralları (Hissedilir Etki)' [2002] 21(4) Banka ve Ticaret Hukuku Dergisi 69-97.

[432] For example, *The Case Doğan Yayın Holding v. Feza Gazetecilik* [2010], Turkish Competition Authority, Case No: 10-47/858-296.

[433] 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).

[434] According to Advocate General Wahl in *Groupement des cartes bancaires (CB) v European Commission* [2014], Judgement of the Court, 11 September 2014, Case C 67/13 P. ECLI:EU:C:2014:2204.

necessary to examine the precise purpose of the agreement in the economic context in which is to be applied. Where, however, an analysis of the clauses does not reveal the effect on competition to be sufficiently deleterious, the consequences of the agreement should then be considered and for it to be caught by the prohibition it is necessary to find that those factors are present which show that competition has in fact been prevented or restricted or distorted to an appreciable extent. When analysing case law on restrictions by object, Expedia must be re-assessed deeply again since it is the case that the relation between de minimis and object restriction first arose together. As mentioned above, the court, in Expedia, held that a partnership between two undertakings for the online sale of train and travel service is a restriction by object, and the restrictive agreements to competition by object shall not benefit from de minimis rule. (Since the interpretations on this topic which came out with Expedia has been already held in the 3.1, it is avoided from the repetition in this part).

Following the Expedia, in order to reflect the case law in a written source, the issue that agreements restricting the competition by object cannot benefit from the de minimis rule was regulated by the new de minimis notice in 2014. The Notice 2014 includes a list, which is not numerus clauses, to show the agreements with object restrictions. According to the list, de minimis exemption cannot be applied to agreements containing restrictions which, directly or indirectly, have as their object: a) the fixing of prices when selling products to third parties; b) the limitation of output or sales; or c) the allocation of markets or customers.

Since Cartes Bancaires[435] ('CB') can be regarded as a turning point for the application of 101 TFEU, it is also necessary to lay down the CB Case while discussing the object restrictions. In the CB decision, it was decided in line with Wahl's opinion and the concept of 'restriction by object', whose scope had been expanded by EU courts and the Commission, has been formulated with four stages to clarify;

(i) The limits of the object restriction should be kept narrow,

(ii) In evaluating object restriction, the economic and legal conditions of the agreements should be taken into account,

(iii) The actual effects or potential effects of the agreement on the relevant market will not be used in determining the anti-competitive purposes,

(iv) Only agreements that are harmful to competition by their nature and are clearly visible in the light of economic principles will fall into the category of object restriction.

[435] *Groupement des cartes bancaires (CB) v European Commission* [2014], Judgement of the Court, 11 September 2014, Case C-67/13 P. ECLI:EU:C:2014:2204.

It can be indicated that the CB decision is also important and expositive in terms of the relation between the anti-competitive object and the de minimis principle. The basis of this assessment is the fact that the agreements which have object restrictions cannot benefit from the de minimis rule, and the expansion of the object box causes an increase in the number of the agreements that cannot benefit from *de minimis* rule and this is incompatible with the principle of the de minimis. According to this assessment, CB should be taken into consideration while analysing which agreements can benefit from de minimis principle.[436] Within this scope, when the object box is interpreted narrowly in an accordance with CB, the number of agreement types, not benefiting from de minimis application in the Notice, may decrease.

Lastly, following these explanations, certain cases that would generally constitute restrictions by object are identified by the Commission in the Guidance on restrictions of competition 'by object' for the purpose of defining which agreements may benefit from the De Minimis Notice ('the Guidance'). The Guidance identifies them according to whether the agreements or actions occurred between competitors or non-competitors as in the Notice. Hereby with this guidance, price-fixing, market sharing, output restrictions, bid-rigging, collective boycott agreements, information sharing, restrictions on carrying out R&D agreements or using own technology are counted as the typified restrictions by object between competitors. Nevertheless, the Guidance exceptionally provides with the opportunity to rely on de minimis for the certain situations of price-fixing, market share, output restrictions and restrictions on carrying out R&D agreements or using own technology. Accordingly, when it comes to non-competitors, sale restrictions on buyers, sales restrictions on licensees, sale restrictions on the supplier and resale price maintenance are regarded as restrictions by object, however, exceptions to rely on de minimis exist only for the sales restrictions on buyer and on licensees, not on the supplier or for resale price maintenance. All in all, the Guidance has an essential role in determining the restrictions by object and whether the restrictions can benefit from de minimis principle even though they are found as object restrictions.

4. De Minimis in Turkey

4.1. Before the Recent Amendments to the Turkish Competition Act No: 4054

As mentioned above, before the recent amendment, there was no regulation to apply de minimis directly in Turkish competition law. In 2014, it was aimed at implementing a de minimis rule to Article 4 of the Competition Act, regulating that 'The Competition Authority may not decide to make an agreement or concerted practice or decisions of the associations of undertakings subject

[436] Ruiz Calzado, Scordamaglia-Tousis [2015], 3.

to investigation by formerly determining the thresholds needed such as market shares and turnovers'. However, since such an implementation did not occur actually and was not able to enter into force, de minimis issues had been always debatable in Turkish competition law. The majority of the opinions on whether de minimis principle can apply in Turkish competition law under the existing rules could be gathered under the umbrella that it can be applied.

A group of people claimed that it is not possible to apply de minimis, since there was not any statement in Article 4 indicating 'an effect on trade between the Member States' on the contrary of Article 101 TFEU.[437] The ones against this claim, asserted that de minimis was constructed and developed through case law, therefore, there is no obstacle to apply it in Turkish competition cases as well.[438] According to this view, it is possible to estimate the concept of 'affecting trade' in the 101 TFEU as 'affecting competition' in terms of the Competition Act, and to exclude the agreements that do not affect competition in based on the case law developed in the EU law.[439] Besides, there was no stability in the TCA's decisions due to lack of regulation and normlessness, the TCA had diverse decisions in the line of this view. For instance, the first case which the TCA held relying on de minimis implicitly was the case Antalya Fırıncılar Odası dated 20.11.1997 and numbered 40/245-1. In this case, the TCA did not make the issue subject to an investigation by referring to the market shares of the undertaking which was quite low and not appreciable. Similarly, it is also possible to come across other decisions where the de minimis rule was not explicitly shown as a reason not to investigate but evoked, such as TMMOB Salihli EMO dated 19.02.1998 and numbered 53/384-44, and Türk Çimento dated 17.06.1999 numbered 99-30/276-166, Yatsan dated 23.9.2010 numbered 10-60/1251-469, and Gaziantep Köfteciler dated 10.01.2019 numbered 19-03/13-5. As having mentioned the instability in the decisions of the TCA, it could be also found the decisions stating that de minimis is not applicable in Turkish law because of the normlessness.[440]

In the cases where the TCA relied on market shares implicitly referring to de minimis, the fundamental rule to exclude the issue from the subject of the investigation was Article 9 (3) of the Competition Act. The Article 9 (3) states that TCAcan give a written opinion in an accordance with how the undertakings can terminate the infringement. However, against these decisions taken relying on Article 9 (3) by the TCA, the Council of State also has held several decisions in

[437] Zekerriya Arı, *'Danışıklılık'* (2004) 133 p.144; Yiğit, Tazminat Sorumluluğu, 74.
[438] İ. Yılmaz Aslan, '*Rekabet Hukuku'* (2006) 142; also see Canbolat, 68; Günay, 48; Güven, '*Rekabet Hukuku'*, 217; Kesici, 143; Sanlı, '*Geçersizlik',* 103; Tomur, p. 51; Topçuoğlu, *'İşbirliği'*, 144.
[439] Sanlı, *'Geçersizlik'*, 186, footnote 227; Tomur 53; Topçuoğlu, '*İşbirliği',* 144
[440] See the case of Turkish Competition Authority dated 05.04.2007 numbered 07-30/297-113 and the case of the Council of State, 13th Circle, dated 25.11.2008 and numbered 2006/4724 E. 2008/7418 K.

completely contrasting line. Thus, the decisions of the Council of State are made another topic in this part to touch on and discuss.

The Council of State defines the TCA's opinions as the final decision which must be carried out and can be subject to administrative litigation, and decides by analysing the merits of the cases. Nevertheless, according to a view, it is not possible for the TCA's opinions, which do not actually bear legal consequences, to be subject to an administrative lawsuit.[441]

The Council of State, in its decisions, indicates that the TCA cannot perform its task by giving opinions or refusing the investigation demand after preliminary investigation according to Article 41 and 9 (3). In some decisions taken by the majority of the TCA, it can be also come across with dissenting opinions based on this approach of the Council of State. For instance, in the case dated 09.05.2013 and numbered 13-27/363-167, following the preliminary investigation, the board of the TCA decided that there is no need to initiate an investigation in accordance with Article 41 of the Competition Act and that practices which cause or may cause anti-competitive effects should be avoided by considering the findings and indications in the case. Otherwise, within the framework of the Competition Act and in accordance with Article 9 (3) of the Competition Act, the TCA expresses an opinion. A dissenting opinion surprisingly claimed that when the TCA is not convinced by the finding and indications to investigate, if it is presumed that they might reach the finding or indications needed by investigating, then the TCA should investigate. Likewise, in the AESAŞ case, dated 22.10.2014, and numbered 14-42/761-337, the TCA decided to give an opinion to EPDK and not to investigate the case under the Article 41 of the Law No. 4054. According to the dissenting opinion in this decision, giving the opinion via Article 9 (3) by the TCA means an admission of the infringement. To explain, the dissenting view addressed those decisions of the Council of State and claimed that if there is an implication for an infringement in a case, the TCA needs to make the case subject of investigation. Furthermore, if the TCA considers itself unauthorised to investigate, it would not decide to give an opinion according to Article 9 (3) as well.

On the other hand, the main basis of the opposing view to the decisions of the Council of State is that the opinion given by the TCA is not executive and not an administrative transaction, therefore, it is not possible to be crosschecked by the Council of State. This is because as a rule, administrative transactions are executable, and in order for them to be subject to action for annulment, they must be final and executable, as stated in Article 2 of the Turkish Administrative Jurisdiction Procedure Law. However, the opinion instrument of the TCA based on Article 9 (3) is not an administrative

[441] Elvin Evrim Dalkılıç, 'Rekabet Kurumunun 4054 Sayılı Kanun Madde 9/3 Uyarınca Bildirdiği Görüşlere Danıştay'ın Yaklaşımı', Rekabet Forumu Dergisi 100. Özel Sayı

transaction but a sort of preparation process. As it can be seen, before the amendment of de minimis to the Act, the application was pretty controversial for a long time. Nevertheless, besides these polemics in the doctrine, the Council of State consistently regards the decisions given by the TCA as an executive and administrative transaction without distinguishing its opinions. As a result of this authority, according to the Council of State[442], if the case was not sufficiently enlightened with findings in the stage of the preliminary investigation, the TCA has to initiate an investigation for the purpose of enlightening this case and then make a final decision mentioning in Art 48 of the Competition Act. Otherwise, a decision on non-investigation is the decision that was brought with missing information and cannot serve the purpose of eliminating anti-competitive acts. Hence, the Council of State points out that the TCA can decide to not investigate (relying on the grounds counted by the Competition Act, such as Art 9(3) in a case only if the case was sufficiently enlightened with the findings.

Another case based on Article 9 (3) is the KWS Turk Tarım[443]. In this case, where the fixing of the resale prices is in question, it has been decided that KWS Turk Tarım's market share is not appreciable and there is no need for an investigation in accordance with Article 41.

In the other recent cases, it would be appropriate in this case to draw special attention to the fact that the decisions taken on the basis of Article 9 (3) were unanimously made. In ESGAZ[444] which is another recent case, the TCA unanimously decided that the potential anti-competitive effect of ESGAZ in the insurance market is also limited.

4.2. Current Policy with The Amendments Introduced by The New Law

Turkey is a candidate country to the European Union. For this reason, in the process of admission to the European Union, the legislation must be in line with EU legislation in order to obtain the membership. In Turkish competition law, therefore, it is necessary to make the current rules comply with the EU acquis and to make necessary changes in the light of changes in the EU. Contrary to the draft amendment law in 2014, the de minimis regulation was implemented to Article 41 of the Competition Act instead of Article 4. Accordingly, the agreements, concerted practices and decisions of associations of undertakings that are not exceeding the certain threshold to be determined by taking into consideration the criterions such as market share and turnover thresholds, may not be subject to investigations unless they are not explicit and gross infringements, such as price-fixing between competitors, territory or customer sharing and restriction of supply. After a while, The TCA presented the Draft Communiqué on Agreements, Concerted Practices,

[442]Danıştay 13. Dairesi. Council of State, 13th Circle, dated 29/11/2010 and numbered 2010/4818 E. 2014/2197K.
[443] The decision of Turkish Competition Authority dated 25.11.2009 , numbered 09-57 /1365-357
[444] The decision of Turkish Competition Authority dated 04.04.2019, numbered 2018-4-69

Acts and Conduct of Association of Undertakings That Do Not Have an Appreciable Effect on Competition ('Draft Communiqué') on its website on October 23, 2020, and on March 16, 2021, Draft Communiqué entered into force with the critical changes in some articles. Although the turnover threshold is counted in the Article 41 of the Competition Act as an example of criterions to consider, there is no such a criterion under the Communiqué on Agreements, Concerted Practices, Acts and Conduct of Association of Undertakings That Do Not Have an Appreciable Effect on Competition ('Communiqué') but the market shares thresholds.

The Communiqué regulates the procedures and principles regarding the agreements, concerted practices, decisions of associations of undertakings, and provides, excluding hard-core violations, guidance for assessing when minor agreements between companies are not caught by the general prohibition of anti-competitive agreements under the Turkish competition rules. What hard-core violation means is clarified concerning the agreement between competitors and agreements between non-competitors relatively under Art 4. With respect to the agreements between competitors, these following violations are considered a hard-core violation; price-fixing, customer, supplier, territory or trade channels sharing, restriction of or setting measures to supply, concerted practice in tenders, sharing of data which is susceptible to competitions, such as future price, output or sale amount. In the matter of horizontal agreements, fixed price or resale price are counted as hard-core violations. Thus, in the case where these sorts of agreements, concerted practices or decisions of associations of undertakings are involved, de minimis is not applicable as these are out of the scope of the Communiqé.

Similar to the European Union competition rules, the Communiqué ordains that the following agreements do not appreciably restrict competition if;

(i) the aggregate market share held by the parties to the agreement does not exceed 10% on any of the relevant markets affected by the agreement where the agreement is made between competing undertakings;

(ii) the market share held by each of the parties to the agreement does not exceed 15% on any of the relevant markets affected by the agreement if the agreement is made between non-competing undertakings. The Communiqué states that the aggregate market share of parties should not exceed 10% on any of the relevant markets affected by the agreement if it is difficult to classify whether the undertakings are competing or non-competing parties, or if the relevant decision belongs to an association of undertakings. The Communiqué has a specific provision for vertical restrictions. Accordingly, the aggregate market share of competing or non-competing undertakings should be below 5% to benefit from the de minimis if the parallel networks formed by vertical restrictions cover

> more than 50% of the relevant market. The Communiqué also indicates that it will not be deemed to be an appreciable restriction on competition if the market shares of the contracting parties or members of the association of undertakings are above the specified thresholds by a maximum of 2% during the agreement or the decision period for two consecutive calendar years.[445]

According to Art 6(1), the TCA may not initiate an investigation in cases where the market share thresholds are not exceeded. Through the expression of this article, it can be concluded that the TCA has a discretionary power on initiating an investigation even though the aggregate market shares do not exceed the relevant thresholds. Under Art 6(2), when an investigation is initially commenced due to the inability to determine the aggregate market shares of the relevant undertaking or association members, however, it is later calculated that the market shares of the undertakings or associations of undertakings do not exceed the above thresholds, the TCA may terminate this investigation. Last but not least, de minimis principle under the Communiqué is applicable to both ongoing preliminary investigation and full-fledged investigation as of 16th of March 2021.

4.3. Predictions and Expectations

Compensation liability arising from agreements restricting competition corresponds to tort liability in terms of its elements.[446] Herein it is essential to assess whether de minimis rule is a reason for the compliance in law. This is because the application of a reason of compliance (with law) has an essential role in excluding the compensation out of the scope of the anti-competitive restrictions. As how de minimis can be distinguished among the other competition terms has already been explained in part 3.3. of this article, in this part it will be discussed if de minimis can make a restrictive agreement comply with law or not.

The fact that some restrictions may not be subject to an investigation thanks to de minimis principle cannot directly prevent the possibility to initiate private law sanctions. Thus, even if any administrative sanction or fine are not imposed on an agreement restricting competition by the

[445] Esin Attorney Partnership, Competition Authority Publishes Draft Communiqué on De Minimis Exception [2020], <https://www.esin.av.tr/tr/2020/10/27/rekabet-kurumu-rekabeti-kayda-deger-olcude-kisitlamadigi-kabul-edilen-anlasma-uyumlu-eylem-ve-tesebbus-birligi-karar-ve-eylemlerine-iliskin-teblig-taslagini-yayimladi/> accessed 10 October 2020.

[446] Ateş Akıncı 'Rekabetin Yatay Kısıtlanması' Rekabet Kurumu Yayını, 2001, p. 358 - Şahin Ardıyok, Ali Ilıcak 'Yakın Dönem Rekabet Kurulu Kararlarının Ampirik Analizi: İdarenin Tazminat Davalarına Katkı Düzeyi' Rekabetin Korunması Hakkında Kanun'un Özel Hukuk Alanındaki Sonuçları, Sorunlar ve Çözüm Önerileri Sempozyumu, 2013, 493.

TCA, the way of applying for private law would be still available to demand compensation.[447] The fact that the implementation of de minimis was conducted in Article 41 which is included in procedural provisions of the Competition Act may support this approach.

On the other hand, we also need to evaluate the matter of demanding compensation de facto. In practice, the Court of Appeal ('*Yargıtay*'), for an examination of a compensation case, seeks a declaratory decision of the TCA in relation to whether there is an infringement of competition in that case.[448] Although the existence of a declaratory decision of the TCA is not regarded as a cause of action by the court, the declaratory decision from the Authority is must to be, according to Turkish case law, to hear the judgement on compensation. However, in the existence of a de minimis decision (decision to not investigate), there could never be a further decision of the TCA declaring an infringement of competition at the same time. Thus, where the aggrieved party issues an action for compensation in practice, he/she will more likely not receive a ruling from the court that makes him/her entitled, due to the lack of declaratory decision. In this context, besides de minimis is definitely not a reason for compliance with the law, it might be considered 'almost' a reason for compliance with the law in terms of compensations unless these precedents are overruled.

Another question is whether it is possible to make a negative declaratory decision about the agreements that are evaluated within the scope of the de minimis, with the argument that it is lawful. When considering the previous decisions of the TCA on the rule of reason doctrine, it can be obviously seen that the TCA also held a negative declaratory decision with the rule of reason principle at the same time.[449] Nevertheless, for an accurate answer, we need to handle it with the Competition Act and its ratio legis as a whole, and make prioritization between the requests.

First situation to take into account is, before detection of de minimis, to determine whether there is a competition infringement. This is because if there is no competition infringement in a case, the TCA does not need to evaluate de minimis principle. In other words, in the case that the TCA has already given a negative declaratory decision, there would be a fortiori no need of de minimis investigation.

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[447] Cansın Akcan, Rekabeti Kısıtlayıcı Anlaşmalardan Doğan Tazminat Sorumluluğu, Ankara Universitesi Akademik Arşiv, 2020 <http://hdl.handle.net/20.500.12575/69852> accessed 10 October 2020.

[448] Yargıtay Kararı - 13. HD., E. 2019/1422 K. 2019/8836 dated 25.9.2019; the Court held that, for the compensation there must be a final verdict about the competition infringement, otherwise the Court shall make the asserted infringement preliminary issue. Yargıtay Kararı - 11. HD., E. 2015/5134 K. 2016/2543 dated 8.3.2016; in this case where the Commercial Court dismissed the claims a limine due to the absence of cause of action, The court of appeal held that final verdict to be considered is not a cause of action but a reason to make it a preliminary issue.

[449] The decision of Uluslararası Nakliyeciler Derneği of Turkish Competition Authority dated 21.03.2012 numbered 12-13/389-118; and the decision of Digiturk of Turkish Competition Authority dated 12.08.2004 numbered 04-52/699-180.

For further evaluation on whether the conditions of de minimis exist or not, it must be found a competition infringement in the case. If it was determined that there is an infringement, then the parties can ask for the TCA to make a further decision for de minimis. However, a negative declaratory decision can be made only when the facts of the case fall outside of Article 4, 6 and 7 of the Competition Act on request of undertakings. Thus, the cases where we can confront de minimis application in a negative declaratory decision is quite limited. The only presumption where we can come across with the analyse of both de minimis and negative declaratory together is when the requester undertaking and the undertaking committing the infringement are the same undertaking. In this case, the TCA first must find the practice of the undertaking as infringing the competition under Article 4, 6 or 7 of the Competition Act. If the TCA does not see that practice as an infringement, then it can settle, without analysing de minimis, a negative declaratory decision. When it comes to compensation, negative declaratory decision does not prevent the undertakings to bring an action for compensation. However, regarding the Court of Appeal's precedents, as mentioned above, and the negative declaratory decision of the TCA, the probability of awarding compensation is quite low.

Another point to handle here is that the turnover threshold is counted to be taken consideration in the Competition Act, but not in the Communiqué at all. At this point, even though turnover threshold has been disregarded in the Communiqué and this can lead to legal uncertainty, turnover threshold still can be taken into account by the TCA in the light of the decision 'Kurumsal Krediler[450]' of the TCA.

Last but not least, the consequence of Art 9(3) that has been a sui generis application of the TCA so far, and whether Art 9(3) will still be continued to apply in a case should be evaluated. As a result of the amendment to the Competition Act and the Communiqué, it is inevitable that de minimis will take over the mission of the application of Art 9 (3) and that the application area of the 9(3) will be getting limited with this principle. However, the question of whether the TCA can decide to not investigate relying on Art 9(3) in a de minimis case is worth discussing here since de minimis principle cannot apply to the cases where hard-core violations are included. To illustrate, in the Gaziantep Köfteciler case where there is an anti-competitive act between competitors, the TCA detected the price-fixing but decided to not investigate on the ground that the violation was not

[450] The decision of Turkish Competition Authority dated 28.11.2017 numbered 17-39/636-276; Article 16/6 the Competition Act rules that, on the condition that the TCA explicitly explain reasons, the TCA may not impose an administrative fine, and the details about discount or dispensation from the fine can be defined by the regulations of the Competition Authority. According to the Regulation on Active Cooperation for Discovery of Cartels ('the Leniency Regulation'), only cartel cases can benefit from the leniency. However, in this decision, the TCA applied the Act rather than Leniency Regulation and its guideline and did not fine the Bank of Tokyo Mitsubishi UFJ Turkey A.Ş which committed 'other' type of infringement than 'cartel', namely information sharing.

found appreciable in the market. Similarly, in the Erova-Erektaş[451] where the anti-competitive acts were market and customer sharing, the TCA adopted the same approach and did not investigate the undertakings. In terms of vertical agreements, in KWS and Yatsan Cases previously mentioned above, the TCA applied Art 9(3) as well in spite of the resale price-fixing which is currently considered a hard-core restriction by the Communiqé. If we presume that these cases occurred after de minimis adoption, the TCA intending to not investigate would not do this relying on de minimis as each violation is hard-core and out of the scope of de minimis principle. At this point, can the TCA do this not relying on de minimis, but Art 9(3)? Preserving Art 9(3) in the Competition Act as it was, even after the adoption of de minimis principle can refer that the manner of Art9(3) will still be open for the TCA to agree on non-investigation. However, the accuracy of this prediction will, for sure, be verified only in a future case.

Finally, it is believed that de minimis conditions will not occur in cases of abuse of dominant position due to its nature and field of application.[452]

5. Conclusion

Under the Article 41 of Turkish Competition Act, the agreements, concerted practices and decisions of associations of undertakings that are not exceeding the certain threshold to be determined by taking into consideration the criterions such as market share and turnover thresholds, may not be a subject to investigations unless they are not explicit and gross infringements. The extent of hard-core/explicit and gross violations is regulated and enlarged by the Communiqué of the TCA after the amendment to the Competition Act. Beside there is doubt that the application of Art 9(3) will replace with de minimis principle with regard to violations others than explicit and gross infringement. However, considering the cases where we can come across with the infringement counted by the Communiqué as explicit and gross, it looks that the opportunity to not be a subject to an investigation under Art 9(3) may remain valid for them.

Although turnover threshold is counted in the article 41 of the Competition Act as an example of criterions to consider, there is no such a criterion under the Communiqué of the TCA but the market shares thresholds. However, it seems that the TCA can also take the turnover criterion account based on the Kurumsal Krediler decision. In addition, the TCA may also initiate an investigation even in cases where the market share thresholds are not exceeded. This is a significant approach of the Turkish competition policy which is separated from the EU de minimis policy as

[451] The decision of the Turkish Competition Authority dated 11.06.2009 and numbered 09-27/576-136.

[452] Şahin Ardıyok, Presentation called 'Rekabetin Korunması Hakkında Kanun'da Yapılan Değişiklikler: Nedenleri, Kapsamı ve Olası Etkileri' by Rekabet Hukuku Merkezi, 2020 <https://rhm.bilgi.edu.tr/tr/sayfa/rekabetin-korunmasi-hakkinda-kanundaki-yapilan-deg-54/> accessed 20 October 2020.

de minimis principle in the EU policy provides the agreements with safe-harbour. In other words, whereas it is not possible to investigate an agreement if all conditions to benefit from de minimis are met, it is possible for the TCA to investigate an agreement not-exceeding thresholds.
The highly significance which de minimis principle has always had now gained much more importance with the amendment to Turkish Competition Act. Before the clarified new rules enacted to the Competition Act, indistinctness of de minimis situation led to various points of view in legal doctrine. This indistinctness and different points of view, however, will more likely disappear with the graphic regulation of the Article 41 of the Competition Act.

The conflicting decisions of the Council of State on the TCA's application of Article 9 (3) before the amendment, which state that cases should be made subject to investigation in any cases, will not have any ground in competition law anymore. Moreover, de minimis is distinguished from exception and negative declaratory decision under Turkish Competition Law. Although it seems possible to demand compensation where de minimis has a place to be practiced, the probability of awarding compensation is quite low because of the previous decisions of the Court of Appeal. This is because, according to precedents of the Court of Appeal, contrary to de minimis decision, there must be a declaratory (and final) decision mentioning the infringement.
Finally, although in the EU policy, restrictions of competition 'by object' is out of the scope to benefit of de minimis, and the agreements may benefit from the de minimis principle exceptionally for certain situations are also defined in a guidance, a hard-core restriction defined by the TCA under the Communiqué cannot benefit from de minimis in any case.

COMPARATIVE COMPETITION LAW ENFORCEMENT AND POLICY APPROACHES IN THE EUROPEAN UNION, TURKEY, THE UNITED KINGDOM, AND THE UNITED STATES DURING THE COVID-19 PANDEMIC

Faik YETGİN*

Abstract

In times of crisis, public authorities may be inclined to sacrifice elements of competition in markets to meet urgent short-term objectives by showing lenience in their enforcement. However, governments have naturally grown reluctant to do so, given the dire long-term consequences in past practice. Due to the COVID-19 outbreak, we are once again faced with a question as old as competition law itself: to what extent should the strict application of competition regulation be derogated from when faced with an emergency? Rather than attempting to answer this question directly, this study aims to provide a methodological analysis of the differing approaches taken by the respective public authorities of various jurisdictions in response to the pandemic and its economic effects. The Conceptual Comparisons method of comparative law will be used to analyse and compare the courses of action taken in the European Union, Turkey, the United Kingdom, and the United States, the characteristics of which may align or diverge based on factors such as public policy and legal tradition.

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1. Introduction

A central idea in neoclassical economic thought is that the forces of supply and demand will provide a favourable distribution of goods and services as opposed to other means.[453] The objective of competition law is to establish and uphold the competitive environment in which these forces fully thrive and achieve their intended results. Under normal circumstances, competition protects the long-term interests of the public by keeping prices low and supply steady; but what of immediate needs in circumstances far from normal?

When faced with emergencies, public authorities have time and again chosen to stray from the principles behind competition law for the sake of short-term objectives, a reaction which history has repeatedly proven far from ideal.[454] As the first truly global emergency since World War II, the COVID-19 pandemic has prompted different courses of action in each country, particularly in regard to law and economics. The situation simultaneously faced provides an excellent opportunity to capture and analyse varying responses to a common problem. With consideration to differences in legal tradition and governance structure,[455] the European Union, Turkey, the United Kingdom, and the United States have been chosen to best reflect a multitude of diverging approaches to competition law enforcement and policy. By comparing the real-world practice of public authorities in its four sample jurisdictions, this study aims to assess the varying degrees and means in which governments may choose to derogate from competition law in times of emergency.

2. Method

For comparative law studies, functionalism remains the primary method, despite its shortcomings. While certainly practical, the presumptive nature of the functional approach sets aside all but the law and its results, abstracting and oversimplifying complex situations as simple problem-solution scenarios.[456] Other notable approaches to comparative law, such as the Comparative Law and Economics method by Mattei,[457] have similar drawbacks, making them unfit for this particular scenario. This study will therefore adopt the methodology set forward in *Conceptual Comparisons*, devised by Professor Oliver Brand.[458]

As the first step of the comparative process, the legal institutions, or in this case, the emergency measures taken by competition authorities and public institutions in regard to competition law

[453] Nicholas Gregory Mankiw and Mark P Taylor, *Economics* (3. ed, Cengage Learning 2014). p 41-71.
[454] Thomas K Fisher, 'Antitrust during National Emergencies: I' (1942) 40 Michigan Law Review 969.
[455] Einer Elhauge and Damien Geradin, *Global Antitrust Law and Economics* (2nd ed, Foundation Press Thomson/West 2011).
[456] Oliver Brand, 'Conceptual Comparisons: Towards a Coherent Methodology of Comparative Legal Studies' 32 63.
[457] Ugo Mattei, *Comparative Law and Economics* (University of Michigan Press 1997).
[458] Brand (n 4).

during the pandemic, will be 'conceptualized' to form a standard by which they can be compared.[459] This will be done primarily through the preliminary abstraction of the course of action taken in various jurisdictions. Each 'concept' will be subject to qualitative and quantitative analyses in their respective sections of the article, examining their qualities and scope, respectively.

The second step to examining each legal concept is a systematic comparison of the real-world applications of the concept, and to which extent they align with the qualities deduced in the previous phase. Existing institutions of law and emerging competition enforcement practices in the four countries covered by this study will be thoroughly examined and contrasted to one another. By doing so, a relative sense of severity can be established for each concept by comparing the scale of derogation from standard application of competition law in the jurisdictions they can be observed in. Examples of the developed concept in each country will be listed in the relevant section in order of perceived severity.

3. Conceptualization

In accordance with the research question posed in the introductory section of this article, the scope of the concepts formed and analysed in this section will be limited to the extraordinary competition measures taken by governments in response to the economic effects caused by the COVID-19 pandemic. Data provided by the World Bank on 146 existing instances of pandemic-induced competition measures was instrumental in constructing preliminary concepts,[460] which gradually took their final shape as seen below through the research process. The examples gathered under each concept may be contrasted to prior examples within their respective categories for insight regarding their possible effects or analysed utilizing the wealth of theoretical output by scholars of both law and economics.

3.1. Price Regulation (Price Controls)

Price is perhaps the most central element in competition as a whole.[461] In a given market of buyers and sellers, the forces of supply and demand naturally determine how goods and services are priced. These forces are shaped by the willingness of actors on both sides of every transaction within the market. Ideally, these actors are so numerous and varied in nature that no individual actor or group of actors can willingly have a significant effect on pricing, leaving it to be determined by the

[459] ibid.

[460] World Bank, 'Workbook: COM-COVID19' <https://dataviz.worldbank.org/views/COM-COVID19/Overview?%3Aembed=y&%3AisGuestRedirectFromVizportal=y&%3Adisplay_count=n&%3AshowAppBanner=false&%3Aorigin=viz_share_link&%3AshowVizHome=n> accessed 19 November 2020.

[461] Niamh Dunne, 'Price Regulation in the Social Market Economy' [2017] SSRN Electronic Journal <https://www.ssrn.com/abstract=2921037> accessed 19 November 2020.

market.[462] This is called a competitive market, which competition law seeks to establish and maintain.[463]

However, even within a competitive market, these actors are not independent of real-world events. Prices of goods and services are therefore perhaps the most immediate reflection of crises in terms of economics, especially apparent in those in sudden demand due to the crisis at hand. The sudden hike in demand for a product resulting from such a crisis may cause prices to naturally fluctuate, leading to excessive prices or even shortages of supply until the market recalibrates itself. This could clearly be observed during the COVID-19 pandemic, with sharp increases in prices of medical supplies in high demand, such as disinfectants and face masks.[464]

These price changes may also stem from opportunistic behaviour of sellers in such markets. Through price gouging, sellers may engage in excessive pricing at the detriment of the consumer and overall market efficiency. The primary objective of competition law is to ensure a competitive market, in which no party or colluding parties possess the market power to sway prices in a significant manner through such behaviour.[465] Unfortunately, competition law enforcement does have its shortcomings in situations such as these; pinpointing non-competitive behaviour can be costly, in terms of both time and money. The time in between, for instance, may have some very real consequences for consumers, the welfare of whom competition law seeks to protect.[466]

Such events may not even fall within the scope of competition law, drifting on its fringes as excessive pricing occurs devoid of abuse of market power by any discernible party. Additionally, some competition agencies may be competent in taking action in these instances, while those of others may not enjoy such authority. In some jurisdictions, excessive pricing may not even be prohibited, so as long as it is a natural result of the mechanisms of the free market.[467] What happens then varies with the approached taken in different jurisdictions, blurring the lines between competition law and public policy.

Governments may be inclined to intervene in markets directly, seeking to achieve socially desirable outcomes at the cost of market efficiency. Temporary failure of private price formation may prompt a public response, often due to political considerations.[468] Perceived inadequacies of the free market in distributing resources may lead public officials to take matters into their own hands, regardless of whether said inadequacy actually exists.[469] Thus, prices may directly be regulated

[462] Mankiw and Taylor (n 1). Chapter 3.
[463] W Kip Viscusi, Joseph Emmett Harrington and John M Vernon, *Economics of Regulation and Antitrust* (4th ed, MIT Press 2005). Chapter 1.
[464] OECD, 'Exploitative Pricing in the Time of COVID' 15.
[465] Jay B Sykes, 'Antitrust Law: An Introduction', Congressional Research Service.
[466] O Odudu, 'The Wider Concerns of Competition Law' (2010) 30 Oxford Journal of Legal Studies 599.
[467] OECD, 'Exploitative Pricing in the Time of COVID' (n 12).
[468] Dunne (n 9).
[469] Mankiw and Taylor (n 1). P. 191.

through price floors and ceilings, or, more often than not, price structures consisting of complex combinations of the two.[470]

However, this is generally considered to be an extreme derogation from the very principles competition law is instituted upon. Price controls are generally considered to be counterproductive, as they attempt to completely circumvent the natural forces which determine prices, thus undermining the singular purpose of competition law.[471] Market outcomes may also be affected, leading to suboptimal distribution and supply shortages, possibly defeating the purpose of the action taken in this scenario.[472] To which extent price regulation could be justified and implemented in various jurisdictions will be detailed in the section below.

3.1.1. United States

Despite efforts by previous governments, the United States possesses no federal legislation regarding price gouging, with activities combatting price gouging generally remaining on a state level. Federal agencies have instead historically relied on the Defence Production Act of 1950 (DPA) as the basis for price gouging enforcement on a federal level.[473] The DPA is a relic of the Korean War era, intended to furnish the federal government with the emergency powers to direct public and private actors for quick mobilization in times of war and other national emergencies. It includes numerous provisions relating to antitrust, including price controls, which were initially so vast as to be deemed a 'danger to free enterprise' by both legislators and academics as early as 1950.[474] However, despite the antitrust controls granted by the DPA, US antitrust practice shows that authorities have been generally reluctant to utilize these powers in regard to price gouging, even in emergencies.[475]

The definition of what constitutes a national emergency within the DPA is very broad.[476] As a result, the DPA has routinely been invoked in a wide variety of situations, now including the COVID-19 pandemic.[477] Between 18-27 March 2020, President Donald Trump enacted a series of Executive Orders that address various issues relating to competition law and enforcement,

[470] Viscusi, Harrington and Vernon (n 11). P. 358
[471] Dunne (n 9).
[472] Mankiw and Taylor (n 1). Chapter 8.
[473] 'Price Gouging Federal Enforcement Updates' <https://www.natlawreview.com/article/federal-price-gouging-enforcement-update> accessed 21 November 2020.
[474] Shirley J Norwood, 'Function of the Antitrust Division under the Defense Production Act of 1950 Note' (1952) 24 Mississippi Law Journal 228.
[475] Frédéric Jenny, "Market Adjustments, Competition Law and the Covid-19 Pandemic" (*Concurrentialiste Review*, 6 July 2020) <https://leconcurrentialiste.com/frederic-jenny-covid-competition/> accessed 7 December 2020.
[476] Joshua T Lobert, 'The Role of Section 708 of the Defense Production Act in the Federal Government's Response to COVID-19: Antitrust Considerations' 4.
[477] 'Pricing Controls under the Defense Production Act' (*The National Law Review*) <https://www.natlawreview.com/article/pricing-controls-under-defense-production-act> accessed 21 November 2020.

including price gouging.[478] All three Orders invoke the DPA, however, on the matter of price gouging, Executive Order 13910 titled *'Preventing Hoarding of Health and Medical Resources To Respond to the Spread of COVID-19'*, signed 23 March 2020, is particularly noteworthy. Section 2(a)(i) of the Order confers a number of emergency powers to the Secretary of Health and Human Services, including the authority to

> '*to designate any material as a scarce material, or as a material the supply of which would be threatened by persons accumulating the material either in excess of reasonable demands of business, personal, or home consumption, or for the purpose of resale at prices in excess of prevailing market prices'*.[479]

On 25 March 2020, the Department of Health and Human Services (HSS) designated 15 materials, such as N-95 masks, respirators, and various forms of personal protective equipment (PPE) as scarce or threatened materials within the scope of the aforementioned Executive Order.[480] Stockpiling or excessively pricing these items could potentially even be subject to criminal procedure, as the DPA prescribes up to a year in prison as an alternative to fines up to $10,000. The Department of Justice has also previously utilized criminal code provisions on conspiracy in cases involving the DPA, which can amount to up to $250,000 in fines or a maximum of five years in prison.[481]

Despite the potentially hefty punishment prescribed, many aspects of the price gouging measures within the DPA remain vague, complicating compliance and enforcement. Many key terms including 'accumulation' and 'reasonable demands' are undefined in both Executive Order 13910 and the DPA. Arguably, these deficiencies preclude any federal price controls, as the triggers to their enforcement are underdefined to the point they would never realistically be actionable on their own.[482] Further, the wording of Section 4512 focuses on the act of 'accumulation', with the already unclear 'resale at prices in excess of prevailing market prices' simply serving a secondary role as the intention behind the act of accumulation.[483]

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478 'COVID-19 and Competition: Antitrust Law During the Global Pandemic' (*SGR Law*, 21 May 2020) <https://www.sgrlaw.com/covid-19-and-competition-antitrust-law-during-the-global-pandemic/> accessed 20 November 2020.

479 'Preventing Hoarding of Health and Medical Resources to Respond to the Spread of COVID-19' (*Federal Register*, 26 March 2020) <https://www.federalregister.gov/documents/2020/03/26/2020-06478/preventing-hoarding-of-health-and-medical-resources-to-respond-to-the-spread-of-covid-19> accessed 20 November 2020.

480 'COVID-19 Survey of Federal and State Price Gouging Laws - King & Spalding' <https://www.kslaw.com/pages/covid-19-survey-of-federal-and-state-price-gouging-laws> accessed 22 November 2020.

481 'Analyzing Price Gouging Under the Federal Defense Production Act' (*The National Law Review*) <https://www.natlawreview.com/article/analyzing-price-gouging-under-federal-defense-production-act> accessed 21 November 2020.

482 'Pricing Controls under the Defense Production Act' (n 25).

483 'Price Gouging Federal Enforcement Updates' (n 21).

With limited cases to provide clarification by courts, state laws and enforcement by the Department of Justice have served as the primary examples of how the DPA should be applied. In some jurisdictions, such as California, state statutes include specific wording or rates, generally between 10%-30%, to define price gouging.[484] On 24 March 2020, the Department of Justice created the COVID-19 Hoarding and Price Gouging Task Force *'to address COVID-19-related market manipulation, hoarding, and price gouging'*, supported by the Criminal Program of the Antitrust Division.[485] Prosecution activities by the COVID-19 Task Force have so far targeted price-gouging and hoarding related only to scarce materials designated by the Department of Health and Human Services.[486] It is safe to conclude that federal authority has been used sparingly in combatting price-gouging, with enforcement activities generally taking place through criminal prosecution rather than civil enforcement and price controls, in accordance with traditional US Antitrust practice.[487]

3.1.2. European Union

At its very core, the European Union was founded as an institution to establish and maintain a free single market spanning the continent. Every aspect of the 'ever closer union', from the way competences are shared with Member States to the structure of its institutions, was designed in pursuit of the principles of a free market, including its competition framework.[488] Yet, with ordoliberal influences in both its foundation and application,[489] European competition law may yet be reconciled with price regulation.[490]

In the vertical structure of the European Union, competences are shared between the Member States and the Union, with competences regarding economics and the internal market generally being areas of exclusive or shared competence of the Union. However, despite being well within the competences of the Union, price regulation within the single market is generally done on a national level rather than at the EU level. This is due to the structural and ideological concerns resulting from the unique relationship between the Union and Member States. The EU instead

484 'Pricing Controls under the Defense Production Act' (n 25).
485 US Office of the Attorney General, 'Department of Justice COVID-19 Hoarding and Price Gouging Task Force' 2.
486 'An Inside Look At DOJ Fight Against COVID-19 Price-Gouging - Law360' <https://www.law360.com/articles/1285498/an-inside-look-at-doj-fight-against-covid-19-price-gouging> accessed 22 November 2020.
487 Carl Hittinger, 'Avoiding Price Gouging, Price Fixing and Other Antitrust Risks During the COVID-19 Pandemic' (*Competition Policy International*, 15 April 2020) <https://www.competitionpolicyinternational.com/avoiding-price-gouging-price-fixing-and-other-antitrust-risks-during-the-covid-19-pandemic/> accessed 22 November 2020.
488 Wolf Sauter, 'The Economic Constitution of the European Union' 4 43.
489 David J Gerber, *Global Competition: Law, Markets, and Globalization* (Oxford University Press 2010).
490 Dunne (n 9).

favours the 'negative' utilization of its competence over price regulation, selectively intervening in domestic regulation to preserve free market principles.[491]

The legal framework for price regulation at the Union level certainly exists, with the prohibition of unfair pricing in Article 102(a) of the Treaty on the Functioning of the European Union (TFEU) serving as the basis for the practice in several Court of Justice cases.[492] While the concerned paragraph is indeed framed within the context of dominant undertakings, its broad interpretation is also applicable to excessive pricing in the absence of other mechanisms.[493] In *Italian Flat Glass*, it was established that unfair pricing could also be carried out by multiple independent entities, broadening the interpretation of the article. Further, in *ABG Oil*, the concept of 'transitory market power' was recognized in a competition law context, further establishing the concept of temporary collective market dominance.[494]

Yet, as Akman notes, *'abuse of excessive pricing has remained underdeveloped conceptually and in practice at the EU level'*.[495] As stated above, price regulation remains an inherently domestic activity, further evidenced by countries such as Cyprus and France instituting price ceilings while the Union remains reluctant to intervene.[496] Under normal circumstances, the Union limits itself to the negative application of its authority over price regulation; however, the unique concurrence of the developing legal precedent and the critical circumstances simultaneously affecting all Member States may enable EU-level positive intervention in the developing 'social market economy'.[497]

3.1.3. United Kingdom

Since the beginning of the pandemic, much of the antitrust debate in the United Kingdom has been centred around the lack of tools to address issues such as exploitation in the absence of competition law triggers. Following the consideration of *'direct action to regulate prices'*, the UK Competition and Markets Authority announced the formation of its COVID-19 taskforce on 20 March 2020 to effectively address the unique problems caused by the emergency at hand, which functioned in a 'fundamentally different way' compared to standard CMA practice.[498]

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491 ibid.

492 P Akman and L Garrod, 'When Are Excessive Prices Unfair?' (2011) 7 Journal of Competition Law and Economics 403.

493 Francisco Costa-Cabral and others, 'EU Competition Law and COVID-19' [2020] SSRN Electronic Journal <https://www.ssrn.com/abstract=3561438> accessed 7 December 2020.

494 Penelope Giosa, 'Exploitative Pricing in the Time of Coronavirus—The Response of EU Competition Law and the Prospect of Price Regulation' [2020] Journal of European Competition Law & Practice lpaa029.

495 Akman and Garrod (n 42).

496 Giosa (n 42).

497 Dunne (n 9).

498 Okeoghene Odudu, 'UK & Covid-19: An Overview of the Competition Policy and Leading Cases' [2020] e-Competitions Bulletin <https://www.concurrences.com/en/bulletin/special-issues/uk-covid-19/general-antitrust/uk-covid-19-an-overview-of-the-competition-policy-and-leading-cases> accessed 7 December 2020.

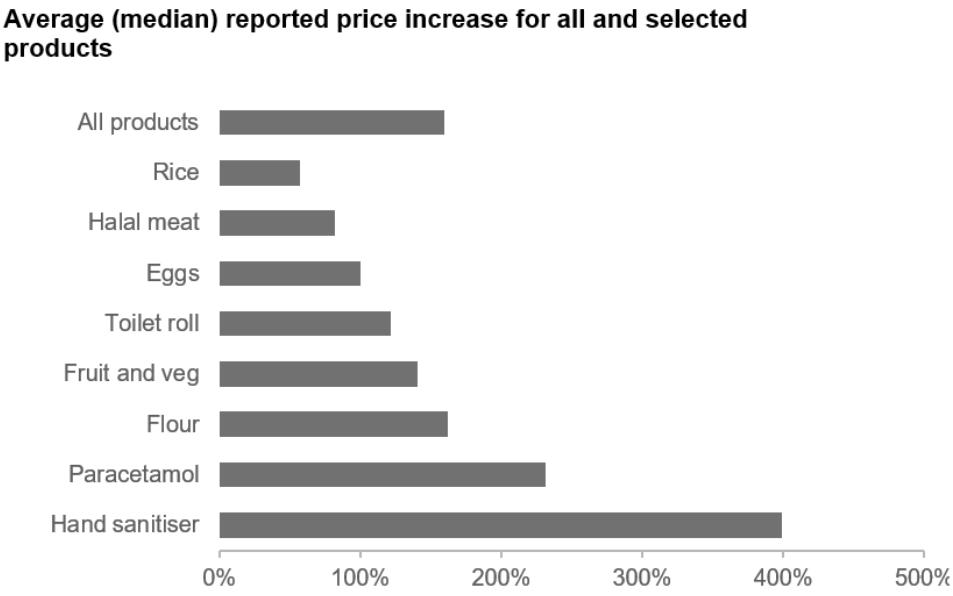

Figure I: Price increases reported by the CMA, 21 May 2020.[499]

With over 1,200 daily complaints received in its first three months of monitoring excessive pricing,[500] the CMA has launched multiple investigations on grounds of the 1998 Competition Act, most of which have been inconclusive.[501] However, with obsolete legal precedent for potential lawsuits and next to no grounds for price controls, it seems unlikely that the CMA can take direct action unless permanent changes are made to antitrust laws.[502]

3.1.4. Turkey

On 17 April 2020, Act No. 7244 on 'Mitigating the Effects of the Novel Coronavirus (COVID-19) Outbreak on Economic and Social Life and Amendments to Certain Laws' came into force, instituting a number of temporary measures regarding economic activities and amending previous legislation on retail trade. Its most notable effect, however, was the introduction of the Unfair Price Assessment Board. Designed to operate solely in emergency conditions, its purpose is to curtail stockpiling and 'unfair price increases', which the regulation defines as *'exorbitant and unjust price increase by manufacturers, suppliers and undertakings that operate in retail level in the products and services that are required for basic needs of the public such as nutrition, healthy living and protection without any valid ground,*

[499] 'Protecting Consumers during the Coronavirus (COVID-19) Pandemic: Update on the Work of the CMA's Taskforce' (*GOV.UK*) <https://www.gov.uk/government/publications/cma-coronavirus-taskforce-update-21-may-2020/protecting-consumers-during-the-coronavirus-covid-19-pandemic-update-on-the-work-of-the-cmas-taskforce> accessed 7 December 2020.
[500] ibid.
[501] Odudu, 'UK & Covid-19' (n 46).
[502] Timothy Cowen, 'Shortages, Price Hikes, and Profiteering: Pandemic Effects on UK Supermarkets and Online Markets' (*Competition Policy International*, 10 June 2020) <https://www.competitionpolicyinternational.com/shortages-price-hikes-and-profiteering-pandemic-effects-on-uk-supermarkets-and-online-markets/> accessed 7 December 2020.

such as increase in the cost of input and other production costs'.[503] The Board is authorised to act both in response to complaints and to its own accord when addressing stockpiling and excessive pricing. The Board may also issue administrative fines between TRY 10,000-500,000, proportional to the effects to prices, competition, and supply.[504]

In addition to legislators, the Turkish Competition Authority was naturally highly active in combatting exorbitant pricing, announcing that it was committed to guarding consumer welfare and launching several investigations into markets including produce, cleaning supplies, masks, and retail.[505] An additional and somewhat unique measure to combat exorbitant prices taken by Turkish authorities was the direct price controls set for medical masks. On 7 May 2020, the Ministry of Trade announced a price ceiling of 1 Turkish Lira for medical masks sold by retailers, announcing that anything would be treated as an 'excessive price'.[506]

3.2. Merger Controls

Through a number of factors, such as heightened uncertainty and disruption of global supply chains, the COVID-19 pandemic has had an undeniably adverse effect on the world economy.[507] In the first half of the year, the World Trade Organization (WTO) forecasted a %13 contraction in global trade in the best-case scenario, and 32% at the worst.[508] The World Bank predicted a similar outcome, with an estimated 5.2% shrinkage of GDP world-wide – the deepest since the economic fallout caused by the aftermath of World War II.[509]

The global recession in motion will undoubtedly have major effects for markets, its economic shocks forcing many firms to exit the market through mergers or failure. As these rapid exits take place, markets will undoubtedly suffer an unprecedented rate of concentration, leading to near-irreparable damage to competitive markets in the long run if left unchecked.[510] The highly

[503] Bahadir Balki, Fırat Eğrilmez, Seniha Irem Akin, 'Turkey – Recent Regulation on the Unfair Price Assessment Board: How the Board Will Function?' (*Kluwer Competition Law Blog*, 2 June 2020) <http://competitionlawblog.kluwercompetitionlaw.com/2020/06/02/turkey-recent-regulation-on-the-unfair-price-assessment-board-how-the-board-will-function/> accessed 22 November 2020.

[504] 'Procedures Published for the Unfair Price Assessment Board' (*Esin Attorney Partnership*, 29 May 2020) <https://www.esin.av.tr/2020/05/29/procedures-published-for-the-unfair-price-assessment-board/> accessed 23 November 2020.

[505] Karamustafaoglu, Mert, 'Evaluation Of COVID 19 Outbreak In Terms Of Turkish Competition Law - Anti-Trust/Competition Law - Turkey' <https://www.mondaq.com/turkey/antitrust-eu-competition-/967204/evaluation-of-covid-19-outbreak-in-terms-of-turkish-competition-law> accessed 18 May 2021

[506] T.C. Ticaret Bakanlığı, 'Cerrahi Maskelerin Satışına İlişkin Basın Açıklaması' (*https://ticaret.gov.tr*, 5 July 2020) <https://ticaret.gov.tr/haberler/cerrahi-maskelerin-satisina-iliskin-basin-aciklamasi> accessed 23 November 2020.

[507] Sophia Chen and others, 'Tracking the Economic Impact of COVID-19 and Mitigation Policies in Europe and the United States' WP/20/125 IMF Working Paper.

[508] World Trade Organization, 'Trade Falls Steeply in First Half of 2020', accessible at <https://www.wto.org/english/news_e/pres20_e/pr858_e.htm> accessed 7 December 2020.

[509] World Bank, 'Global Economic Prospects, June 2020' [2020] GLOBAL ECONOMIC PROSPECTS 66.

[510] Fisher (n 2).

concentrated markets resulting from this global event may further amplify the adverse effects of the pandemic which public authorities seek to avert.[511]

To prevent concentration and preserve competition in the long run, governments and competition authorities may seek to preserve market structure through entry and exit controls.[512] Due to both the economic effects of the emergency at hand and the suboptimal competition environment it creates, encouraging entry is likely not a viable option for the maintenance of competitive markets, which naturally causes authorities to lean towards regulation of market exits.[513] The rationale for exit controls is to maintain both the variety and safety of supply for the consumer which the free market may not when left to its own devices, particularly in markets intertwined with significant public concerns. However, direct exit controls may also result in reduced market efficiency and markets rendered unprofitable, so they must be utilized sparingly and, on a case-by-case basis.[514]

A viable method for regulating market exits under normal circumstances is through the means firms utilize to exit markets. Ideally, this would be done through mergers and acquisitions, so that the resources allocated to the market remain within to preserve consumer welfare. However, this may not always be possible. In a crisis simultaneously affecting all actors within a given market, other actors within a market will often have no choice but to prioritize self-preservation overgrowth, leaving no alternative but firm failure. This is very much the case with the current crisis, with major industries such as tourism and aviation undergoing collective losses.[515] Under these conditions, competition authorities may authorise a practice called failing firm defence (FFD), which enables firms to engage in mergers and acquisitions that would otherwise be prohibited by competition law. While the application of failing firm defence has been very selective, the unique circumstances of the COVID-19 pandemic may result in broader application in the absence of measures less detrimental to competition and public interest.[516]

Public policy may also choose to scrutinize mergers and acquisitions in response to concentration. When the economic realities of the pandemic are considered, a glaring fact becomes clear: as economies shrink, smaller firms receive the bulk of the damage. This is likely to prompt further concentration in sectors affected by the economic ramifications of the pandemic through actors seeking to exit the market and 'killer acquisitions' of shrinking firms.[517]

[511] OECD, 'Merger Control in the Time of COVID-19'.
[512] Viscusi, Harrington and Vernon (n 11). P. 359.
[513] Giosa (n 42).
[514] Viscusi, Harrington and Vernon (n 11). PP. 359-360.
[515] OECD, 'Merger Control in the Time of COVID-19' (n 58).
[516] ibid.
[517] Lord Tyrie, 'How Should Competition Policy React to Coronavirus?' 38.

With continually arising challenges regarding shifting market balances, merger controls are an important and effective tool in the hands of competition authorities, be it for maintaining a competitive market or protecting public interest.[518] Which is prioritized differs with the approach taken in different countries, influenced by legal tradition and public and private interests.

3.2.1. European Union

While the merger-related response in the EU has largely been limited to procedural matters, the COVID-19 crisis has reignited the debate on failing firm defence under EU competition law, which was last permitted by the Commission in 2013 with the Aegean/Olympic II case in the aftermath of the financial crisis. In Aegean/Olympic II, the merger was approved in light of the economic situation, not unlike the one the world faces right now, despite previously finding that none of the criteria for failing firm defence were met only two years prior.[519]

As similar as the economic environment may look in both crises, the Commission's Director General for Competition announced in November that despite the expectations of those seeking mergers under a less rigid failing firm defence regime, the EU will not relax merger regulation.[520] However, with the Commission showing crisis-induced leniency for state aid matters Union-wide, a similar course of action may yet be taken as the situation develops.

3.2.2. United Kingdom

A notable exception to the general aversion to the failing firm defence under EU law was from the United Kingdom, where EU competition law continues to be applied until the end of the Brexit transition period. Following an investigation prompted by a US$575 million investment, the Competition and Markets Authority approved Amazon's minority shareholding acquisition in the online food delivery company Deliveroo on 4 August 2020. The initial reasoning for the approval was that *'Deliveroo was likely to exit the market unless it received the additional funding available through the Transaction'* due to the impact of the pandemic on their business. Although the CMA later found that Deliveroo's financial situation had improved and approved Amazon's stake acquisition based

[518] OECD, 'Merger Control in the Time of COVID-19' (n 58).
[519] 'A Re-Awakening of the Failing Firm Defence in the EU in the Aftermath of COVID-19? | White & Case LLP' <https://www.whitecase.com/publications/alert/re-awakening-failing-firm-defence-eu-aftermath-covid-19> accessed 7 December 2020.
[520] 'Antitrust Official: EU Won't Relax Merger Rules During COVID-19 -' (*Competition Policy International*, 18 November 2020) <https://www.competitionpolicyinternational.com/eu-antitrust-official-eu-wont-relax-merger-rules-during-covid-19/> accessed 7 December 2020.

on its impact on competition instead, the successful failing firm defence in the early stage is certainly worthy of note, especially considering it is a minority stake.[521]

3.3. Subsidies (State Aid)

With major changes to market structure, it falls to competition authorities to take the necessary measures to maintain competitiveness in markets where actors are inclined to exit. However, with the rapid rate of concentration in this extreme situation, the finite resources competition authorities have at their disposal may not be sufficient in enforcing exit controls or even assessing where they may be necessary. In such a scenario, governments may be inclined to grant state aid as a measure to prevent firms from failing to maintain market efficiency, or simply for wider policy considerations.

At a first glance, subsidies are direct and effective tools for governments to direct markets towards policy objectives. Governments may use public funds to subsidise firms through reduced taxes, allocated resources, loan guarantees, and more. In some cases, particularly in critical sectors such as military arms, governments may also implicitly subsidise firms with purchases over market value.[522] Regardless of their form, subsidies have an observable effect in market outcomes, the value of which remains debated.[523]

State aids are of concern to competition authorities in matters of predatory pricing and, to a lesser extent, mergers. Subsidies may move recipients to engage in below-market pricing, pushing competing firms out of the market and instituting an artificial barrier to entry. This practice, often called predatory pricing, allows subsidized firms to establish a dominant position in markets, therefore making state aid a concern of competition law. Additionally, governments may use subsidies to leverage mergers, persuading or dissuading firms from performing them.[524]

3.3.1. European Union

The distortive effects of subsidies also present themselves on an extranational scale. Due to their inherent effect on the formation of free prices, subsidies are considered detrimental to the ideal competitive and efficient market competition law seeks to establish and/or protect. It affects not only domestic markets, but global markets as well, as governments may seek to provide a competitive advantage to domestic firms against foreign ones. With this fact in mind, the member

[521] 'Amazon/Deliveroo - When Small Shareholdings Can Lead to Big Issues' (*Antitrust and Competition Report*, 11 August 2020) <https://www.antitrustandcompetitionreport.com/2020/08/merger-control/amazon-deliveroo-when-small-shareholdings-can-lead-to-big-issues/> accessed 10 December 2020.
[522] OECD, 'Policy Roundtable on Competition, State Aids and Subsidies' 286.
[523] Mankiw and Taylor (n 1). P. 199.
[524] OECD, 'Policy Roundtable on Competition, State Aids and Subsidies' (n 69).

states of the World Trade Organization adopted the Agreement of Subsidies and Countervailing at the Uruguay Round in 1986.[525] Though certainly multilateral and international in nature, the restrictions in the Agreements pertain only to state aid influencing international trade, either through export performance ('export subsidies') or incentivizing preference of domestic goods ('local content subsidies'), categorizing them as prohibited or actionable.[526]

While regulated to a limited extent on a global scale through international agreements due to their potential impacts on global competition, subsidies are generally not subject to the authority of domestic competition agencies directly. The European Union is unique in that it is the only entity, national or supranational, to possess strict and effective authority over state aid through competition law and competition agencies.[527]

The authority to enforce decisions regarding competition is well within the competence of the European Commission, as national competition authorities are prescribed a subsidiary role in Council Regulation (EC) No 1/2003.[528] In addition, the Commission also possesses the competence to control state aid and subsidization, which predates the European Union itself. This unique power, conferred to the European Coal and Steel Community by its six founding states in 1951, was intended to hasten market integration through strict controls on vertical integration on a domestic scale. Member States still require the permission of the European Commission to grant aid, making for a powerful *ex-ante* approach in contrast to the *ex-post* countervailing rules of the WTO.[529] The current legal basis for the strict controls on state aid by the European Union stems from Article 107(1) of the Treaty on the Functioning of the EU, which reads:

> *'Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.'*[530]

The EU state aid control regime has been invoked twice in response to comparable crises.[531] First, following the September 11 attacks, the air transport industry was granted state aid for already

[525] ibid.
[526] WTO, 'Agreement on Subsidies and Countervailing Measures ('SCM Agreement')' <https://www.wto.org/english/tratop_e/scm_e/subs_e.htm> accessed 7 December 2020.
[527] OECD, 'Policy Roundtable on Competition, State Aids and Subsidies' (n 69).
[528] Walter Frenz, *Handbook of EU Competition Law* (Springer Berlin Heidelberg 2016) P. 108.
[529] OECD, 'Policy Roundtable on Competition, State Aids and Subsidies' (n 69).
[530] Article 107, Treaty on the Functioning of the European Union.
[531] Francisco Costa-Cabral and others, 'EU Competition Law and COVID-19' [2020] SSRN Electronic Journal <https://www.ssrn.com/abstract=3561438> accessed 7 December 2020.

present structural problems heightened by the effects of the event.[532] Second, following the European sovereign debt crisis in 2008, financial institutions were granted relief to restore market function.[533]

On 19 March 2020, the European Commission adopted the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak, allowing Member States to preserve liquidity in markets utilizing the flexible options given.[534] These options are categorized under the third exception to the general EU state aid regime, worded in Article 107 TFEU as *'aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest'*.

3.4. Authorization of Non-Competitive Practices

Authorizing private parties to co-operate is perhaps the swiftest response to market failures in situations such as these, save for direct interventions such as price controls. By authorizing market actors to temporarily circumvent legal restrictions on collusion, public authorities can address the shortcomings of a market in the short-term. Supply security for essential goods and services are often used to rationalize authorization of non-competitive practices. For instance, if resources are scarce and distribution is critical, a government may authorize distributors to cooperate in a horizontal manner to guarantee supply to the consumer. Similarly, specific purposes may also warrant such authorization. As an example, competing pharmaceutical companies may be allowed to collaborate for urgently required drugs or vaccines.[535]

However, emergencies should not be grounds to bypass the central element of non-cooperation in competition law, and for good reason.[536] History has proven once and again that promotion of non-competitive behaviour can lead to catastrophic results in the long term, as evidenced by prior crises.[537] When pitted against the potential backlash of the general population, public authorities may be moved to provide short-term relief at the detriment of competitive markets and the economy as a whole. These adverse effects may not be immediate but will certainly scale with the

[532] European Commission, 'EU Response to the 11 September: European Commission Action' <https://ec.europa.eu/commission/presscorner/detail/en/MEMO_02_122> accessed 7 December 2020.
[533] Philip Lowe, 'State Aid Policy in the Context of the Financial Crisis' [2009] Competition Policy Newsletter 6.
[534] European Commission, 'State Aid: Commission Adopts Temporary Framework' <https://ec.europa.eu/commission/presscorner/detail/en/ip_20_496> accessed 7 December 2020.
[535] OECD, 'Co-Operation between Competitors in the Time of COVID-19' 13.
[536] Okeoghene Odudu, 'Feeding the Nation in Times of Crisis: The Relaxation of Competition Law in the United Kingdom' (2020) 19 11.
[537] Fisher (n 2).

duration of the crisis and behaviour controls imposed by authorities.[538] Governments and competition authorities must therefore refrain from authorization unless necessary.

3.4.1. United States

The United States has so far been disinclined to provide any general exemption to emergency cooperation normally prohibited by antitrust laws, perhaps in part due to the somewhat disastrous effects of previous instances in the last century.[539] On 24 March 2020, the Department of Justice and the Federal Trade Commission, the two federal entities responsible for antitrust enforcement on a national scale, released a Joint Antitrust Statement stating that enforcement would continue as is, with an expedited 7-day review process for COVID-19 related collaboration. As with activities combatting price-gouging, exemptions have been authorized sparingly and almost exclusively within the bounds of the DPA-mandated framework laid out by the HHS, with the only notable exemption being to collaboration between medical supply distributors.[540]

3.4.2. European Union

So far, the action taken by the European Union has been consistent with the Commission's policy of prioritizing consumer welfare alongside allocation of resources and production.[541] In a joint statement in March, the European Competition Network announced that it *'will not actively intervene against necessary and temporary measures put in place in order to avoid a shortage of supply'* in addressing cooperation agreements, which it deems may prove more efficient than restrictions under Article 101 of the TFEU.[542] National competition authorities, including the Bundeskartellamt of Germany, have made similar announcements exempting emergency cooperation.[543]

In accordance with these statements, the Directorate General for Competition issued its first comfort letters since the introduction of Regulation 1/2003,[544] signalling a need for direct involvement of the Commission due to the gravity of the situation.[545] Two letters of note were

[538] Odudu, 'Feeding the Nation in Times of Crisis: The Relaxation of Competition Law in the United Kingdom' (n 83).
[539] Thomas K Fisher, 'Antitrust during National Emergencies: II' (1942) 40 Michigan Law Review 1161.
[540] 'COVID-19 and New Exemptions Under the Antitrust Laws - A Global Review' (*International Comparative Legal Guides International Business Reports*) <https://iclg.com/briefing/13286-covid-19-and-new-exemptions-under-the-antitrust-laws-a-global-review> accessed 22 November 2020.
[541] Frenz (n 75). Para. 19-21.
[542] Joint statement by the European Competition Network (ECN) on application of competition law during the Corona crisis.
[543] Lebensmittel Praxis, 'Kartellamt: Ausnahmeregeln möglich' (*Lebensmittel Praxis*) <https://lebensmittelpraxis.de/handel-aktuell/26802-kartellamt-ausnahmeregeln-moeglich-2020-03-20-12-58-31.html> accessed 10 December 2020.
[544] Gauer C and others, 'Regulation 1/2003 and the Modernisation Package Fully Applicable since 1 May 2004' (2004), Competition Policy Newsletter.
[545] European Commission Resurrects Comfort Letters to Combat COVID-19' (Bristows) <https://www.bristows.com/news/european-commission-resurrects-comfort-letters-to-combat-covid-19/> accessed 18 May 2021.

published; the first assuring that cooperation in vaccine production through a matchmaking event was in order,[546] the second authorizing cooperation in production of medicine in high demand between willing manufacturers.[547]

Further, with a Communication dated 8 April 2020, the Commission has relaxed the self-assessment protocol in Council Regulation (EC) No 1/2003, providing channels for informal guidance.[548] In addition to these measures, the European Commission announced on 8 April 2020 and 4 May 2020 that it would allow cooperation between producers of generic medicine and in the sectors of dairy, live plants, and potatoes within the Single Market to ensure security of supply.[549] A similar sectoral exemption was made with air cargo services, with additional changes made to quality controls for ease of service.[550]

3.4.3. United Kingdom

Perhaps motivated by concerns of public image and impression management, UK public officials have openly advocated suspending various aspects of competition law in hopes of temporary cooperation outperforming market outcomes.[551] Most notably, on 19 March 2020, members of the UK government announced that after discussion with *'chief executives from the UK's leading supermarkets and food industry representatives,'* they had decided to temporarily waive certain elements of competition law for retailers in order to *'feed the nation'*.[552] With the Competition Act 1998 (Groceries) (Coronavirus) (Public Policy Exclusion) Order of 27 March 2020, actors within the grocery industry were exempted from certain aspects of competition, such as stocking, opening hours, and limits to sales per person.[553] The order was revoked on 8 October 2020, and is currently under consideration for reinstitution due to its perceived success by members of government. Similar exemptions could

[546] European Commission DG Competition, COMP/E-1/GV/BV/nb(2021/034137)
[547] European Commission DG Competition, COMP/OG – D(2020/044003)
[548] European Commission, Temporary Framework for assessing antitrust issues related to business cooperation in response to situations of urgency stemming from the current COVID-19 outbreak (2020/C 116 I/02)
[549] Thomas Janssens, Daniel Swanson and Leonor Cordovil, 'The Reactions of Competition Authorities to the Covid-19 Pandemic – an IBA Contribution June 2020 IBA Antitrust Committee' 92.
[550] Georgiana Pop, 'Up in the Air: Airlines and Competition Policy in Times of COVID-19' (*Competition Policy International*, 28 July 2020) <https://www.competitionpolicyinternational.com/up-in-the-air-airlines-and-competition-policy-in-times-of-covid-19/> accessed 10 December 2020.
[551] Maarten Pieter Schinkel and Abel d'Ailly, 'Corona Crisis Cartels: Sense and Sensibility' [2020] SSRN Electronic Journal <https://www.ssrn.com/abstract=3623154> accessed 7 December 2020.
[552] 'Supermarkets to Join Forces to Feed the Nation' (*GOV.UK*) <https://www.gov.uk/government/news/supermarkets-to-join-forces-to-feed-the-nation> accessed 7 December 2020.
[553] Odudu, 'Feeding the Nation in Times of Crisis: The Relaxation of Competition Law in the United Kingdom' (n 83).

also be observed in other sectors under threat of shortage of supply, such as the dairy and health sectors.[554]

In addition to sectoral exemptions, on 25 March 2020, the CMA announced a set of criteria based on section 9 of the Competition Act 1998, which automatically excludes any conduct from antitrust enforcement. The conditions set by the CMA require that temporary cooperation agreements *'(a) are appropriate and necessary in order to avoid a shortage, or ensure security of supply, (b) are clearly in the public interest, (c) contribute to the benefit or wellbeing of consumers, (d) deal with critical issues that arise as a result of the Covid-19 pandemic and (e) last no longer than is necessary to deal with these critical issues.'*[555]

By prioritizing matters of public interest over strict application of competition law, the approach of the UK Competition and Markets Authority clearly diverges from the approaches taken by similar institutions in the US and EU. Whether this so-called 'field experiment' in relying on cooperation rather than competition will pay off remains to be seen.[556]

4. Conclusion

The COVID-19 pandemic has warranted emergency government responses in all countries, economic or otherwise. While undoubtedly necessary, the extent of measures employed differs in each country, particularly in regard to competition law and policy. This study has conceptualized and compared the observable derogations from standard, day-to-day competition enforcement in the European Union, Turkey, the United Kingdom, and the United States. When compiled into a table, the findings of this study on the types of emergency action taken and their presence in these four jurisdictions is as follows:

Emergency Deviations from Competition Law		European Union		Turkey	United Kingdom	United States	
		Union-Wide	Member States			Federal	State-level
Price Controls	Horizontal		✓	✓	✓		✓
	Sectoral		✓	✓	✓	✓	
Merger Controls	Horizontal						
	Sectoral				✓		

[554] 'COVID-19: Health Services and Dairy Granted Temporary Competition Law Exemptions and Collaboration Allowed for COVID-19 Medicines - Lexology' <https://www.lexology.com/library/detail.aspx?g=a4e04318-0e0d-46ff-81ce-88b981ff6f1d> accessed 8 December 2020.

[555] Jenny (n 23).

[556] Schinkel and d'Ailly (n 94).

Subsidies (State aid)	Horizontal	✓					
	Sectoral						
Emergency Cooperation	Horizontal	✓			✓		
	Sectoral	✓	✓		✓	✓	

With the information gathered, several fascinating takeaways can be made by contrasting the approaches taken:

- The European Union, with its unique structure as an economic and legal entity comprised of multiple countries, shares its competences with its 27 Member States. Notable emergency measures taken through the agency of national competition agencies were the reintroduction of comfort letters and the authorization of state aid from national governments. In accordance with the long-standing continental competition tradition rooted in ordoliberal ideals, the EU has seemingly exercised its existing competences to best respond to the crisis. Yet, perhaps due to founding principles or the fragile balance of vertical power, direct enforcement on matters such as price regulation was left to individual Member States despite emerging legal grounds for Union-wide action.
- Turkey, with its unique legal system based on amalgamated codes and transplanted aspects of various European jurisdictions, has seemingly taken initiative to safeguard the interests of the general public, successfully adapting its competition enforcement efforts to overarching policy.
- The United States, following long-standing tradition, continues to observe strict adherence to its overarching antitrust policy even in a global emergency. Situational measures remain limited to specific instances, such as the stockpiling of specified goods in critical demand, so as to not distort competition on a general scale. The federal government's faith in free market outcomes remains unshaken with next to no observable derogation from antitrust enforcement on a national scale, while some states have taken diverging approaches within the scope of their authority.
- Despite serving as the progenitor of the very same common law tradition, the United Kingdom was surprisingly prolific in its employment of emergency-induced competition measures. While the idea of suspending competition law entirely was voiced in decision-making bodies, no such attempt was made. Yet, with measures ranging from large-scale cooperation exemptions to the only notable instance of successful failing firm defence,

the United Kingdom clearly leads the four in both severity and prevalence of derogations from standard competition law enforcement in response to the COVID-19 pandemic.

THE INFLUENCE OF INTEREST GROUPS IN THE ANTI-TRUST POLICIES IN THE EUROPEAN UNION

Defne POLAT[*]
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Abstract

Interest groups are part of any political regime and perform a relevant role in the regulatory environment of a country. Recently, because of geopolitical changes and technological advancements, antitrust rules are being questioned and subjected to adaptations when needed. This study aims to understand how interest groups, in general, are enabled to conduct their work in the European Union and whether the EU's antitrust regime is currently being put into a stress test. Specifically, it investigates which actors are mostly involved in today's scenario in actions to promote changes in the competition regulations and what are the arguments used by these interest groups to sustain the claim that a change is needed. The results suggest that many different interest groups are always engaged in policy change in the European Union's antitrust law, but the member states are advocating for a substantial transformation in the field due to external threats being presented that generate pressures for an adequate response in the EU level.

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1. Introduction

The increasing scenario in terms of globalization in every sector of human force and work drives the creation of different elements in every field of human aspects. The concept of globalization and its inner elements which have increased the integration at the international level are bringing links between sectors of the economy and areas of work more connected. This level of increased international aspects inside of the human life creates the inevitable results as the increased amount of complexity in every sector of the economic life and in the new steps of mankind to take as the future planning. One of the examples of this complexity in economic sectors is the changing dynamics of the antitrust policies. The word antitrust is one of the most well-known words of the 21st Century because of its changing dynamics, people that trying to understand the word to create an optimal approach that can be useful for every people and every economic sector from the unification of the approach of the court decisions in the antitrust law and cases of antitrust to the future planning of the governmental steps that can be significant for the companies and their plans with a reciprocal behaviour with the governmental decisions. Therefore, as it can be seen, even the word 'antitrust' is majorly heard, especially in the field of economy, the real scene is telling that the word contains huge importance in ever since sector that people work, from the legal field such as the court decisions to political attitude of the administrators take with respect to coming up with decisions that may lead the attitude of other sectors.

It can be stated as the sectors in the working life, from the administrative side as the political career to the basic labour force, every decision under the concept of Antitrust is linked with each other. Concerning the fact that the Antitrust laws which get its source of creation from the need of regulating every risky behaviour of companies, from small to major as the scale of the company, they are also relatively new in terms of their creation and the fact that the concept and the word of 'Antitrust' contain several question marks in people's minds which make the word to be hardly understandable. Therefore, we can observe the rapid and quick changes related to the Antitrust Laws and regulations both in the local and international point of view, that it is possible to state the European Union's (EU) attitude towards the concept of Antitrust and the creation of several regulations, especially in order to maintain a balanced view to regulate the antitrust policies in every sector of the economy and lead the origination of a unified scene and attitude in those sectors of life and also the works of the governments to create their understandings to regulate the Antitrust policies of their national level of sectoral empowerment and their also own empowerment as the dominance of the administrative field.

The aim of the figures as the international unions as the European Union to governments as a local approach is to have more voice in terms of the coming up regulations in the field and concept of

the Antitrust and therefore the Antitrust law and regulations. This may lead to more figures from the associations to legal force to have the same aim and attitude with a different area of the working field. The common and general aim is to be a part of the regulations of the Antitrust laws and regulations by implementing their own sectoral understandings and approaches to get more advantage from the changeable structure of the Antitrust regulations and therefore, with the right-direct correlation, their results. The actors in that sense who try to implement their own set of goals and approaches in the creation of the regulations and behaviour of the Antitrust Laws and regulations are referred to as the interest groups.

The interest groups contain a tremendous spectrum containing approximately every sector of the economy or with a general saying, every sector that humankind works into. Judges in the legal field in the economy can be referred to as one of the examples of the interest groups, so the administrators or administrative committees of the companies. Therefore, even it is driving a scenario for the Antitrust concept and therefore its regulations as being hard to be fully understood, the actions of every interest group that majorly on implementing their own set of ideas and sectoral behaviours in the structure of Antitrust law and regulations, are stating and taking the Antitrust concept more complex because every economical sector, or with a generalization that can be referred as the sectors of the work contain their unique features and therefore, it is a difficult goal to create a unified structure for the regulations in the Antitrust policies and also make every economic sector satisfied with the regulations as a general overview.

2. Relational IGs and antitrust rules dynamics

Policymaking is a time interval, which has an accessible structure for aspects and effects that are coming from outside. One of the most effective subjects that put an effect on the shape of the policy-making process is the general naming: interest groups. The term interest groups contain several types inside, which makes the definition for interest groups more complex. In a direct/positive correlation, the policy-making process may take place in several areas, from economy and politics, specifically on the state of the power. To understand how interest groups act and aim, it is beneficial to understand the basis of the term itself. The term 'interest groups' consists of gatherings of individuals or organizations that form an association among those key people. The association that people form as interest groups has a main aim which is affecting the government actions, specifically on policy-making periods in different areas, from economy to international trade. The effect of them on the policy-making power of the government acts in favour of the interest groups' benefits about their specified areas as their target areas. Interest groups contain a variation in their structure. Related to this fact, it is possible to state that there is

more than one interest group in affecting government policymaking, such as economic groups, professional groups, and public groups. The list continues to the division of labour and sectors inside the country and/or in a global scope.

The unions, in terms of the working fields, both having their work nationally and internationally. The concept of the unions contains a big and detailed historical background, with respect to the fact that one of the main reasons to form a union or be a part of a union relies on the desire to be with people that are focusing and working on the same working field, inside the economy. This main reason is beneficial to speak up and have support inside the working field. In that case, there are countless unions in different economical areas. One of the examples of unions is the labour unions, inside the economic system. The labour unions are the gatherings to speak up, get to know the network of the working field and support further developments or changes in the respective area of work. It is important to mention that labour unions are one of the leading interest groups in terms of the changes in the Antitrust policies both nationally and internationally. Using the power of the labour union by the workers, it is possible to make an influence of the changes of the payment for the labour. The collective changes of the payment with respect to the usage of the labour union contain an effect on the power to compete with other actors in the relevant industry, as an outcome. The main force inside the labour unions to gain power or be an actor on future changes is coming from human dynamism, as labour unions contain great importance in representation of a specific group of people in a working area and bringing the sense of a union within people which belong to a specific working group. The concept of unions is making the working groups gather up under one name to state the needs and ideas louder, with official support. The aim to make an influence on governments' policies and revisions of them, contains a systematic behaviour of the interest groups to follow up, in stating their output as a beneficial result. This common behaviour is leading the creation of regulations, specifically on interest groups. The regulations on interest groups are stating the behavioural structure of the groups should make an action according to their specific sector. With respect to the behaviour of IGs on policies, to maintain their actions to avoid the possible outcomes that restrain the trade, regulations are on the actions of IGs to regulate how they have an action, and therefore, their power on putting an influence on policymaking. The regulations on interest groups give a more transparent structure for people to observe their moves clearly by, for example, requiring them to register with government authorities and declaring their funds and objects of expenditure. Organically it creates a controlling mechanism though, basically, the public disclosure and the monitoring of IGs activities.

European Union's member states are within the spectrum of the so-called 'pluralist' and 'corporatist' interest groups systems. These models define the process through which IGs act and

somehow exert influence because they are related to the very structure and organization (regime) of groups in each political system. In the EU, in general, it is possible to affirm that these processes are transparent because of the methods used and the publicity that characterizes them. This article does not intend to discuss the differences between these two types, so it is enough, here, to explain that the first one understands that the policymaking process occurs in a competitive marketplace, largely used in the United States. While the second perceives a dynamic of commitment between the main societal actors (government, labour and business) that voluntarily agree about needed actions in order to keep the public interests protected and promoted.

To understand the impacts of the interest groups, it is essential to be aware of the discussions which are related to the implementation between antitrust laws and the economical approach on the concept of antitrust. In that matter, with respect to the general approach on antitrust, and therefore the antitrust laws in accordance with the development of this concept is that the antitrust concept and the laws are working to reach economic efficiency. Economic efficiency relies on the idea of the level of interaction, between the companies and the money. Therefore, the main aim, as the beginning of the understanding of the creation of antitrust, relies on economic efficiency, which suggests that it is significant to allow the amount of transaction with respect to the fact that sectoral division does not contain any limitations as the monopoly. However, according to Judge Robert Bork (1979) and Peter Arch (1970), there is a concept called 'the Antitrust Paradox', also named as 'The Antitrust Dilemma'. This dilemma states the fact that even though there is an inevitable relationship between the concept of antitrust and legislations, the antitrust law does not focus on the economic efficiency idea which is stated as the main idea of the antitrust regulations in the field of economy. The dilemma (or the paradox) states that away from the understanding of focusing on maintaining and developing economic efficiency, Antitrust regulations and laws majorly focus on the actions of the interest groups, such as corporations, unions, and NGOs. Therefore, even the antitrust policies are related to the economic goals, the goals to create laws in order to regulate the Antitrust policies do not majorly get the source to create from the economic approach. Government, corporations, unions can be counted as the interest groups, which contain a major influence on the development of the Antitrust laws to maintain and regulate the economic life with the scope of competition. It is, with respect to the difference of the focus of the economic approach and law, normal to observe a velitation. This velitation brings a 'dilemma' with the right correlation.

The importance of understanding the actors in the antitrust regulations and the approaches is relying on the fact that the actors contain interest within themselves. This interest of the actors in the field of antitrust can be specifically stated as the 'special interest'. Special interest is the interest

of the groups that may lead them to act according to. In that case, it is possible to count the 'special interest' as 'interest'. Special interest is not, therefore, a common interest, which can differ from actor to actor in the field of antitrust. Every actor, who in the action to contribute, maintain and change the antitrust policies contain their own specific interest to engrain in the antitrust law. In that sense, it is not possible to come up with a common scale to observe every interest at the same time. The structure of the actors, or with another saying, 'interest groups', differ from each other and so that their interest with the positive correlation. Companies, governments and unions are the most commonly known actors as interest groups in order to shape the antitrust regulations. The main reason for those three actors to be mostly known relies on the fact that the antitrust regulations are majorly seen in the economic field, especially on trade and other transactions. However, even that companies, governments and unions are known as the most, it is not possible to mention that these three actors are the only interest groups in the antitrust regulations. The NGOs and even the judges can also be counted as the actors in terms of maintaining, changing and continuing the antitrust policies as the interest groups. The judges, as being specifically saying, are the groups that focus on reaching justice as a general scope. In that case, judges mainly focus on how to implement the laws to the scenarios to reach the general scope of justice. The importance of the effect of the judges as the interest groups in terms of shaping the antitrust regulations is solid in thinking as judges are the main organs of the legal decision-making process, and therefore the implementation of the law and the codes to the scenarios. This, therefore, creates a legal common attitude towards the conflicts which are related to the antitrust policies, with respect to the fact that the effects of the globalization that bringing participants to focus on a common idea and as can be counted as the result of globalization, the global economy theories and the increase of the multicultural corporations and companies.

The complexity of the idea of creating a common behaviour in terms of the antitrust policies as a general and whole spectrum is having a difficult structure, and even for some research, it is an idea or a goal that will not be achieved as fully expected. The major reason which shows how difficult to achieve a common structure or behaviour in terms of the creation of antitrust policies is visual in the legal field. The qualifications of the legal conflicts in the antitrust basis, with respect to different interest groups which contain different special interests, the judges who are counted as a special interest group, are the groups that make synthesis from thesis and antithesis. The creation of the synthesis for the legal cases on antitrust policies and conflicts on them, cannot be a fully easy process to achieve, with respect to the fact that it can be counted as the meeting point of three or more interest groups at the same time. This meeting can also be a visualization of the general scope of antitrust policies and the effects of the interest groups as a general observation. Different interest groups bring different behaviours, attitudes, theories, and dynamism in the antitrust concept and

therefore the policies. This spectrum of difference may also be one of the reasons that the antitrust law and regulations are having a changeable structure.

As it stated how interest groups aim to make an influence on policymaking, one of the major impacts is on the government's actions related to antitrust policies. Antitrust means the collection of laws that act on prohibiting the behaviours as business practices that lead to several effects majorly on trade, from the creation of a monopoly within the sector to corporate mergers. The antitrust institute works for the public good in the sense that its absence would lead to harmful costs to society's well-being as a collective but also the consumer autonomy. The laws on the broad term of antitrust, have a direct effect on the public for trade to be seen as transparent and understandable related to business-related actions or with a broader term, transactions. With respect to the dynamic structure of the developments within laws for antitrust (Antitrust Laws), several points are prevented. The monopolistic structure of the economy as sectors, the cartel structure of the companies in their own working area are examples of the Antitrust Laws behaviour to eliminate. The main general idea of the antitrust laws is to fix the competitive structure in the economy and pricing with its regulations. In a general saying, interest groups must consider the laws on antitrust to create, change or maintain their behaviour in the economy. In addition to this fact, it is possible to mention that the effects are vice versa between the Antitrust regulations and the policies of the interest groups. Both sides of the economical behaviour affect each other, and this effect exchange is also on the future policymaking strategies related to the antitrust policies. The changes because of the effects between the interest groups and the antitrust policies, lead the structure of the antitrust policies and antitrust laws dynamic in terms of the change.

To build on this topic, it is relevant to mention the political settlements framework, which understands the distribution of organizational power within society as a very strong determinant of the amount of economic and political power possessed by an institution/organization or exerted by a policy. This is directly linked to how resources are allocated between actors in each organizational context and how this allocation creates an environment of intense power owned by a specific organization. In this environment, the organization in vogue will eventually have to deal with external dynamics and actors, by supporting, resisting or distorting other organizations or policies, depending on its interests. Attention must be paid to this relative power exerted by one organization, how/if it changes over time and in different contexts. How one organization engages with its environment and the other actors/policies there will define its relative power over that context.

One organization's ability to reflect its interests over other organizations in the same environment will vary according to how capable it is to exercise its agency, which will depend on how flexible

the structure of the political settlement is in relation to the specific organization. In more advanced political regimes, formal rules are usually able to adapt (the government exerting its influence), so the distribution in this given context will be forged by the government's willingness. Stronger organizations have more resources to allocate to influence or to cause monetary costs in others, and consequently making the others subject to their preferences.[557]

Concentration makes organizations stronger and imperfect competition is traditionally a cause for government intervention Pigou (1912) and Samuelson (1947). As already mentioned, IGs can fight against or in favour of this intervention, and this paper will analyse this dynamic and what are the most relevant influences found in the domain of EU's antitrust law.[558] But first, it is important to ponder that public policy should not always try to fix market failures except if it considers broadly the potential political consequences that fixing a market failure could bring, even if it makes sense economically. There are some specific conditions under which politics and economics are conflicting logics/forces, so the simple correction of a market failure does not necessarily, by itself, correct the distribution of resources (political equilibrium) and can harm this equilibrium, making clear that a cost-benefit analysis of the situation is not enough. To avoid unintended political consequences, it is important to holistically analyse the political and economic mechanisms that might generate non-desired effects.

This work deeply focuses on, not only, but mainly, answering the following question: how successful are the IGs attempts to influence antitrust rules in the European Union? This involves an analysis of the factors that most determine their potential success but also a comprehension about if the all-powerful interest groups always get what they want.

It is undeniable that in today's world some issues require an international approach. The international approach, which differs from the topic, in general, is the approach that to be observed, behave and think with the common understanding. The international approach takes place, mostly, when the topic requires to be talked about in a global manner. The processes being carried out by civil society, businesses, governments and other actors tend to increase the interdependency between national and international interests because the connections and new flows of people, goods and capital are being established. Howard Tolley argues that because of the political parties and elections void at the international arena, interest groups are even more relevant in global affairs than at the domestic level. Not coincidentally, the neo-functionalism and the liberal intergovernmentalism theories of European integration imply huge importance to interest groups

[557] Mushtaq H Khan, Political settlements and the analysis of institutions, *African Affairs*, Volume 117, Issue 469, October 2018, 636–655.

[558] Acemoglu, Daron, and James A. Robinson. 2013. 'Economics versus Politics: Pitfalls of Policy Advice.' *Journal of Economic Perspectives*, 27 (2): 173-92.

actions (Grossman 2004). So, it is also required to comprehend how this influence process of IGs takes place on the broader level of international policy and if there are relevant differences compared to the domestic playing field.

There is also an extremely valid discussion about the transboundary effects (extraterritoriality) of unfair competition and the consequent necessity of establishing international antitrust rules, but how would be the most effective and feasible way of doing it? In this field, multilateral cooperation has great potential but few achievements until now, the Doha Round at the World Trade Organization being a good illustration of this, because it was not effective for antitrust purposes. Then, non-multilateral, more horizontal, means to solve this issue can be considered (e.g. bilaterally, plurilateral agreements and networks), but not every antitrust issue is compatible with this kind of solution, remaining the need for top-down action in these cases (subsidiarity principle).[559] It should be stated with the fact that the European Union contains several principles in terms of regulating the attitude of the EU as a whole with the general overview of the EU and the Member States of it. In that sense, one of the major and tremendously important principles in terms of the foundation and the maintaining of the unified EU attitude is the principle of subsidiarity. The principle is also containing benefits not only on having a common attitude within the EU as its Member States but also protecting the attitudes, especially in terms of competence and therefore the concept of proportionality within the EU in general with its Member States. The principle of subsidiarity and proportionality is stated within the regulations of the EU, as in Article 5/3 in the Treaty on European Union (TEU) and the Protocol as No.2. The importance of the principle of subsidiarity is having a major background dated back to the time of the Maastricht Treaty in terms of the foundation and creation of the EU in general. Therefore, the maintenance of the competence and the need to coming up with the common sense of regulations to create unified behaviour inside the EU as its Member States were a need from the very beginning of the origination and foundation of the Union from the time dated back to the Maastricht Treaty to today and the future planning. It is possible to mention that the principle of subsidiarity and proportionality in the EU is not having the same structure and understanding inside the union from the Maastricht Treaty to today's understandings of the EU. Concerning the time and especially the major impact of the increased globalization in every field from the social life to the economic working areas from the legal understandings to companies and their expansions as can be given as examples for the working fields, may cause the understandings change and transform, or sometimes vanish but having a re-creation. In that case, the principle of subsidiarity and proportionality is not in the same structure

[559] Fox, E. (2017), 'Antitrust Without Borders: From Roots to Codes to Networks 'opens in new window, E15Initiative, International Centre for Trade and Sustainable Development (ICTSD) and World Economic Forum, Geneva.

as it was at the time of first spoken during the creation of the Maastricht Treaty. The globalization, with respect to the changing structure of the Antitrust regulations and policies, is putting another dimension of the principle of subsidiarity and proportionality of the EU to maintain and monitor the competence more within the Member States and also to create a common attitude towards it since the dimensions of the working areas in the economy are majorly getting more complex and therefore, with the positive- direct correlation the competition within the companies and also in the interest groups is getting a more complex structure because the complexity of the Antitrust Law and Regulations are having major importance with the global interactions in every single economic field of the human work life, as sectors.

3. The balance of power and its structures in the European Union

Andreas Dür (2009)[560] argues that the lack of concrete conclusions about IGs' empirical influence in the EU would happen because of the difficulties to define what means 'influence', 'power' and how to measure these terms considering the varying tactics used by interest groups to achieve its policy goals. Additionally, the number of studies conducted about the EU case is low and many times they are not able to converge in terms of conclusions and common ground for moving the research forward. The measurement of the influence with respect to the power of the interest groups in terms of the changes in the policymaking process should be done with the combination of different perspectives, such as the international and national/local perspective. The actors or main parameters are the points that we should focus on in terms of the measurement of the power and influence of interest groups on policy-making processes.

From the perspective of the European Union and the law, it is necessary to understand the general structure of the European Union, as a beginning. From being one of the successful international unions to the pillar system as the development of the inner structure and laws, the European Union contains major importance, because of the several aspects which it contains and the relations among the European countries. As being the link between its member states, the EU contains a web of laws, as in the 'free movement'. Several free movements within the EU bring several actions to its member states and so to the citizens of those EU member states, with respect to being under the umbrella of being an 'EU Citizen'. Free movement is an umbrella concept under the general structure of the EU. The general concept contains sub-concepts as free movement of people, free movement of services and the most related for the development of the antitrust regulations, free

[560] Dur Andreas, 'Interest Groups in the European Union: How Powerful are They?' [2009] 32(1) West European Politics

movement of capital. Those free movements are one of the most important facts in terms of understanding the general structure of the EU, in the beginning. The free movement brings a common area in terms of the free movement of workers, the capital and the goods. This concept increases the number of transactions within the countries that are members of the EU. With respect to this increased transaction, free movement creates a scene for firms to be more visual in other EU countries. In this visuality of the firms, the general result is to see the market expanded through the other member countries. The concept of the 'free movement' is settled under the regulations, specifically to Article 45 of the Treaty of the Functioning of the EU and is developed with the EU secondary legislation. As it is stated before, the free movement contains a structure as an umbrella concept which increases several transactions, specifically the transaction of services and people. As mentioned, the Antitrust law and the regulations, such as the handbook of 'Rules Applicable to Antitrust Enforcement' of the EU under competition law, get and effect from several concepts. The transactions and the results of those transactions have a direct effect on the EU Antitrust regulations and laws. It creates the expansion of the firms in other countries, and unions to have more member capacity since there is a concept of 'free movement of people' which allows people to have a job opportunity and work in another country as long as it is a member of the European Union. These results show the effect on the firms to have a role in other EU member countries' economical structure since they will have an expanded scope in the specific working area. That also brings the fact that, as the scope of the firm drives a power for that firm to go for a monopoly, it will affect not only a country but more countries inside the EU structure. Since the regulations under the European Union allows firms to be visible in more than one state, as long as the other states are counted as the member states, and the free movement of capital and people allow the firms to maintain and expand their actions. These facts can make the international and national perspective to understand the creating and development of the Antitrust law and regulations within the EU, as it is needed to be mentioned that the EU was one of the first sources that came up with regulations and laws to put the concept of Antitrust with a structure. Especially concerning the fact that the concept of digitalization increases every time, the digitization process also shows its effects on the working atmosphere that firms can transform their work into digital, in their working area. The digitalization of the work of the firms also increases the amount of reach to the work from the other countries, and therefore, it makes the visibility of the firm and the works of the firm more solid, and this brings the result of expanding the working capacity, even more than the EU member states. The expansions with respect to the digitalized era bring a multidimensional state within firms in terms of their working capacity.

Every industry has evolved but the tech sector, which includes specifically four big companies that can be stated as Google, Apple, Facebook and Amazon (GAFA), (GAFA) has reached unprecedented dimensions and influence because of the digital economy movement that reorganizes society in the way individuals transact, interact and act, so it is indispensable to bring this subject to the discussion given its relevance. The particularity of this sector shows up, for example, when analysing the emergent needs for recent regulations over the use of data and against unfair competition.

Therefore, it is important to keep in mind that there are distinguishing aspects between the many companies or industries that assume the role of interest groups, which are determined, among other things, by the sector. For example, when talking about big tech, it is necessary to consider specificities such as how companies are regulated in a certain location on the 'intermediary liability', i.e., the responsibility the firms have in relation to the content put up by others in their platform. If protected against it, companies in this industry have a considerable advantage and the business model is substantially reinvented thanks to the range of actions provided by this protection.[561] Users are responsible for creating content, not the firm, and the latter will not be sued because of its users' activities inside the platform (with just a few exceptions). As part of this business model enabled by this legal protection, the company is able, consequently, to explore a whole range of possibilities such as analysing its users, understanding behaviour and exploring it economically.[562] In the United States, this protection was given by Section 230 of the 1996 Communications Decency Act. It is possible to state that Facebook, Google, YouTube and Amazon, for example, could grow similarly to monopolies.[563]

Differences in the way competition are perceived vary depending on the moment and context in question. These changes are reflected, for example, in the way, in 2016, Margrethe Vestager, Commissioner of Competition, talked about 'Competition in a big data world' when she stated that '*... I hope it makes clear that we don't need a whole new competition rulebook for the big data world*', and in the way she expressed concerns, in 2019, in another speech about 'Defining markets in a new age', when she stated that 'the challenges we're facing, at the start of this new decade, mean that we need to look again at the tools we use to enforce the competition rules' and concluded by saying that it is needed to 'keep the rulebook up to date'.

These fast changes in the discourse reflect changes in the way society is organized and this context marked by intense transformations brings to the discussion the issue of, for example, managing the

[561] Frank Pasquale, *The Black Box Society: The Secret Algorithms That Control Money and Information* (Cambridge, Mass.: Harvard University Press, 2015).
[562] Khan, 'Amazon's Antitrust Paradox.'
[563] Farrell H. & Newman A. (2019), 'Weaponized Interdependence: How Global Economic Networks Shape State Coercion opens in new window', International Security, 44(1): 42-79.

trade-off between the positive and the negative sides of concentration, and how to define the relevant market to analyse the concentration. In December 2019, Commissioner Margrethe Vestager expressed the necessity of adapting the 2004 Horizontal Merger Guidelines to the new realities presented in today's world and the definition of 'relevant market'.[564]

An antitrust intervention is an intervention to change the political equilibrium in a certain direction. Assessing mergers and acquisitions between companies that exceed a determined revenue is a way of preventing detrimental concentrations in the relevant competitive environment. A cost-benefit analysis is also a way of understanding the effects of such a merger, that can guide the authority to take a decision making sure the consumer and producer surpluses are increased, but as already mentioned in this work, this purely economic analysis is not enough to measure and take into consideration the political consequences.

Huveneers pointed out that 'should competition not only be effective for the benefit of the consumer, in the sense of distributive efficiency or should it also promote an efficient productive structure (productive efficiency)? This introduces a problem of trade-offs. Thus, increasing the number of competitors on a market allows a lower price level to be achieved which optimises distributive efficiency, but can degrade productive efficiency because this increase in the number of competitors may prevent economies of scale from being fully exploited and forces producers to spread their fixed costs over a more limited production volume, which may even cause certain firms to incur losses.'[565]

Mergers can happen with different consequences. One case would be if the merger increases competition by creating challenges for the dominant player. Another case would be if the merger harms the competitive landscape by giving more power to the already dominant firm. The EU Commission responsible for competition works on analysing markets and seeking remedy for this kind of competition issues. There is a current recommendation for this institution to guide itself by the Swiss Merger Regulation, Article 10(2)b117 that states: 'The Competition Commission may prohibit the concentration or authorise it subject to conditions and obligations where it appears from the examination that the concentration [...] (b) does not lead to an improvement in the conditions of competition on another market which outweighs the disadvantages of the dominant position'.

There has also been some recognition of efficiency defence in European merger control since the entry into force of the second merger control regulation of 2004 (Regulation 139/2004). Similarly,

[564] Speech at the Chilin' Competition Conference, Brussels, [2019]. 89 China, Japan and Korea were excluded from the relevant market in the Alstom/Siemens.

[565] C. Huveneers, 'Les multiples objectifs de la politique de concurrence: un système de N équations à N+1 inconnues'Reflets et perspectives de la vie économique 2008/1 (Tome XLVII).

it may be noted that industrial policy concerns may occasionally arise, for example in paragraph 4 of the Regulation: 'Such restructuring [of undertakings] should be assessed positively provided that it meets the requirements of dynamic competition and is likely to increase the competitiveness of European industry, improve the conditions for growth and raise the standard of living in the Community'.

For example, the recent Alstom-Siemens merger case, if executed, would have harmed the competitive landscape in the European rail industry by reducing the number of overall competing companies. China and the United States are world dominants in the high-tech sector, possessing the world's 20 most prominent companies. Considering the recent developments in AI (artificial intelligence), big data, and genetics, the healthcare sector is going to be dominated soon by these two Nations. The question here is 'what are the actions Europe should take to remain competitive in the markets where it is still relevant and to become competitive in the markets where it still is not, like health-care?'. Of course, that one possible answer here is to reform procedures and substantively the regulations in this field, by the revision of Article 173 TFEU[566] or through the integration of other objectives into competition law by balancing the consumer welfare with overall welfare, for example.[567]

After the Alstom-Siemens merger case, France and Germany, because supporters of this merger, announced the willingness to revise EU rules regarding this competitive matter, even with the Commission's argument in this case that the merger would result in increased prices for consumers. This joint initiative from the French and German governments demonstrates how tensions take place between the EU mandate and the Member States role in this type of situation, where the latter would very much like to be allowed to question the first's antitrust decision.

In 2018, the EU's competition authority blocked 0 mergers, approved 370 unconditionally, and 23 conditioned, usually after one month of investigation. Two mergers were blocked in 2017 and since the adoption of the current regulation, less than 30 mergers were blocked by the authority. Considering these numbers, it is possible to state that the Commission is not unreasonably intrusive and is allowing most mergers without requirements of additional actions for companies. As it has been done currently, competition policy has been applied by politically independent entities, and in (a few) cases, when the circumstances clearly offer potential social harm, there is intervention and control.

[566] Foundation Robert Schuman, Deffains, B., D'ormesson, O., & Perroud, T. (2020). *Competition Policy and Industrial Policy: For a reform of European law.* <https://www.robert-schuman.eu/en/doc/divers/FRS_For_a_reform_of_the_European_Competition_law-RB.pdf> accessed 20 December 2020.

[567] Competition Litigation Conference, London, 20 Sept. 2019, MLEX 20 Sept. 2020.

The discussion here is if the enforcement should be in the hands of elected national officials or in the hands of EU's competition authorities (Commissioner and the Directorate-General for Competition). It is recognized that Treaty's provisions on competition enjoy almost 'constitutional status', but politicians are usually influenced or at least subject to the influence of the firms and industry organizations (relevant interest groups in this case), and this fact can tend to lead to harming the competition (and ultimately the consumer) instead of protecting it. The Director-General for Competition's staff is composed of 30 PhD economists specialized in competition matters, which makes their decision more evidence-based than politicised.

But there is a big scepticism regarding the sufficiency of this solution, and the claim to find solutions in other spheres, such as international trade (World Trade Organization dispute settlement procedure) and State aid policy. Regarding focusing on the WTO, the current problem is its stagnation because of the United States', more specifically Trump Administration's actions against the appellate body, but, of course, Joe Biden's election being a reason to be optimistic in this sense. There are no common competition rules adopted under the WTO umbrella, given that all attempts unsucceeded, and there is a recognized lack of political will in Europe also demonstrated by the small number of EU officials dealing with these issues (around 150) compared to the hundreds of US'.[568]

Another complement for remedying this issue would be, for example, data law, because of the power of digital companies, or using the already mentioned international trade law for solutions to promote industrial strategies, and also the development of the European innovation policy. However, it is difficult to believe that these, by themselves, could be effective solutions for this broad problem because one would be assuming that the current competition policy is enough and does not require a deeper reform, for example, in relation to the already mentioned Treaty.

The current European Commission procedure for mergers (control of concentrations) is commonly criticised by companies for taking too long, so naturally, there is a demand to change it and making it quicker. For example, transitioning from a required pre-notification system to a voluntary one, which would inevitably require a unanimous willingness from member states. Especially for the tech sector companies that are inherently dynamic and being often contested in regard to 'abuse of dominant position', it is important to accelerate the responses. Finally, another possible reform would be related to the Article 8 of Regulation 1/2003 and the conditions for the utilization of 'interim measures', which could accelerate the process if used more often, but still properly.

[568] Fondapol Report, November 2019, part 3, 25.

Other actions that could work in the same direction but not necessarily linked to competition law would be initiatives like the Joint European Disruptive Initiative (JEDI) or the European Innovation Council (EIC). The first is a Franco-German initiative for the creation of a Disruptive Innovation Agency, which would focus on funding civilian projects, in a start-up model, aiming at projects that are limited in time and unprofitable in the short term. The idea is to promote revolutionary innovations so Europe would be able to compete worldwide in the tech sector.[569] The second is a European Commission initiative and the aim is to make important reforms to the Horizon Europe programme, by helping start-ups and SMEs (small and medium enterprises) in funding new and innovative projects.[570] Both of them are looking at the promotion of innovation at the European level mainly in strategic sectors/industries, which is also a way of tackling wicked societal problems and move the European agenda in the direction that supports the achievement of European policy goals.

Should a rebalancing be carried out between competition policy and industrial policy so that the objectives of the latter can be deployed? Operational solutions that will make the European competitive framework compatible with industrial policy objectives. In a conference organised by the OECD in December 2019, 'Competition Under Fire', Jean Tirole, Nobel Economics Prize winner, discussed the relationship between industrial policy and competition policy and raised the issue of 'participatory' antitrust.[571]

It is relevant to understand the correlation between competition and industrial policy. For this work, specifically, these relational dynamics play an important role in the analysis, because the more competitive a market is, the more efficient the industry policy will be on that specific market. Aghion et al. (2015) using data from China proved the statement above and found that productivity, growth and product innovation improves. At the same time, in sectors with a low degree of competition, the effects are not good.[572]

When intervening on the market, the government can take *ex-ant*e or *ex post* action, usually the first one for concentration issues (merger control) and the second for abusive dominance. But many other factors end up determining how influential, for example, the big tech companies are, and the antitrust regulations play a role in this, but other factors must be taken into consideration for a complete analysis. Specifically, for big tech companies, the current antitrust comprehension and concept is applied and has effects on keeping them influential when there is an abuse of dominance.

[569] See online: < https://www.euractiv.fr/section/concurrence/news/return-of-the-jedi-european-disruptive-technology-initiative-ready-to-launch/ > accessed 20 December 2020

[570] See online: https://ec.europa.eu/commission/presscorner/detail/fr/IP_19_1676

[571] OECD Competition Division. (2020, January 8). *Keynote address by Jean Tirole - 2019 Global forum on competition* [Video]. YouTube. <https://www.youtube.com/watch?v=9Rymb1TUpEE> accessed 20 December 2020

[572] Aghion, Philippe, Jing Cai, Mathias Dewatripont, Luosha Du, Ann Harrison, and Patrick Legros. 2015. 'Industrial Policy and Competition.' American Economic Journal: Macroeconomics, 7 (4): 1-32.

In other words, the company is already well established in the market and has achieved (naturally, in other words, 'business acumen' or 'historic accident') extraordinary dimensions, so not necessarily a merger happened, and abuses its dominance through specific practices. The unprecedented dimensions achieved by these companies create a relatively *sui generis* circumstance with the lack of competition (without merging) and lots of influence. Hence, there is a common understanding for the reinvention of the concepts of monopoly and concentration (including by courts), because of the unprecedented dynamic of this market format. It is consequently necessary to review the ways antitrust concentration mechanisms are used because they were usually used *ex-ante*, but now the reality demands change, when this new form of monopoly harms consumers, workers and even the democratic process. It creates the so-called 'non-economic' harms such as hate speech and fake news, having a direct impact on democratic levels. Although very relevant, these consequences are not directly linked to competition matters, but undeniably antitrust/antimonopoly rules would affect these negative externalities depending on the intensity of the intervention. In any case, it is an extremely relevant discussion to have, if these non-economic consequences should represent a motivation for competitive law action/intervention or if these issues belong to different fields of law and regulation in general. Historically, such important negative consequences, for example, to the democratic process, when ignored, generated huge dangers and true historical villains.

4. Permeating trends and futures building

Finally, what is also being discussed when the interest groups topic is brought to the table is the concept of 'change' and its bearer/holder`s role. After all, what is considered 'change' depends on the limitations or restraints allocated by the proponent entity when creating the meaning to the influence wished to be translated into policy and implemented. The relevance of this piece of work comes from this fact in great part. The 'agent of change' exerts control over the definition of 'change' and, therefore, designs the boundaries of the plausible futures that society will be able to experience. The forces that countervail this lobbying process surely also play an important role in defining the extent and meaning of 'change'. That's why it is so important to understand the entire process because when all the elements and the ways they play together are comprehended it is possible to conclude which ways to better regulate and sophisticate this democratically phenomena in the modern world.

When a trend (understood as detrimental) is pointed out in a determined jurisdiction, it creates the possibility to reorganize the set of rules on that matter and act accordingly to generate the desired future. For example, one trend identified by Martin Gilens and Benjamin I. Page (2014) using a

data set of the key variables for 1.779 policy issues indicates that 'economic elites and organized groups representing business interests have substantial independent impacts on U.S. government policy, while average citizens and mass-based interest groups have little or no independent influence'.

The future of antitrust law in the EU depends less on political matters than on technical ones. As seen earlier in this work, the entity responsible and competent for the decision-making process is part of the European Commission and highly considers empirical evidence of the impacts a specific practice is or will generate to consumers. Unlike in the US, where this matter depends more on political alliances in the congress and how policy changes because of that. So, given this assumption, it is possible to consider EU's trajectory as a perception issue of what constitutes the role of competition law in this political system and, in contrast, what goals other regulatory fields should play to promote enough amount of innovation, competition and, of course, to keep the democratic process healthy. After the crisis originated by the COVID-19 pandemic, the European Union will have other priorities established, with all the negative consequences such as unemployment, economic recession, budget constraints and solvency. These elements play a very important role, one that is inevitable to talk about, because, most likely, the share of this crisis' burden will fall over specific sectors and players and considering the already many times referred dimension of GAFA, one of the Commission's options will be to attribute a substantial part of the burden over these players, what would reduce considerably the influence and resources of these companies to keep the status quo. The same could be argued about large oil, insurance, and banks private players, it could be expected a bigger burden over these players because of the external context that largely changed as a consequence of the pandemic, and the consumers are not capable of holding this alone.

The recent joint proposal by France, Germany and Poland[573] does not completely cover the existing issues being faced in terms of competition policy, but it is possible to imply that the three member states go far enough, approaching determining matters such as merger control, member states influences and big tech. After the Siemens/Alstom case, there was a need regarding the European Commission's power to analyse merger control, and the need was, according to these proposer nations, to increase the flexibility level in the Commission's process to decide. Flexibility in the sense that allowing certain market movements to happen may bring global competitive advantages to the EU. By considering the global arena, EU (and member states') competition authorities can

[573] (2019, July 24). *Modernising European Competition Policy: A Brief Review of Member States' Proposals* [Review of Modernising European Competition Policy: A Brief Review of Member States' Proposals]. <https://www.bruegel.org/2019/07/modernising-european-competition-policy-a-brief-review-of-member-states-proposals/> accessed 20 December 2020.

enable greater competitive capacity for Europe, allowing it to stand next to other global leaders. Geopolitical reasoning behind the argumentation to benefit European companies and creating shared and broad benefits for Europe.[574] The issue here is basically that this idea is usually mixed with the concept of selecting 'national champions' (or Europeans in this case), because of the necessary step of promoting individual firms' interests in specific manners, leaving behind or aside the decision to benefit an entire market, in general. One could argue that one thing is not necessarily related to the other, which in other words would mean that envisioning this geopolitical reasoning to change European merger rules is not linked to the process of benefiting specific European winners. But the difference between the joint proposal and the promotion of champions is hard to identify and explore.

While privileging specific companies is 'unhealthy' from the competitive and social well-being perspectives, the necessity to compete on a global level is hard to ignore, mostly because of the tactics used by some other nations worldwide to drive companies not purely by a commercial rationale. These important geopolitical trends, sooner or later, must be internalized by Europe, in the reasoning of the joint proposal, and seeking a merger review in terms of EU regulation is one of the required steps to be taken. It is undeniable that there are impacts in the European market generated by third-country governments that exert directive powers over their companies to pursue their interests (internal policies and strategies), which escapes from a pure market rationale. This power exerted by third countries is the fruit of benefits (usually subsidies or soft loans), creating the so-called 'state-controlled entities'. The argument here is that the European regulation should consider the impacts in its territory from these phenomena and adapt, for example, its merger flexibility.

Even more, in the long run, the kind of competition described above could have the capacity to create such distortive conditions in the market that European consumers would be negatively impacted as a consequence of the preference given to the third countries'-controlled companies in detriment of the European organizations that were fighting in the market with the commercial rationale. In other words, inefficiency has benefited over efficiency.

The merger of China Shipbuilding Industry Corporation (CSIC) and China State Shipbuilding Corporation (CSSC) is one example that must be observed in the next months/years given the relevance for the global shipping market but also the European. How the competition agencies will react to this movement, also in relation to potential mergers happening between shipping European

[574] European Council meeting (21 and 22 March 2019) – Conclusions, (2019). <https://data.consilium.europa.eu/doc/document/ST-1-2019-INIT/en/pdf> accessed 20 December 2020.

firms, will be defining the upcoming understanding of the regulations in this field and the possibility of developing regulations that are more coherent with these global trends.[575]

Bruno Le Maire, former French minister of economy and finance, made an opening speech[576] in 2019 which is an example that contextualizes these phenomena. He affirmed that Europe, compared to the United States and China, is investing much less in innovation, and supported a bigger budget to this area for the Union to be able to compete in the 'technological race' against the mentioned nations. He even conditioned Europe's political sovereignty to its technological sovereignty, given the importance this area plays for European self-determining capacities. In this sense, thinking about and building a modern industrial policy for Europe is an essential key to pursue this goal, which, in his words, is 'inseparable from competition policy and trade policy'.

It is inevitable to think about competition policy together with the other two mentioned fields because they are usually connected to other public policy concerns, such as consumer protection, jobs, unfair trade practices, intellectual property protection and data privacy, so they must be coherent and complement each other, and the French, German and Polish joint proposal comes as a force in this direction. For them, competition law must allow Europe to promote its own companies as world leaders, this being part of the 'new industrial policy' desired by Bruno Le Maire. It can make sense to deal with these issues in a holistic and unfragmented way.

To understand the trends in these three fields and how they are connected[577], it is possible to draw a historical view to visualize the determining factors of this recent political and economic scenario. The last decade significantly changed the context in which this kind of regulation is interpreted and applied. The intensity of globalization and the substantial technological advancements have a lot to contribute to this explanation and end up requiring competition law to change as well. For competition authorities, some firm behaviours that generate negative impacts for consumers, such as excessive pricing and exploitation, are long-standing and have been for a long-time concern. But recently, it is being noticed that such attempts by competition authorities take much longer than other potential solutions would. Also, a competition law case represents a remedy for the specific case and creates a precedent, but it does not mean that the whole market will change its behaviour, which would be the consequence of passing/implementing regulations.

The concern regarding the need for a more flexible competition policy as a consequence of the problem that state-owned or subsidized enterprises in other countries represented for the domestic

[575] Is China's shipbuilding merger on course? (n.d.). IISS, 2020, from <https://www.iiss.org/blogs/military-balance/2020/09/china-shipbuilding-merger> accessed 20 December 2020.

[576] *Opening speech by Bruno Le Maire | Bruegel.* (n.d.). <https://www.bruegel.org/2019/07/opening-speech-by-bruno-le-maire/ > accessed 20 December 2020.

[577] *Competition and industrial policy in Europe: how can they work together?* (n.d.). Oxera. <https://www.oxera.com/agenda/competition-and-industrial-policy-in-europe-how-can-they-work-together/#_ftn4> accessed 20 December 2020.

market is also reflected by acquisitions.[578] When a domestic company is acquired by a foreign state-controlled one many impacts can be generated in the local market, some of them potentially being negative and influential on the comparative advantages of the national economy internationally as a consequence of relocation of assets, for example. Because of this, existing legislation on foreign direct investment (FDI) guarantees that critical national security and long-term strategies are controlled and safe, such as electricity, communication and nuclear power.

In March of 2019, following this reasoning, it was adopted by the European Union regulation[579] that guarantees the possibility for the EU institutions and member states to filter new FDIs when these may exert impacts on national security and public issues and raise this kind of concerns. This new filter can be used when a merger was approved from the competitive perspective (by a competition authority), but still may represent concerns on other legislative grounds (industrial or trade policy, for example), which potentially imposes more control over transactions that might be detrimental under the member states perspective, which gain the power to 'correct' the assessment made by the competition authority, complementing the article 21 (4) of the EU Merger Regulation. This initiative envisions the same goal of allowing the European competitive environment to flourish by promoting European companies but through imposing more control possibilities instead of through the flexibilization of competitive rules, because it aims to restrict acquisitions made by foreign firms while the other aims to loosen the acquisitions made between domestic firms. The argument here is that through flexibilization of competitive law European firms can reach 'critical mass' and compete in the global market while Europe also pays attention to the penetration of foreign companies in the domestic markets.

Product and geographical market definition are also important factors to be considered when analysing merger regulation. It is increasingly difficult to define what is the relevant market to be considered when assessing a merger case, because the merger may generate positive impacts (efficiencies) in many markets but negative in another and depending on the market extent this analysis will define the invalidity of the merger. It is important to consider that the Commission's 1997 Notice on Market Definition may have to be updated as well given the recent technological advancements and economic structure changes already mentioned in this paper.

All the argumentation demonstrated here is reflected by the mentioned joint proposal, which claims for particular scrutiny in certain cases and a new vision for the European Union regarding the

[578] *The Economist* (2018), 'How to safeguard national security without scaring off investment', 11 August; Pickard, J., Massoudi, A. and Mitchell, T. (2018), 'Tighter rules on foreign investment have China in their sights', *Financial Times*, 25 July.

[579] European Commission (2019), 'Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union', 21 March.

direction of its market and how the dynamic will take place in relation to the European positioning in the global market. The promotion of common European interest is the general goal that the proposal covers. As demonstrated here, there are strong arguments to explain the necessity to balance an active industrial policy at the European and national level with competition policy, considering the geopolitical competitive pressures of global markets and the changing structures that are currently happening in it. Transnational competitive pressures are changing and the European Union institutions and some of the member states are demonstrating that they are understanding this emerging need to realign and adapt while maintaining the rigorous assessment procedures conducted by competitive authorities and other relevant actors. This 'judgement' should of course be neutral and not respond to political or business interests while it guarantees gained efficiencies to firms and consumers in the relevant (defined) market, without harm.

The joint proposal also brings a section specifically about big tech. In this subject, the discussion changes because what the proposal focuses on is the necessity to regulate the 'systemic platforms actors' instead of the revision of merger rules. The proposal claims for a different treatment for these platforms and sustains the claim by arguing about the 'critical role' such platforms play nowadays. How regulators should deal with this issue is a struggle not only for Europe, but it is or should be a concern for all world jurisdictions.

It is important to understand how differentiable the proposal by France, Germany and Poland is, regarding the promotion of European leaders/champions, from detrimental public restraints. Anti-competitive public restraints are exposed in situations in which businesses achieve monopoly status through government power, by reducing the competition and increasing the barriers to entry in a certain market/industry/sector, including for foreign businesses. This form of governmental intervention necessarily harms consumers because of the increased prices or taxes needed to sustain the protection (immunity given by the state) and enables the privileged firm to act anti-competitively in its sector but also can create destructive distortions in other sectors.

The protection given by the government to a firm, for example, incentivizes inefficiency because of the reduced competitiveness and as mentioned already produces international effects, the so-called 'spillover effects'. This type of action may occur sometimes because of the lack of transnational regulatory coordination in this specific field, leaving the space for a nation to cause harm to another without any monitoring or sanction. This situation is complicated because it is difficult for the affected (harmed) country to respond in a way to neutralize the negative (spillover) effect generated by the country that provides the subsidy, for example. There is no perfect remedy for the situation because there is not a proper international instrument that allows one nation to directly influence the regulation in another's territory (jurisdiction). It is still not possible to affirm, but it is important to keep in mind that the joint proposal brings some sort of beneficial treatment

for European companies, for these companies to be able to balance the level playing field and compete in equal terms with global players that are also backing their domestic firms with incentives.

Because of the already mentioned void in international policy coordination in this field, it is even difficult for many countries to understand the extent to which their markets are being harmed by other nations'. This is exactly what would cause France, Germany and Poland, for example, to propose such a remedy, because given the current circumstance that is what exists and is possible to be done: not the best solution, but a way to minimize the negative effects in EU territory/market. Interestingly, a possible reason for a country to maintain its incentives to certain industries that cause international spill over effects is precisely domestic interest groups that may have influenced the political will for that to happen. It is known that the reduction of antitrust-related public restraints, also called 'regulatory tariffs', increases growth and benefits to consumers and represents most of international trade liberalization negotiations.[580]

Public restraints may also be generated by the nation's domestic regulations, being part of the regime and created, for example, by the legislative or judiciary powers. This of course restricts the extent to which the antitrust agencies are able/allowed to act against anti-competitive behaviour.[581] This phenomenon can be explained by the public choice theory[582] and it happens a lot because of the influence exerted by interest groups over the ways the government chooses[583] to regulate and how these groups can benefit from it, many times having as consequence the so called 'rent seeking'[584], which is when the group captures to its own private gain the public regulatory environment/regime.[585]

This sort of interest groups' actions[586] generates inefficiencies because of its detrimental consequences to competitive levels in a jurisdiction.[587] But how do interest groups have so much power in their hands and are able to cause such substantial distortions? The positioning of interest

[580] Aydin Hayri & Mark Dutz, Does More Intense Competition Lead to Higher Growth? 1 (World Bank Policy Research, Working Paper No. 2320, 1999).
[581] Deborah Platt Majoris, Hot Topics in EU Antitrust Law: What Every Multinational Needs to Know, 13 GEO. MASON L. REV. 1175 passim (2007) (providing examples of such restraints).
[582] William N. Eskridge, Jr. & Philip P. Frickey, Legislation Scholarship and Pedagogy in the Post-Legal Process Era, 48 U. PITT. L. REV. 691, 703 (1987).
[583] Daniel A. Farber & Philip P. Frickey, The Jurisprudence of Public Choice, 65 Tex. L. Rev. 873, 874-75 (1987); Dennis C. Mueller, Public Choice III passim (3d ed. 2003).
[584] James M. Buchanan & Gordon Tullock, The Calculus of Consent: Logical Foundations of Constitutional Democracy 9 (1962).
[585] George J. Stigler, The Theory of Economic Regulation, 2 Bell J. Econ. & Mgmt. Sci. 3, 3 (1971).
[586] Mancur Olson, The Logic of Collective Action: Public Goods and The Theory Of Groups 141-48 (1965).
[587] Kevin M. Murphy, Andrei Shleifer & Robert W. Vishny, Why Is Rent-Seeking So Costly to Growth?, 83 Amer. Econ. Rev. 409, 409 (1993).

groups depends[588] on many factors already presented in this paper, and of course, it varies according to each case, because each jurisdiction, political regime, industry sector and moment in history are unique.[589] For the matters discussed in this paper, it is possible that antitrust agencies are less powerful than interest groups or not. And for the antitrust specific matter, it is noticeable that it is usually not very well organized or defended by strong political groups. The diffused benefits generated to consumers, which are also not commonly verified or informed, makes this regulatory area peculiar.[590]

As already mentioned in this article, the joint initiative proposed by France, Germany and Poland justifies its claims a lot in the fact that some countries support their firms and therefore the European companies are harmed. China is surely one of these countries that do not promote competition rules as stringent as in Europe[591] and the article 7 of the new Chinese Anti-Monopoly Law creates immunities from antitrust for state-owned enterprises in 'strategic' sectors, which include aviation, banking, electricity, oil, railroads, and telecommunications.[592]

5. Conclusion

The maintaining and creating further on the Antitrust Law and therefore the regulations, the interest groups want to aim to implement their own sectoral approaches and main goals into the construction of the further Antitrust developments as regulations and in the current Antitrust attitudes. The aim of the interest groups, therefore differ from each other since the word 'interest groups' contains, approximately figures from all the working areas as from the legal field that judges want to come up with a unified regulation and procedural improvements to administrative that form governments to come up with the ideas on the generating regulations to support their economy and bring a more powerful structure to their stand especially on the international scene of the economy most specifically on empowering the national companies to be more present on the international economy and area because that there is a direct correlation between the speaking up of the companies and gaining more power to bring more change specifically in favour of the company and the company's origin state. In that case, the European Union, which has a reputation as being one of the most successful international - regional unions to maintain the work and balance

588 Richard Hofstadter, What Happened to the Antitrust Movement?, The Paranoid Style in American Politics and Other Essays 188, 195-96 (1966).
589 Sam Peltzman, Toward a More General Theory of Regulation, 19 J.L. & Econ. 211, 212 (1976).
590 William H. Page, The Chicago School and the Evolution of Antitrust: Characterization, Antitrust Injury, and Evidentiary Sufficiency, 75 VA. L. REV. 1221, 1228-43 (1989).
591 Anti-Monopoly Law (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 30, 2007, effective Aug. 1, 2008).
592 Eleanor M. Fox, An Anti-Monopoly Law for China - Scaling the Walls of Government Restraints, 75 Antitrust L.J. 173, 173 (2008) (providing an analysis of antitrust public restraints in China).

for a very long time, came up with several regulations as also being one of the interest groups on the changes in the regulations related to the Antitrust laws. Therefore, it is possible to come up with a visual understanding that interest groups are not also located in a different way in Antitrust laws but also contain a multi-dimensional structure as being an interest group that also containing more interest groups inside, as the European Union that having its member states, with respect to the fact that even the member states are the parts of the EU, they also contain their own national understandings, obviously that majorly focusing on their own interest in the very beginning. Therefore, the EU, as a union that also counted as one of the interest groups that try to be a part of the change in terms of the regulations and laws related to the general concept of the Antitrust, its member states also put another dimension to EU to have sub-interest groups inside which contain the same common aim in the Antitrust regulations and laws. In that sense the EU has its idea on being a part of the change to have a favour in the Antitrust regulations and laws, it should also, as an international-regional union, consider it in the favour of its own member states. This is leading to several consequences in terms of the approach of the EU, related to the fact that it has to focus on the general sake and act according to the ways that in favour of the general understanding as forming a union, but also there are several local sub-interest groups that also form the union; therefore, EU administration also has to focus on the needs of its member states as well. This can be stated as the clash between the international-general approach on the union and the minor understandings and approaches that also need to be integrated inside the international-general approach but still also remain its uniqueness as in favour of the member states specifically. In light of this, it is clear that certain member states, especially the ones mentioned in this paper illustrated by the joint proposal, have been actively working on promoting changes to the antitrust law at the EU level. In this sense, the member states act as interest groups at the regional level to make their voices heard and interests fulfilled according to what is more relevant for them to address in the present moment. Given the already mentioned and explained geopolitical circumstance and technological changes that recently altered the arena of global competition with new sorts of economic structures and business models, some member states felt the need to make sure they will remain relevant players internationally and with that in mind started to express their willingness to provoke changes in the EU regulation regarding competition law, especially antitrust law. These countries argue that because of the external forces surrounding Europe, it is important for the Union to be able to promote its own big players and compete in the international arena facing leading nations, such as the United States and China. It is important to keep in mind the fact that by creating European 'champion' businesses member states would be concentrating more power in the hands of a few companies and this will rebalance the power relations inside Europe.

The fact that this action can weaken antitrust and other governmental agencies are relevant to consider. Also, given the nature of antitrust laws already explained in this paper, it is reasonable to consider that the influence of member states in this field is substantial and will most likely generate effects to fulfil their agenda. It was noticed that efforts in the 'big tech' area were not very well defined and are still under analysis to understand what kind of regulatory actions should be taken. Initially, it seems that merger control is not considered to be the best option because of its inner characteristics and procedures that would not be sufficient to 'tame' these new private forces and, because of that, other regulation areas beyond competition law would have to coherently act to make sure the GAFA will be controlled in the sense of reducing its negative externalities.

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