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EDITORIAL MESSAGE

In line with the GAR's commitment to provide a forum for academic debate on matters of international competition law and policy, the 2019 volume consists of contributions discussing a diverse selection of prominent and controversial topics.

This volume has four interesting articles. The first article assesses whether the current European Union cartel enforcement system strikes a fair balance between effectiveness and fundamental rights through the presumption of innocence perspective. The second article empirically ascertains the soft law of the European Commission and shows more is needed to achieve the consistent enforcement. The third article analyses the suitability of a regulation against excessive concentration of market power and discusses the appropriacy of Article 9 of the Antimonopoly Act in Japan with respect to regulation against aggregate concentration. The fourth article describes the Liquefied Natural Gas (LNG) industry and examines the effects of the removal of anti-competitive provisions in LNG sale and purchase agreements.

The journal is also complemented by three enlightening essays. The first essay analyses the intersection between intellectual property rights and competition law in light of standard essential patents. The second essay delves into the decisions of the European Commission and the General Court in relation to the anti-competitive effects of pay-for-delay agreements. Lastly, the third essay analyses and carries out the economic assessment of the conduct of unilateral refusal to license cases in the United States of America.

The volume lastly includes a succinct review of the book titled, *Competition Litigation UK Practice and Procedure* (by Mark Brealey QC and Kyle George).

As always, we would like to specifically thank Professor Eyad Maher Dabbah, the director of the ICC, for his time, guidance and endless support.

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

Editors

September 2020

PRESUMPTION OF INNOCENCE: TOWARDS A MORE LEGITIMATE EU CARTEL ENFORCEMENT

Alexandru-Andrei Dumitru[*]

The paper assesses whether the current EU cartel enforcement system strikes a fair balance between effectiveness and fundamental rights from the presumption of innocence perspective. Particularly, the paper seeks to establish the extent to which the sanctions imposed by the European Commission for infringements of the competition rules are compatible with the presumption of innocence as enshrined in the EU Charter of Fundamental Rights and European Convention of Human Rights. It is submitted that, as the current system stands, the imposition of sanctions in the form of fines for competition law infringements fails to take due account of the presumption of innocence. It does so especially because the legal nature of the sanctions imposed are criminal or quasi-criminal in nature while the legal instruments developed to ensure the effective application of the competition rules were developed under an administrative law framework. As such, the system creates a contraction with itself.

Keywords**:** *presumption of innocence, criminal sanctions, legitimacy of EU cartel enforcement*

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1. Introduction

The present article aims at assessing the legitimacy of the EU competition enforcement system in the light of the criminal nature of sanctions imposed for infringements of the antitrust rules. More specifically, it is analysed whether the current system gains in terms of legitimacy by striking a fair balance between effectiveness and protection of fundamental rights – in particular the presumption of innocence. In this regard, the paper follows an approach which gradually shifts the focus from a broad policy perspective towards a narrower perspective of the formal legislation and the legal instruments developed to ensure the effective application of the norms.

As such, the analysis begins by providing a critical narrative of the theoretical foundations underpinning the enforcement system as well as the level of protection of fundamental rights in EU law (Section 2). It is submitted that since the entry into force of the Lisbon Treaty the fundamental rights in EU law have gained the status of constitutional values. Therefore, the standard required for the protection of fundamental rights impacts significantly upon the policy and ultimately upon application of the rules. This gains relevance especially in the light of the criminal nature of competition proceedings.

Then, the focus is changed to the legal mechanisms designed to ensure the protection of competition (Section 3) whereby the analysis aims to illustrate that in the general context of cartel infringements the legal instruments developed by the case-law of the EU Courts present some deficiencies that potentially clash with the presumption of innocence. Again, the criminal nature of cartel infringements significantly impacts the level required to ensure a sufficient protection of the presumption of innocence.

Finally, the last section of the article aims at illustrating how deficiencies regarding the legal mechanisms that ensure the enforcement of the system are exacerbated in the particular context of information exchange as stand-alone offences (Section 4). More specifically, it is submitted the approach taken by the Courts in dealing with such practices which primarily consists in using a set of presumptions that potentially infringe the presumption of innocence at both procedural (i.e. burden and standard of proof) and substantive law level (i.e. the principle of culpability). It is submitted that these two dimensions of the presumptions of innocence are closely related and convergent. Finally, an account of the degree of culpability required to impose criminal sanctions which ensures the overall legitimacy of the system is undertaken. Then, overall conclusions are provided (Section 5).

2. Competition Law Enforcement and Fundamental Rights in the European Union

2.1. Theoretical Foundations of the Enforcement System in EU Competition Law

Effective compliance with the rules designed to ensure the proper functioning of competition within the internal market could not be attained without the existence of an enforcement system. One of the primordial tasks of an antitrust enforcement system is to prevent violations of the established prohibitions, and this is usually achieved through the imposition of punishment for those who violate the competition law rules.[1] Here, the main role attributed to punishment is to ensure the effectiveness of the enforcement system by reducing the infringers' willingness to commit violations through

[1] W. Wils, 'Optimal Antitrust Fines: Theory and Practice', (2006) World Competition Vol 29, No 2, 6.

the threat of sanctions.[2] More specifically, the mere existence of an enforcement system is not sufficient to provide a satisfactory level of compliance with the substantial rules; the system also needs to be effective.

Traditionally, it has been considered that the effectiveness of an enforcement system could be achieved through deterrence i.e. the reduction in the level of anticompetitive activity.[3] Thus, the efficiency of the enforcement system is translated into the ability of the system to keep undertakings away from violating the antitrust rules (i.e. deterrence).[4] However, effectiveness is a matter of degree. It is strongly influenced by what the enforcement policy maker considers to be an effective application of the competition rules.[5]

In the EU antitrust enforcement law, the theoretical foundation of the punishment system is based on two major theories: deterrence and retribution.[6] While deterrence directly contributes to the effectiveness of the enforcement system, retribution aims at ensuring fairness[7] in that the power of the competition authorities should not be absolute. The deterrence theory is based on the utilitarian reason that punishment as a form of suffering should be escaped, and thus punishment should be imposed only if the society is able to extract a benefit from its imposition.[8] It has been argued that deterrence is a consequentialist theory as it is concerned with the preventive nature of punishment.[9]

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[2] ibid. 7.
[3] B. Balasingham, *EU Leniency Policy: Reconciling Effectiveness and Fairness*, (Wolter Kluwer, 2017) 13.
[4] W. Wils, (n 1) 11.
[5] B. Balasingham, (n 3) 10.
[6] P Whelan, *The criminalization of European antitrust enforcement : theoretical, legal, and practical challenges*, (Oxford University Press 2014) 26.
[7] B. Balasingham, (n 3), 13.
[8] ibid., 14. See also, P. Whelan, (n 6), 28.
[9] A. Ashworth, *Sentencing and Criminal Justice*, (Cambridge University Press 2010), 78.

Two forms of deterrence are widely recognised: 'specific' and 'general' deterrence.[10] 'Specific' deterrence is directed to the offender in a particular case and aims at averting the commission of illegal conduct through the imposition of punishment for the already committed offences.[11] Therefore, 'specific' deterrence represents an *ex-post* mechanism aiming at preventing the reoccurrence of future offences. Conversely, 'general' deterrence forms an *ex-ante* means aiming at depressing occurrence of future infringements through the credible threat of future sanction[12]. However, the recent law and economics literature advanced a development in the classic utilitarian theory of deterrence the so-called 'economic deterrence'. The concept of 'economic deterrence' lies on the idea of ensuring the maximisation of economic welfare- as opposed to the utilitarian maximisation of happiness[13]. Here, it is submitted that the commission of anticompetitive practices tempers with the legal equilibrium causing costs to society, and therefore punishment represents a means to reduce the economic impact of the unlawful conduct upon the total welfare of the society.[14]

There are two fundamental concepts underlying the notion of 'economic deterrence': rationality and economic efficiency. According to the concept of rationality, 'economic deterrence' rests on the fundamental premise that economic operators act rationally in their own interest to maximise their profits.[15] Therefore, rational undertakings are discouraged to engage in a specific conduct if the costs of committing the conduct are greater than the

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[10] P. Whelan, (n 6), 28. B. Balasingham, (n 3), 14.
[11] ibid.
[12] ibid. W. Wils, (n 1), 7.
[13] B. Balasingham, (n 3), 14. P. Whelan, (n 6), 29.
[14] G. Becker, 'Crime and Punishment: An Economic Approach', (1968) 76 Journal of Political Economy, 169.
[15] G. Becker, *The Economic Approach to Human Behavior*, (University of Chicago Press 1978), 14.

profits which could extract form it.[16] On the other hand, 'economic deterrence' is seen as a good means to ensure economic efficiency by way of maximising the total welfare of society.[17] It provides that inefficient behaviour -i.e. whether the costs inflicted to the society are greater than the benefits gained as a result of the conduct- should be denied[18]. A further development of the 'economic deterrence' theory is represented by the theory of 'optimal deterrence'. The 'optimal deterrence' theory presupposes that the optimal financial level of the fine to be imposed on the infringer is represented by the product between the gain resulted from the illegal conduct and the inverse probability of the effective imposition of a fine.[19] Here, it is submitted that the imposition of fines of a significant financial level directly ensures the effectiveness of the enforcement system.[20]

The theories of deterrence present the advantage of being able to ensure an effective punishment system in terms of its quantifiable value.[21] More specifically, the theory of 'economic deterrence' is able to design effective sanctions safe from arbitrariness being thus able to solve the issue of punishment-setting.[22] However, it has been correctly pointed out that the theories of deterrence do not take into consideration the principle of culpability i.e. that the existence of a crime and therefore punishment should

[16] P. Whelan, (n 6), 29.
[17] ibid.
[18] ibid.
[19] W. Wils, (n 1), 12.
[20] P van Cleynenbreugel, *Effectiveness through Fairness? 'Due Process' as Institutional Precondition for Effective Decentralized EU Competition Law Enforcement*, in P. Nihoul and T. Skoczny (eds.), *Procedural Fairness in Competition Proceedings*, (Edward Elgar 2015), 70.
[21] B. Balasingham, (n 3), 15.
[22] D. Beylefeld, *Deterrence Research and Deterrence Policies*, in A. Ashworth and A. von Hirsch (eds.), *Principled Sentencing: Readings on Theory and Policy*, (Hart Publishing 2000), 76.

be attributed only to those who have committed the prohibited conduct with a certain form of guilt.[23]

The criticism points out that theories of deterrence tend to justify excessive levels of severity of punishment for the sake of ensuring effectiveness of the enforcement law system[24] resulting in a breach of fundamental rights.[25] Therefore, it is submitted that an effective enforcement system should not only deter, but also protect fundamental rights.[26] This in turn leads to the issue of legitimacy of the enforcement system. The legitimacy of a law enforcement system is present whereby a comprehensive protection of the fundamental rights is ensured leading thus to an overall effectiveness of the system.[27] This paved the way for the inception of retributive justice arguments that justify punishment.

In order to avoid the shortcomings of a punishment system based only on deterrence arguments, the criminal law literature has put forward a theoretical framework built upon the notion of retributive justice. Under retributivism, punishment is justified on the reason that the subjects of the law are responsible for their conduct, and thus they have to respond when their actions go against the defined public interest of the society in form of unlawful criminal behaviour.[28] The retributivist approach to punishment is backward-looking to the offence; it is not the ability to prevent the commission of future unlawful behaviour that should justify punishment, but

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[23] A. von Hirsch, *Censure and Sanctions*, (Oxford University Press 1993), 13.
[24] K. Yeung, *Securing Compliance: A principled approach*, (Hart Publishing 2004), 69.
[25] K. Mathis, *Efficiency Instead of Justice: Searching for the Philosophical Foundation of the Economic Analysis of the Law*, (Springer 2009), 118.
[26] P van Cleynenbreugel, (n 20), 72.
[27] A. Scordamaglia-Tousis, *EU Cartel Enforcement: Reconciling Effective Public Enforcement with Fundamental Rights*, (Kluwer Law International 2013), 15.
[28] P. Whelan, (n 6), 31.

rather it is the redress for acts that breach the moral precepts of the society.[29] Here, the justification for punishment assigns the concept of blame a primary role.[30] Therefore, the retributive theories take into account that the infringers are morally responsible actors, and punishment should be applied only where the moral responsibility for the unlawful conduct could be attributed to the offender.[31]

However, the greatest disadvantage of retributionist arguments for justification of punishment is that they fail to provide a comprehensive argument of why the legal consequence attached to the commission of unlawful conduct is punishment.[32] Additionally, they fail to provide a specific quantum for the punishment, acting only as a limitation in the process of individualising the sanction to be applied in specific cases.[33]

Hence, a legitimate sanctioning system should not be solely built upon the theoretical foundation of the mentioned theories. Instead, it has to be advocated that a coherent punishing system should be built upon a combination of the two theories.[34] A theoretical framework has been advanced within which the approximation of the two theories could be done by combining the preventive feature of punishment according to the deterrence theories, while taking account of the retributivist principle of proportionality (i.e. the level of the sanctions must be decided taking into account the gravity of the offence).[35] In particular, in the context of cartel offences, it has been pointed out that since the main reasons for imposing

[29] ibid.
[30] A. von Hirsch, (n 23), 14.
[31] B. Balasingham, (n 3), 17.
[32] P. Whelan, (n 6), 35. B. Balasingham, (n 3), 18.
[33] N. Walker, *Modern Retributivism*, in A. Ashworth and A. von Hirsch (eds.), (n 21), 156-157. See also, B. Balasingham, (n 3), 18.
[34] ibid.
[35] L. Kaplow and S. Shavell, *Fairness versus Welfare*, (Harvard University Press 2000), 238.

punishment for antitrust infringements does not relate to the moral dimension of the unwanted behaviour, and since the severity of the sanctions does not reflect the blameworthiness of the unlawful conduct, the level of punishment should be based primarily on deterrence while the principle of proportionality should act as limitation to the excessiveness of punishment.[36] In the EU competition law enforcement, the retributive function of the sanctioning system contributes to the process of restoring the competition on the market.[37] It is thus submitted that a hybrid sanctioning system based on an approximation of the two theories legitimises the enforcement system.

Nevertheless, the legitimacy of the EU competition law enforcement does not stem only from its efficiency in terms of detection, prosecution, and prevention of future anticompetitive practices (i.e. effectiveness), but also from the level of protection of the fundamental rights of the infringers[38]. Therefore, an account of the fundamental rights applicable in the enforcement of the EU competition prohibitions is needed.

2.2. The Protection of Fundamental Rights in the EU Competition Law

In a society based on the rule of law such as the European Union,[39] the protection of fundamental rights is paramount. Indeed, the importance of respecting fundamental rights had been spelled out since the beginning of the long and difficult process of democratisation of Europe in the wake of the French Revolution in 1789. Here, we recall the words of Maximilien de Robespierre who stated: *'Any law which violates the inalienable right of man*

[36] P. Whelan, (n 6), 18. See also, K. Yeung, (n 24), 89.
[37] B. Balasingham, (n 3), 20.
[38] A. Scordamaglia-Tousis, (n 27), 15.
[39] Case C-294/83 *Les Vertes v Parliament*, ECLI:EU:C:1986:166, para. 23.

is essentially unjust and tyrannical; it is not a law at all'.[40] Thus, one could not talk about the legitimacy of the EU competition law enforcement in the absence of a due account of the fundamental rights of the actors involved in the enforcement process. This has been unambiguously recognised by the Court of Justice of the European Union (hereinafter 'CJEU') in *Kadi* whereby the Court stated that the protection of fundamental rights constitutes an essential condition of legality of any EU action.[41] Even in its earlier case-law, the CJEU noted that the protection of fundamental rights is part of the wider set of general principles of law sanctioned by the Court.[42]

It should be mentioned, however, that there had not been a formal recognition of fundamental rights in the EC since the conclusion of the Treaty of Rome in 1957. This can be explained by the *'ius mercantile'* vocation of the European Economic Communities ('EEC'), whilst the protection of fundamental rights was of a secondary importance if of any at all[43]. Nevertheless, since the entering into force of the Lisbon Treaty, fundamental rights in the EU legal architecture have gathered an unprecedented legal protection. Therefore, the legal instrument through which fundamental rights have formally been sanctioned in EU law is represented by the Charter of Fundamental Rights (hereinafter 'CFR') which pursuant to Article 6(1) of the Treaty on the European Union ('TEU') has gathered constitutional value.[44] Moreover, the CJEU has confirmed that the Charter sits at the top of the

[40] Maximilien de Robespierre, *Œuvres de Robespierre*, Texte établi par recueillies et annotées par A. Vermorel, Paris, F. Cournol, 1866, 273.
[41] Joined Cases C-402/05 and C-415/05 *Kadi and Other v. Council and Commission*, EU:C:2008:461, para. 284.
[42] Case C-11/70 *Internationale Handelsgesellschaft GmbH v Einfuhr und Vorratsstelle für Getreide und Futtermitte*, ECLI:EU:C:1970:114, para. 4.
[43] A. Andreangeli, *EU Competition Enforcement and Human Rights*, (Edward Elgar 2008), 7. See also, B. Balasingham, (n 3), 31.
[44] Article 6(1) of the Consolidated Version of the Treaty on the European Union, OJ C 326, 26.10.2012, p. 13–390.

hierarchy of the EU legislation.[45] Furthermore, it should be pointed out the EU's obligation to adhere to the European Convention of Human Rights (hereinafter 'EHCR') in accordance with Article 6(2) TEU.

The formal adherence of the EU could have happened in 2014, but the CJEU found the accession draft agreement was incompatible with the Treaties, *inter alia,* on grounds of endangerment of the EU legal order autonomy.[46] However, according to Article 52(3) CFR the rights contained in the Charter, which mirror the rights established by the Convention, should have the same scope and meaning as those provided in for by the Convention. The second sentence of the same legal norm provides further that this cannot prevent EU law to provide a more comprehensive protection.[47] Thus, the ECHR as well as the case-law of the European Court of Human Rights ('ECHtR') stands as a minimum protection benchmark of the fundamental rights sanctioned by the primary legislation of the EU providing therefore a great degree of approximation of the scope of the fundamental rights protected by both the Charter and the ECHR.[48] Consequently, for the vast majority of the fundamental rights established by the Charter, the legal interpretation of the scope of their corollary rights as developed by the ECHtR represents a legally binding instrument.[49]

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[45] Case C-407/08 *Knauf Gips v. Commission*, ECLI:EU:C:2010:389, para. 91. Case C-271/08 *Commission v. Germany*, ECLI:EU:C:2010:426, para. 37.

[46] See Opinion 2/2013 of the Court of Justice on Access of the EU to the ECHR. EU:2014:2454, paras 183 *et seqq.* See also, S. Reitemeyer and B. Pirker, *'Opinion 2/13 of the Court of Justice on Access of the EU to the ECHR – One Step Ahead and Two Steps Back'*, available at: https://europeanlawblog.eu/2015/03/31/opinion-213-of-the-court-of-justice-on-access-of-the-eu-to-the-echr-one-step-ahead-and-two-steps-back/ , last accessed on 30.07.2019.

[47] See Article 52(3) of the Charter of Fundamental Rights of the European Union, OJ 2000/C 364/01.

[48] S. Reitemeyer and B. Pirker, (n 46).

[49] See A. Scordamaglia, *'Cartel Proof, Imputation and Sanctioning in European Competition Law: Reconciling effective enforcement and adequate protection of procedural guarantees'*, Competition Law Review, Volume 7, Issue 1, pp 5-52, 10.

Going back to the imposition of fines for competition infringements, specifically through Article 101 TFEU, it should be noted that the protection of fundamental rights gained a particular importance given the increased level of punishment attached to the offences thereof.[50] In this context, one of the most fundamental right used to contest the legality of the Commission decisions imposing a fine for infringements to Article 101 TFEU is represented by the right to be presumed innocent under Article 6(2) ECHR and Article 48 CFR.[51] From a technical legal perspective, there is an inherent conflict between the Commission's enforcement policy based on deterrence in order to ensure the effectiveness of the system, on one hand, and the imperative of protecting the offenders' due process rights, including the right to be presumed innocent.[52]

Moreover, the conflict could deepen if one considers the competition law proceedings in the EU criminal rather than administrative in nature,[53] disciplining thus both the legal qualification and the imposition of fines for infringements of Article 101 TFEU. Therefore, in order to safeguard the legitimacy of the enforcement system the EU, Commission must conduct the application of competition rules in a manner that strikes a proper balance between the effectiveness of the system and the protection of the defence rights.[54] Consequently, a question of major importance for the legitimacy of the EU competition enforcement is whether the current system sets the right balance between the two conflicting public interests. As it will be explained

[50] M. Bronckers and A. Vallery, *'No Longer Presumed Guilty? The Impact of Fundamental Rights on Certain Dogmas of EU Competition Law'*, (2011) 34 World Competition 535, 537.
[51] A. Scordamaglia-Tousis, (n 27), 31.
[52] P van Cleynenbreugel, (n 20), 71.
[53] P. Whelan, *Criminal Cartel Enforcement in the EU: Avoiding a Human Rights Trade-off*, in C. Beaton-Wells and A. Ezrachi (eds.), *Criminalising Cartels: Critical Studies of an International Regulatory Movement*, (Hart Publishing 2010).
[54] P van Cleynenbreugel, (n 20), 71. See also, Opinion of AG Wahl in Case C-583/13 P *Deutsche Bahn and Others v. Commission*, EU:C:2015:92, paras. 1-3.

in the remainder of this paper, the balance between the mentioned interests does not ensure fairness in that the deterrence-based substantive policy for the qualification and punishment of infringements under Article 101 TFEU fails to provide a sufficient level of protection of the presumption of innocence as enshrined in Article 6(2) ECHR as well as Article 48 CFR.

2.3. Disequilibria in the Enforcement Policy of EU Competition Law

As it has been mentioned above, a legitimate antitrust enforcement process needs to strike a fair balance between the two fundamental yet conflicting interests of effectiveness in the application of the law and the sufficient protection of fundamental rights. In this context, an issue of major importance is represented by the legal nature of both the offences and the proceedings ensuring the enforcement of competition law prohibitions. As it will be explained in more detail in Section 3, it is submitted that the legal nature of the EU competition law infringements, in particular the cartel offences indicates the criminal rather than administrative nature impacting thus the nature of the proceedings at stake.[55]

The legal nature of the proceedings has certain implications for the legal standards aimed at ensuring the protection of fundamental rights.[56] In the light of the severity of the sanctions (i.e. fines) applied by the Commission in relation to violations of Article 101 TFEU, the level of protection of fundamental rights needs to be ensured by employing higher standards typical of criminal procedures.[57] This qualification has implications for the core legal

[55] See for a comprehensive discussion B. Balasingham, (n 3), 41-48. A. Scordamaglia-Tousis, (n 27), 33-47. Bronckers and Vallery, (n 50). W. Wils, *'The Compatibility with Fundamental Rights of the EU Antitrust Enforcement System in Which the European Commission Acts Both as Investigator and as First-Instance Decision Maker',* (2014) 37 World Competition 5.
[56] A. Scordamaglia-Tousis, (n 27), 33. B. Balasingham, (n 3), 42. C. Harding and J. Joshua, *" Regulating Cartels in Europe",* (2nd edn Oxford University Press 2010), 198-199.
[57] B. Balasingham, (n 3), 42.

mechanism designed to safeguard the rights of defence, namely the level required to prove the existence of an infringement, the force and admissibility of evidence, and the nature and extent of judicial review.[58] Conversely, when the nature of the proceedings is civil or administrative the protection of fundamental rights is granted to a lesser extent.[59]

In this context, special attention must be given to the sanctioning system as the legal nature of the proceedings is directly influenced by the type of sanction imposed (i.e. criminal, administrative or civil). The function of criminal liability is fundamentally different from that of the civil liability. The former fulfils a punitive and censuring function directed towards acts that violate the social value protected by the criminal law norm, whereas the latter is concerned with compensation for the harm brought to a private interest.[60] However, in the context of competition law, it has been pointed out by the legal literature that there is no clear distinction between criminal and civil law liability.[61] More specifically, in the realm of liability for anticompetitive conduct, competition authorities have used sanctions as morally neutral condemnations[62] fulfilling punitive functions in order to regulate social and economic behaviour which goes against the public interest. Therefore, the qualitative analysis of the legal consequences attached for violations of the antitrust prohibitions reveals that their nature is tantamount to criminal law

[58] M. Bronckers and A. Vallery, *'Business as usual after 'Menarini'?'*, MLex Magazine, January-March 2012. B. Balasingham, (n 3), 42. Renato Nazzini, *'Administrative Enforcement, Judicial Review and Effective Judicial Protection in EU Competition Law: A Comparative Contextual-Functionalist Perspective'*, King's College London Dickson Poon School of Law Legal Studies Research Paper Series: Paper No. 2016-31.
[59] S. Graells and F. Marco, *'Human Rights' Protection for Antitrust Defendants: Are We Not Going Overboard?*, in P. Nihoul and T. Skoczny (eds.), *Procedural Fairness in Competition Proceedings*, (Edward Elgar 2015), 102. B. Balasingham, (n 3), 42.
[60] B. Balasingham, (n 3), 42.
[61] ibid.
[62] ibid.

punishment, and given the scale of severity and punitive nature, their place is at the top of the hierarchy of legal liability.[63]

Once the legal nature of both the offence and the proceedings has been established, an analysis of the objectives pursued by the enforcement policy has to be done in order to assess whether the enforcement system is legitimate. In this context, as it has been argued in section 2.3., the EU sanctioning system is based on the theoretical foundations of both the deterrence and retribution theories. However, some commentators argued that there is no clear determination regarding the relationship between the deterrence and retribution objectives pursued in the case of fines imposed by the Commission for violations of the prohibitions established by Article 101 TFEU.[64] Nonetheless, the Commission enforcement practice has shown that the fining policy followed a shift towards a more deterrent effect of the fines (in particular in the case of fining cartels) over the last two decades.[65]

Therefore, an in-depth analysis of the Commission practice and policy statements, over the last decade, will indeed show that the punishments imposed in collusion cases pursue deterrence-based objectives.[66] Firstly, this could be observed since the adoption of the 2006 Fining Guidelines of which primary goal was to increase the Commission's power to impose higher fines.[67] Moreover, in order to ensure a better deterrent effect of fines, the Commission is allowed to set aside the general fining methodology and increase the level of the fine to be imposed.[68] Similarly, in the case of

[63] ibid. 43. K. Yeung, (n 24), 125.
[64] P. Whelan, (n 6), 38.
[65] B. Balasingham, (n 3), 133-134.
[66] I. Simonsson, *Legitimacy in EU Cartel Control*, (Hart Publishing 2010), 147.
[67] B. Balasingham, (n 3), 133.
[68] Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003,
OJ C 210, 1.9.2006, paras. 30-31.

undertaking with a large turnover the Commission may impose a fine of which value goes beyond the sales of goods and/or services which form part of the infringement.[69] Secondly, it has been pointed out that when compared with its predecessor (i.e. 1998 Fining Guidelines), the 2006 Fining Guidelines seem to adopt a stricter adherence to deterrence-based theory of punishment than to concepts of retribution.[70] However, certain retribution-based characteristics of the regime could be envisaged from the guidelines. These features refer to the basic amount of a fine as relating to the gravity of the offence. The level of the fine can be increased or reduced depending on the mitigating and aggravating circumstances present in the case at stake. These retribution-based features present in the Guidelines are meant to ensure that the level of fines are not excessive in accordance with the principle of proportionality.[71]

Finally, it should be also mentioned that, from a substantive policy perspective, the theoretical foundations underpinning the concepts developed by the EU judicature to establish an infringement under Article 101 TFEU follows the deterrence theory.[72] Particularly, this can be inferred from the broad interpretation of the concepts of agreement/concerted practice and the withdrawal requirement in cases involving meeting between competitors[73] as well as from the notion of restriction of competition by object.[74]

From a policy perspective, the rules developed to establish the existence of an infringement of Article 101 TFEU, in particular cartel offences, are interpreted in such a manner that may fail to strike a fair balance between the

[69] B. Balasingham, (n 3), 133.
[70] P. Whelan, (n 6), 41.
[71] I. Simonsson, (n 66), 287.
[72] ibid. 147.
[73] ibid.
[74] D. Bailey, *'Restrictions of Competition by Object under Article 101 TFEU'*, (2012) Common Market Law Review 559, 566.

interest of effective enforcement (i.e. deterrence) and the protection of fundamental rights- especially in the case of the presumption of innocence. In this context, it is the substantive dimension of the presumption of innocence, namely the principle of culpability which in our view may not be sufficiently considered when establishing the existence of an infringement. As it has been pointed out in the literature, the principle of culpability or responsibility forms one of the most fundamental concepts proposed under the framework of the theory of retribution justifying the imposition of punishment.[75] Thus, as it has been mentioned above, a healthy and legitimate enforcement policy cannot be achieved only by relying on its effectiveness, but also by taking due account of the fundamental rights of the parties involved.[76]

The potential conflict between the deterrence-based framework of Article 101 TFEU and the presumption of innocence (translated into the principle of culpability) will be comprehensively addressed in the remainder of this article. However, a relevant preliminary account of certain dogmas underlying the application of Article 101 TFEU is needed. This will be addressed in Section 3 below.

3. The Substantive Law Mechanisms Ensuring the Implementation of EU Competition Law

The discussions in the preceding section focused on the enforcement policy of the antitrust rules in the EU. The previous provided a critical account of the underlying theoretical foundations of the main legal instrument designed to ensure effectiveness of the substantive regulation. It has also been pointed

[75] A. von Hirsch, (n 23), 13-14.
[76] A. Scordamaglia-Tousis, (n 27), 15.

out that any enforcement action must take due account of the fundamental rights of the addressee of the enforcement action (i.e. offenders). Finally, it has been argued that the current status quo of the sanctioning system in relation to antitrust infringements in the EU is not properly balanced against the retributivist argument that criminal law sanctions have to consider the principle of culpability or responsibility. The present section aims at furthering the discussion from the broad level of policy and the theoretical justifications of punishment to concrete legal mechanisms designed to ensure the implementation of the competition policy in the EU. Thus, the legal nature of the competition law infringements (i.e. offence) and its consequences which follow from the commission of the infringements thereof (i.e. punishment) will be discussed in the following. Following both a historical and systematic interpretation, the legal nature of Article 101 TFEU points to a general (prohibition) constitutional principle rather than a specific rule, and that in certain circumstances is too broadly interpreted to be able to carry an administrative sanction (and *a fortiori* a criminal sanction).

3.1. The Legal Nature of the Commission Proceedings in EU Competition Law

As it has been previously mentioned, the proceedings in which the Commission prosecute and impose fines for infringements of Article 101 TFEU (in particular in cartel cases) present the features of the criminal law procedures. In this respect, it has been pointed out that the since its inception in the Treaties establishing the EEC, the system enforcing the EU antitrust rules has known an evolution from a 'softer' administrative enforcement environment towards a criminal or quasi-criminal law model of enforcement featuring both adversarial and combative features.[77] In the same vein, it has

[77] C. Harding and J. Joshua, (n 56), 3.

been argued that, based on the broad interpretation of Article 6 ECHR, competition law proceedings can be parallelly qualified- namely administrative and criminal.[78]

However, it should be mentioned that there has been a strong resistance on the part of the Commission and the EU judicature regarding the legal qualification of the EU antitrust proceedings as criminal in nature. This resistance is based on the formal literal interpretation of the relevant legislation and the need to ensure the deterrent effect of the sanctions. Firstly, the Commission classifies the fines to be imposed for infringements of Article 101 TFEU as administrative law sanctions based on the *'per a contrario'* interpretation of Article 23(5) TFEU which states that the decisions imposing fines for infringements are not of criminal nature.[79] Therefore, the fines to be imposed on undertakings are administrative law sanctions limiting the extent of the substantial and procedural safeguards as required by the criminal law standards.[80] Moreover, the Commission acknowledges the administrative law classification of the sanctions and proceedings prior to the adoption of the Regulation 17/1962, by stating in the explanatory notes that the fines to be imposed for infringements of the then Article 85 and 86 EC, and present the characteristics of administrative measures and not of the criminal law penalties.[81] Similarly, the CJEU stated on several occasions that the proceedings conducted by the Commission belong to the administrative law category.[82]

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[78] A. Scordamaglia-Tousis, (n 27), 35-36.
[79] Council Regulation (EC) No. 1/2003 of 16 Dec. 2002 on the implementation of the rules on competition laid down in Arts 81 and 82 of the Treaty, OJ L 1, 4 Jan. 2003, 1–25.
[80] A. Scordamaglia, (n 46), 14.
[81] 'Expose de motifs', p. 19, Commission Proposal IV/COM(60) 158 final, p. 18.
[82] Joined Cases T-25/95-T-103-04/95 *Cimenteries CBR v. Commission*, ECLI:EU:T:2000:77, paras. 717-18. Joined Cases C204/00 P and C-205/00 P *Aalborg Portland A/S v. Commission*, ECLI:EU:C:2004:6, para. 200. Case T-99/04 *AC-Treuband v. Commission*, ECLI:EU:T:2008:256, para. 113.

Secondly, the legal characterisation of the proceeding before the Commission as administrative in nature has been construed by the EU judicature based on deterrence reasons. For instance, in *Dyestuffs* the Court rejected an argument made by the applicants referring to the administrative nature of the sanctions by way of which they argued that the fines for infringements should not be imposed as punishment for already occurred offences, but in order to prevent their reoccurrence.[83] Here, the Court argued that if it followed such an approach in relation to sanctions, then the deterrent effect of the fines would be limited to a considerable extent.[84] Based on this judgement, some commentators have argued that the Court acknowledged in an implicit manner that the retributive functions attached to criminal law penalties could also be attained through the use of administrative measures.[85] After it decided that the decision imposing fines are not criminal in nature, the Court pointed out that if it upheld the appellant's argument that the competition law sanctions should only be applied in relation to infringements committed intentionally and not negligently, it would 'impinge seriously on the effectiveness of the Community competition law'.[86] Similarly, a few years later, the General Court rejected the plaintiff's argument that EU competition law is criminal in nature on grounds that such characterisation would undermine the effectiveness of the system.[87] Moreover, in relation to the level of fines, the GC stated that the administrative legal nature of the proceedings before the Commission is irrespective of the amount of fines.[88]

[83] Case C-49/69 *BASF v. Commission*, ECLI:EU:C:1972:71, para. 37.
[84] ibid. para. 38.
[85] A. Scordamaglia-Tousis, (n 27), 34. B. Balasingham, (n 3), 48.
[86] Case C-338/00 *Volkswagen v. Commission*, ECLI:EU:C:2003:473, paras. 95-96.
[87] Case T-276/04 *Compagnie Maritime Belge v. Commission*, ECLI:EU:T:2008:237, para. 66.
[88] Case T-83/91 *Tetra Pak International v. Commission*, ECLI:EU:T:1994:246, para. 235.

However, there have been several Advocate Generals which questioned the administrative law classification of the EU antitrust proceedings. Therefore, in *Polypropylene*, the AG Vesterdorf argued that there is a need for a higher standard of proof in relation to competition law cases as these cases can be easily characterised as criminal in nature.[89] In *Baustahlgewebe*, Advocate General Leger argued that the fines could be characterised as criminal charges based on the ECtHR interpretation of Article 6 ECHR.[90] Similarly, Advocate General Kokott noted in *Solvay* that the EU competition rules are tantamount to criminal law rules in the light of the judgement of ECtHR case-law.[91]

Finally, Advocate General Sharpston noted in her opinion in *KME Germany* that the fines imposed for the infringement of the prohibitions on price-fixing and market allocation agreements constitute criminal charges according to Article 6 ECHR as interpreted by the ECtHR.[92] However, both AG Kokott and Sharpston have argued that even though the competition law fines are of a criminal nature, the scope of the rights provided by Article 6 ECHR should not be given the weight of 'hard-core' criminal law offences.[93] Moreover, the CJEU has held that the legal qualification of the competition law proceedings as administrative in nature limits the scope of the application of the general principles of EU law as opposed to criminal law procedures in the strict sense.[94]

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[89] Opinion of AG Vesterdorf in Case T-1/89 *Rhone-Poulenc v. Commission*, ECLI:EU:T:1991:38.
[90] Opinion of AG Leger in Case C-185/95 *Baustahlgewebe v. Commission*, ECLI:EU:C:1998:37 para. 31.
[91] Opinion of AG Kokott in Case C-110/10 *Solvay SA v. Commission*, ECLI:EU:C:2011:257, para. 99.
[92] Opinion of AG Sharpston in Case C-272/09 P *KME Germany and Others v. Commission*, ECLI:EU:C:2011:63, para. 64.
[93] Opinion of AG Kokott, (n 90), paras. 99-100. Opinion of AG Sharpston, (n 91), para. 67.
[94] Joined Cases C-189/02, C-202/02, C-205-08/02 and C-213/02 *Dansk Rorindustri and Others v. Commission*, ECLI:EU:C:2005:408, paras. 215-223. See also, A. Scordamaglia, (n 46), 15.

Nonetheless, when compared with the case-law of the ECtHR relating to the classification of competition law offences and proceedings we may not reach the same conclusion. In this respect, the criteria developed by the ECtHR in the *Engel* case [95] must be recalled- whereby the Court established the test according to which an offence along with the procedure imposing the penalty for its commission could be classified as criminal in nature. Thus, according to the *Engel* test in order to establish whether the procedure in question falls within the scope of 'criminal charge' under Article 6 ECHR the procedure at stake needs to be assessed against the following criteria: (i) the categorisation of the offence according to the domestic law, (ii) the nature of the offence, and (iii) the nature and the degree of severity of the punishment.[96] The development of the second criterion in the *Ozturk* case, whereby the Court noted that it suffices for an offence to be of a criminal nature whether the norm and the goal of the penalty pursues both deterrent and punitive functions.[97] Further, regarding the third criterion of the *Engel* test (i.e. the nature and the degree of severity of the penalty) it has been argued that a penalty may be considered criminal when the main goal of the sanction is to punish and deter the future commission of the offence, as opposed to the compensatory function attributed to civil law liability.[98] In this respect, it is worth mentioning the reasoning of the CJEU in the *Showa Denko* case in which the Court noted that the fines pursued both punitive and deterrence functions.[99]

Another important development in the ECtHR case-law relating to the nature of the proceedings was made in the *Jussila* case in which the Court

[95] ECtHR App. No. 5100-2/71, 5354/71 and 5370/71 *Engel and Others v. the Netherlands*.
[96] ibid. para. 82.
[97] ECtHR App. No. 8544 *Ozturk v. Germany*, para. 53.
[98] D. Slater, S. Thomas, D. Waelbroeck, *'Competition law proceedings before the European Commission and the right to a fair trial: no need for reform?'*, (2009) European Competition Journal, Vol. 5, pp. 97-134, 103.
[99] Case C-289/04 *Showa Denko v. Commission*, ECLI:EU:C:2006:431, para. 16.

acknowledge the gradual broadening of the notion 'criminal charge' in relation to cases which are not included in the traditional realm of criminal law including, *inter alia*, competition law, and referred to tax surcharges as not being part of the category of 'hard-core' criminal law offences.[100] The Court made an important distinction between the category of 'hard-core' criminal law offences in relation to which the guarantees provided in Article 6 ECHR apply with full force, and the 'peripheral' criminal offences which benefit from a lower standard of protection in this respect.[101]

AG Sharpston and AG Kokott noted that although competition law fines could be considered criminal in nature they do not form part of the sphere of hard-core criminal law, and therefore the guarantees provided in Article 6 ECHR will not apply to their fullest extent.[102] However, the ECtHR put an end to the debate as to the qualification and the intensity of protection of the rights of defence in Article 6 ECHR in the *Menarini* case. The Court acknowledged that the antitrust procedures are criminal in nature comparing the goals of competition law (i.e. prohibit agreements preventing, restricting and distorting competition as well as abuses of market power) to those typical to criminal legislation (i.e. safeguarding the public interest of the society).

The sanction imposed here fulfilled both the punitive and deterrent functions typical to criminal law punishment.[103] Hence, it seems that the criminal nature, and the corresponding level of protection of the fundamental rights provided by Article 6 of the Convention could not be disputed in the case of competition law proceedings.

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[100] ECtHR App. 173053/01 *Jussila v. Finland*, para. 43.
[101] B. Balasingham, (n 3), 46.
[102] Opinion of AG Kokott, (n 90), paras. 99-100. Opinion of AG Sharpston, (n 91), para. 67.
[103] ECtHR App. No. 43509/08 *Menarini Diagnostics S.R.L v. Italy*, para. 40.

3.2. Deficiencies Regarding the Legal Mechanisms Ensuring the Implementation of EU COMPETITION Law

3.2.1. Deficiencies Regarding the Application of the Formal Legislation: Article 101 TFEU and the Implementing Regulation 1/2003

The analysis in the following subsection shifts the focus on the different legal mechanisms designed to ensure the functioning of the EU competition rules. In this context, it should be mentioned that the system designed to protect competition within the internal market is based on the norms envisioned by Article 101 and 102 TFEU. The focus of our analysis is on the provisions of Article 101 TFEU which prohibits any form of collusion that may prevent, restrict or distort competition in the internal market.

In this respect, it is worth mentioning that Article 101 TFEU constitutes a constitutional norm forming legal basis of the system of protection of competition in the EU. In this context, the distinction between the different categories of constitutional norms as envisioned by the legal literature and judiciary should be recalled. Firstly, with reference to the American constitutional law, two categories of constitutional norms have been identified- namely self-executing and not self-executing norms. Thus, the US Supreme Court of Justice in *Davis v. Burke* stated that a constitutional norm is self-executing if it provides a sufficient rule to ensure the enforceability of the right or duty established by the norm in question. By contrast a norm is not self-executing whereby it lacks such a normative character.[104] It has been argued that just because a constitutional norm calls for secondary legislation to ensure its effective application, does not mean that the provision in question is not of a self-executing nature.[105] Similarly, if the legislation

[104] US Supreme Court *Davis v. Burke*, 179 U.S 399 (1900).
[105] T. Cooley, *A treatise on the constitutional limitations which rest upon the legislative power of the state of the American union*, (8th edn Vol. 1 Boston: Little Brown 1927), 170.

stipulates a penalty for infringing a self-executing norm, conversely, the absence of such legislation does not make the self-executing provision ineffective.[106]

Secondly, with reference to the continental constitutional law literature, there is a difference between the normative character of a constitutional norm and its enforceability.[107] Provisions which are of an imperative nature often require the enactment of subsequent completing legislation in order to be fully enforceable.[108] In this context, it is worth recalling the provisions of Article 103 TFEU which states that the Council should adopt appropriate legislation by means of regulations and directives in order to ensure compliance with the prohibitions enshrined in Article 101 and 102 TFEU by establishing appropriate rules for the imposition of fines and periodic penalties.[109] Moreover, the concepts embedded in Article 101 TFEU have not been defined by the letter of the Treaty, but by way of judicial interpretation. The CJEU has afforded an expansive interpretation of the aforementioned concepts in order to catch all categories of anticompetitive conduct preventing thus any lacuna in the scope of Article 101 TFEU.[110] Thus, it follows that the nature of Article 101 points towards a general principle (i.e. free competition) rather than to a sufficiently defined administrative rule that satisfies the precepts of the rule of law (i.e. the legality and culpability principles), requiring the legitimate imposition of criminal law sanctions.[111]

Moreover, it follows that Article 101 TFEU by itself was not envisioned as an administrative offence. The subsequent development of the rules allowing

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[106] ibid.
[107] J. Fos, *The Dogmas of Article 101 TFEU and Information Exchange*, Doctoral Thesis, (Universidad Autonoma de Madrid 2015), 41.
[108] ibid.
[109] ibid. 42.
[110] Scordamaglia-Tousis, (n 27), 203.
[111] J. Fos, (n 108), 43.

the imposition of administrative penalties for violations of the provisions enshrined in Article 101 TFEU was delegated to the secondary legislation (i.e. Regulation 17/62 and Regulation 1/2003).[112] There is a distinction between infringements of Article 101 TFEU which allow imposition of fines and infringements that do not allow for such legal reactions.[113] In this context, the distinction between penalties and administrative measures is worth mentioning. The former is oriented towards the offender fulfilling punitive and deterrent functions, whereas the latter acts upon the effects of the conduct fulfilling a reparatory function.[114]

Each institution stipulates different requirements. While the imposition of penalties needs to fulfil the basic requirements of the rule of law (i.e. legality and culpability),[115] administrative measures could be taken anytime an infringement of Article 101 TFEU regardless the state of mind of the infringer.[116] For instance, according to Article 105 TFEU in conjunction with Article 7(1) of Regulation 1/2003 the Commission can issue a 'cease and desist' order by which requires the infringers to stop the unlawful conduct by simply finding that there has been a violation of Article 101 TFEU. Such a measure aims at restoring the situation prior to the infringement and fulfils a purely reparatory function. By contrast, the imposition of a fine requires the Commission to demonstrate that the infringement has been committed intentionally or negligently according to Article 23(1) of Regulation 1/2003.[117] The imposition of penalties even of non-criminal nature requires the existence of a 'clear and unambiguous legal basis'.[118]

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[112] ibid.47.
[113] P. Whelan, (n 6), 88.
[114] A. de Moor-van Vugt, *'Administrative Sanction in EU law'*, (2012) Review for European Administrative Law, 5(1), pp. 5-41, 12.
[115] J. Fos, (n 108), 50.
[116] A. de Moor-van Vugt, (n 115), 12.
[117] Regulation No. 1/2003, (n 79).
[118] Case C-117/83 - *Könecke v Balm*, ECLI:EU:C:1984:288, para. 11.

The secondary legislation which forms the legal basis for the imposition of penalties in relation to infringements of Article 101 TFEU fails to provide adequate rules for the imposition of fines according to the exigences of the rule of law (i.e. legality and culpability). Firstly, Article 23(1) of Regulation 1/2003, which forms the core legal basis of the sanctioning system in EU competition law, fails as a substantive rule to provide a sufficient legal basis for the imposition of penalties.[119] Article 23(1) does not develop the rules allowing the imposition of fines, but it merely sends back to the provisions of Article 101 and 102 TFEU constituting thus a 'reverse blank norm'.[120] More precisely, the provisions in Article 23(1) link the imposition of fines to the broadly defined wording of Article 101 TFEU instead of clearly defining the unlawful conduct of commission renders the imposition of penalties.[121] Thus, it follows that Article 23 fails to meet the 'clear and unambiguous' standard.[122]

Secondly, in relation to the 'intent or negligence' requirement stated by the aforementioned provision, it had been held by the CJEU that the offender commits an infringement with intention or negligence when it could not be unaware of the anticompetitive character of the conduct.[123] In the *Volkswagen* case, the EU judicature held that the fault requirement is not attributable to the individual acting on behalf of the undertaking with the relevant state of mind, but it attributed the fault to the undertaking as such.[124] The CJEU

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[119] J. Schwarze, R. Bechtold and W. Bosch, *Deficiencies in the European Community Competition Law: Critical analysis of the current practice and proposals for change*, (GleissLutz Rechtsanwälte 2008), 16.
[120] J. Fos, (n 108), 48.
[121] J. Schwarze, R. Bechtold and w. Bosh, (n 120), 16.
[122] ibid.
[123] Case C- 96/82 *IAZ v. Commission*, ECLI:EU:C:1983:310, para. 45. Case T- 83/91 *Tetra Pak v. Commission*, ECLI:EU:T:1994:246, para. 238 *et sq.*
[124] J. Schwarze, R. Bechtold and W. Bosch, (n 120), 48.

rejected the appellant's argument that the Commission has an obligation to identify the responsible persons whose state of mind points towards an intentional or negligent character of the infringement as the fines imposed are not criminal in nature, and if such condition would have been required to impose a sanction it would significantly affect the effective application of the EU competition law.[125]

The Commission's decisional practice as well as the case-law of the EU Courts clearly demonstrate there is no clear distinction between the intention and negligence as forms of guilt required to establish liability for infringements of the competition rules.[126] According to the settled case-law, the Commission does not have a duty to prove that the offender was in fact aware that its conduct would infringe Article 101 TFEU, but it is merely required to demonstrate that the undertaking in question could not have been unaware that the object of its conduct is the restriction of competition.[127] Moreover, in its recent decisional practice the Commission refrained from using the intention or negligence standards when imposing fines but rather used the term 'deliberate' conduct in relation to serious infringements of competition. It did not engage in a relevant legal-assessment of the criterion of guilt.[128] Thus, it has been argued that both the Commission and the EU judicature have to provide principled criteria in order to distinguish between intentional and negligent conduct as different consequences arise whereby an infringement is committed with intention as opposed to negligence (e.g. for

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[125] Case C-330/00 *Volkswagen v. Commission*, ECLI:EU:C:2003:473, paras. 94-98.
[126] J. Schwarze, R. Bechtold and W. Bosch, (n 120), 49.
[127] Case T- 86/95 - *Compagnie Générale Maritime Belge v Commission*, ECLI:EU:T:2002:50, paras. 19 and 234. Case C- 246/86 - *Belasco and others v Commission*, ECLI:EU:C:1989:301, para. 41. See also, O. Blanco, *EU Competition Procedure*, (3rd edn. Oxford University Press 2013), 11.22-11.25.
[128] Case COMP/36.321 *Omega - Nintendo*, OJ 2003 L 255/33, para. 371; Case C.37.519 - *Methionine*, 2003, L 255/1, para. 265; Case COMP/E-1/36.212 - *Carbonless Paper*, OJ 2004, L 115/1.

negligent conduct the level of fine must be lower than in the case of intentional violation of the rules).[129]

3.2.2. Deficiencies Regarding the Legal Mechanisms used in the Legal Characterisation of Infringements under Article 101 TFEU

The analysis in the preceding subsection focused on the legal mechanisms present in the formal legislation, i.e. Article 101 TFEU and the implementing Regulation 1/2003. Article 101 TFEU itself does not constitute a sufficiently defined administrative rule (i.e. offence), allowing for the imposition of fines without infringing basic rule of law requirements (i.e. legality, certainty and responsibility principles). The crux of the argument is that given the general-like nature of Article 101 TFEU, the norm was not envisioned as an administrative offence at the time of its inception in the Treaties. Therefore, infringements of Article 101 TFEU were not able to carry an administrative penalty, but merely administrative measures aimed at re-establishing the legal situation prior to the violation of the general prohibition enshrined the norm thereof. In the same vein, under its mandate under Article 103 TFEU the implementing Regulation 1/2003 failed to provide a sufficient substantive legal basis for the imposition of fines. More specifically, Article 23(1) failed to develop a proper legal framework establishing the offences on the basis of which penalties could be imposed without infringing the aforementioned basic conditions required by the rule of law.

Therefore, as a result of the way in which the sanctioning system has been designed, the EU judicature is obliged to develop from the general principle enshrined in Article 101 TFEU those administrative rules allowing for the

[129] See also, J. Schwarze, R. Bechtold and W. Bosch, (n 120), 49.

imposition of (administrative and criminal) penalties that would not violate the fundamental principle of the rule of law.[130] To this respect the present subsection will analyse the legal mechanisms used in the legal characterisation of infringements as they have been developed by the EU judicature under the framework provided by Article 101 TFEU.

Thus, as it has been mentioned earlier, the EU judicature has promoted an expansive interpretation of the notions embedded in Article 101 TFEU in order to cover all forms of cooperation between undertakings.[131] Furthermore, given the inherent difficulties in proving the existence of an infringement (in particular of cartel offences) the Commission relies on a series of presumptions, as well as relatively irrebuttable evidence which may infringe the fundamental principle of presumption of innocence and its corollary principle of *in dubio pro reo*.[132] In this regard, in order to find the existence of an offence under Article 101 TFEU the Commission has to prove the following constitutive elements: (i) a form of collusion (i.e. agreement or concerted practice), (ii) the object or effect of the cooperation is to prevent, restrict or distort the competition, and (iii) the cooperation between the parties must affect the trade between the Member States.[133]

With regard to the first element, the CJEU discussed the notion of agreement in Article 101 TFEU in *Chemiefarma* case in which it reasoned that in order to constitute an agreement it suffices that the arrangement at stake to represent the 'faithful expression of the joint intention of the parties'.[134] However, the final clarification of the notion of agreement results from the judgement of the GC in *Bayer*, whereby it has held that the notion of agreement constitutes

[130] J. Fos, (n 108), 49.
[131] A. Scordamaglia, (n 46), 21.
[132] ibid. 20.
[133] ibid. 22.
[134] Case C-41/69 *ACF Chemiefarma v. Commission*, ECLI:EU:C:1970:71, para. 112.

an arrangement that 'centres around the existence of a concurrence of wills between at least two parties, the form in which is manifested being unimportant so as long as it constitutes the faithful expression of the parties' intention'.[135]

Secondly, in respect to the notion of concerted practice, the CJEU noted in *Dyestuffs* case that the notion of concerted practice reveals a type of coordination between the parties which even though it has not reached the stage of an agreement it consciously substitutes practical cooperation between them for the risks of competition.[136] Nonetheless, the Court further developed the aforementioned criterion in *Sugar cartel* case, whereby the CJEU held that although undertakings are free to adapt to the current and predicted market behaviour of the competitors, Article 101 TFEU however precludes any direct or indirect contact between competitors of which object or effect is to influence the market behaviour of a (potential) competitor or to divulge to their competitors the decided or contemplated conduct on the market.[137]

In the case of the presumption of infringement in the case of participation in cartel meetings relied upon by the Commission when establishing the existence of an infringement, the 'concurrence of wills' is rendered an objective test and is presumed in an automatic fashion on evidence proofing participation in a meeting having an anti-competitive object.[138] The Commission can infer the existence of intention from the mere participation even though the parties argue against an intention to conclude an anticompetitive agreement.[139] In *Sandoz*, the Court held that intention could

[135] Case T-41/96 *Bayer v. Commission*, ECLI:EU:T:2000:242, para. 69.
[136] Case C-48/69 *Imperial Chemical Industries Ltd. v. Commission*, ECLI:EU:C:1972:70, para. 57.
[137] Joined Cases C- 40 to 48; 54 to 56; 111; 113 to 114/73 *Coöperatieve Vereniging "Suiker Unie" UA and others v Commission*, ECLI:EU:C:1975:174, para. 115.
[138] A. Scordamaglia, (n 46), 25.
[139] A. Scordamaglia-Tousis, (n 26), 204.

be also proven in the case of a communication of an agreement together with the tacit acquiescence of it by the parties leading thus to the existence of an agreement.[140] Even though the participation in a cartel meeting was merely passive it does not render the presumption of infringement inapplicable, unless the undertaking in question adopted an attitude through which it publicly distance from the discussions carried out during the meeting in which it participated.[141]

The presumption of infringement based on participation in meetings with an anticompetitive object applies in relation to concerted practices. Therefore, the Court stated that in the event that after a concerting arrangement the undertaking in question still operates on the market, then there is a presumption that it has taken account of the information exchanged in determining its market behaviour, especially if the concertation has taken place on a lasting basis.[142] In *T-Mobile Netherlands* the Court admitted that the mentioned presumption also applies even though the concertation has taken place as a result of a meeting held on a single occasion.[143] Further, in *Tate & Lyle* the GC held that whether an undertaking receives information regarding its competitors which constitutes business secrets it suffices to prove anticompetitive animus.[144] It is also worth mentioning that according to the 2010 Horizontal Guidelines, the existence of a concerted action could be also established in the case in which an undertaking comes in the possession of information received from its competitors being presumed that it has accepted the information in question and adapted its market behaviour

[140] Case C- 277/87 *Sandoz produtti farmaceutici SpA v. Commission*, ECLI:EU:C:1990:6, para. 11.
[141] Case T -7/89 *Hercules Chemicals NV v. Commission*, ECLI:EU:T:1991:75, para. 232.
[142] Case C- 49/92 *Commission v. Anic Partecipazioni*, ECLI:EU:C:1999:356, para. 121.
[143]Case C-08/2008 *T-Mobile Netherlands NV v. Raad van bestuur van de Nederlandse Mededingingsautoriteit*, ECLI:EU:C:2009:343, para. 62.
[144] Case T- 202/98 *Tate & Lyle and Others v. Commission*, ECLI:EU:T:2001:185, para. 66.

according to the received data, except in the situation whereby it clearly states that it does not want to receive such information.[145]

It follows from the above that in order to rebut the mentioned presumption and avoiding thus liability undertakings participating in anticompetitive meetings have to provide sufficient evidence indicating that it publicly distances from the discussions held during that meeting.[146] Additionally, it has been pointed out by the GC that 'public distance' as a defence to escape liability it should be interpreted in a narrow manner.[147] It is less clear, however, what amounts to an effective 'public distance' defence which would eventually render the undertaking substantiating it not liable for infringement.[148] In this respect, the GC noted that in order for the public distance defence to be valid the undertaking in question must express in an unequivocal manner its disagreement making the other participants to believe that the undertaking has undoubtedly distanced itself.[149] Further, in *ADM* the CJEU upheld the finding of the GC according to which the public distancing condition is not met in the event that the undertaking in question leaves before the end of cartel meeting, and thus stated that the undertaking claiming such a defence should adduce evidence proving that the other participants had indeed the belief that the undertaking put its participation to an end.[150]

Thus, in order to make the public distancing defence valid, an undertaking is under an obligation to convince (i.e. an obligation of result) the other

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[145] Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, OJ C 11, 14.1.2011, p. 1–72, p. 62. (hereinafter Horizontal Guidelines).
[146] Case T -12/89 *Solvay & Cie SA v. Commission*, ECLI:EU:T:1992:34, para. 99; Joined Cases C-204-5/00 *Aalborg Portland v. Commission*, ECLI:EU:C:2004:6, para. 81.
[147] Case T-61/99 *Adriatica di Navigazione v. Commission*, ECLI:EU:T:2003:335, para. 135.
[148] I. Simonsson, (n 66), 126.
[149] Case T-303/02 *Westfalen Gassen Nederland v Commission*, ECLI:EU:C:2004:128 para. 84.
[150] Case C-510/06 *Archer Daniels Midland v. Commission*, ECLI:EU:C:2009:166, para. 120.

members of a meeting, rather than an obligation of means to make its intention known to the other members.[151] Effectively rebutting the presumption of infringement based on participation in cartel meetings is an almost insurmountable obstacle[152] rendering thus the presumption *de facto* irrebuttable.[153] While reliance on such presumptions is desirable from an enforcement effectiveness perspective as the interpretation of the notions of agreement and concerted practice as well as the opt-out rule of public distancing pursues deterrence[154], it may not be compatible with the fundamental rights of the defendants. More specifically, reliance on such presumptions in the process of legal characterisation affects the degree of proof required to demonstrate competition law infringements as the effect of the presumptions is question is that it lowers the of the presumptions is question is that it lowers the standard of proof to an extent that may infringe the fundamental principle of presumption of innocence.[155]

However, although the use of the aforementioned legal instruments to find infringement might be justified in the case of hard-core cartels such as the conducts proscribed in Article 101(1) (a)-(e) TFEU, the same may not be argued in relation to conducts that sit within the grey zone between the competitive and anticompetitive behaviour such as information exchange.[156] In the remainder of this article, the potential clash between the condemnation of information exchange practices and the presumption of innocence will be analysed. In particular, the article will discuss the interaction between the principle of culpability and the legal instruments used in the legal

[151] A. Scordamaglia, (n 46), 28.
[152] D. Bailey, *'Publicly Distancing Oneself from a Cartel'*, (2008) World Competition, Vol. 31, no. 2, pp. 177-203.
[153] A. Scordamaglia, (n 46), 28.
[154] I. Simonsson, (n 66), 125- 126.
[155] A. Scordamaglia, (n 46), 21.
[156] J. Fos, (n 108), 83.

characterisation of information exchange as an infringement carrying a 'criminal' sanction under Article 101 TFEU.

4. Presumption of Innocence – A Corrective Principle Ensuring the 'Fair' Application of Article 101 TFEU as a Criminal Sanction

4.1. The Substantive Dimension of the Presumption of Innocence – *Nulla Poena Sine Culpa* Principle

Since the entry into force of the Lisbon Treaty, the presumption of innocence has gained the status of a fundamental value constitutionally protected in the EU legal order being enshrined in the Charter of Fundamental Rights.[157] It is settled case-law recognising the presumption of innocence amongst the fundamental principles of EU law. Therefore, in *Hüls* the CJEU referring to Article 6(2) ECHR stated that the Community legal order sanctions and protects the fundamental right to be presumed innocent within the realm of competition law.[158] In *E.ON*, the Court admitted that the benefit of doubt (i.e. *in dubio pro reo* principle) must be interpreted in favour of the accused, and that the presumption of innocence, as enshrined in Article 48(1) CFR represents a general principle of EU law applicable to competition law proceedings.[159]

Traditionally, the presumption of innocence has been considered as a procedural law principle with importance for the protection of the rights of defence, the allocation of the burden of proof and the standard of proof.[160] The presumption of innocence concerns only the evidentiary rules and thus it

[157] See Article 48 CFR.
[158] Case C-199/92 *Hüls v Commission*, ECLI:EU:C:1999:358, paras. 149-150.
[159] Case C-89/11 *E.ON Energie v. Commission*, ECLI:EU:C:2012:738, paras. 72-73.
[160] M. Bronckers and A. Vallery, (n 50), 546.

has no value regarding the definitional elements of an offence.[161] However, some commentators moved beyond the procedural function of the presumption of innocence recognising its impact at a substantive law level as well. Thus, it has been argued that whether an offence is technically defined in such way that does not ensure the *a priori* innocence of the defendant until its guilt is proven, then the offence breaches the presumption of innocence.[162] Hence, the authors state that the presumption of innocence is not only concerned with the procedural protection of the defendant but it has also impact on the substantive definition of the criminal offence.[163]

Moreover, there is a blurred distinction between the rules on evidence and the definitional elements of an offence and thus the existence of such impact cannot be rule out *a priori*.[164] In determining the impact upon the criminal law institutions (i.e. offence), some importance has been attributed to the meaning of the notion of 'innocence'. The notion 'innocent' refers to guilt in its technical sense as an essential constitutive element of a criminal law offence (i.e. *mens rea*).[165] This leads to the issue of whether it is possible for the legislator to define criminal law offences containing only an objective element (i.e. *actus reus*), but without an account of the subjective element among the definitional elements of the offence.[166]

The case-law of the ECtHR touched upon this issue in *Salabiaku* case, whereby the Court assessed the right of the Contracting States to condemn a

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[161] F. Castillo de la Torre, *'Evidence, Proof and Judicial Review in Cartel Cases'.* (2009) World Competition 32, no. 4, 505-578, 507.
[162] V. Tadros and S. Tierney, *'The Presumption of Innocence and the Human Rights Act'*, (2004) Modern Law Review, Vol. 67, No. 3, pp. 402-434, 413.
[163] ibid.
[164] M. Bronckers and A. Vallery, (n 50), 561.
[165] S. Trechsel, *Human Rights in Criminal Proceedings*, (Oxford University Press 2005), 156-157.
[166] ibid.

conduct regardless the state of mind (i.e. criminal intent or negligence) of the defendant *vis-à-vis* the conduct and its consequences.[167] Moreover, the Court noted that Article 6 ECHR allows the domestic criminal legislation to adopt presumptions of fact or law the effect of which is that the prosecution is absolved from the duty to prove all the elements of an offence. However, the Court stated that such presumptions exist within certain reasonable limits taking due account of the importance of the value protected by the criminal norm and respect the rights of defence.[168] Thus, it would seem that the ECtHR founds that the existence of the strict liability (i.e. liability without fault or *responsabilité sans faute*) is compatible with the Convention. However, there is a visible shift in the case-law of the ECtHR towards the recognition of the principle of culpability (i.e. *nulla poena sine culpa*) as a fundamental right protected by the Convention.[169] It would be entirely arbitrary and disproportionate to condemn defendants for conducts committed without blame, and thus as general principle the *nulla poena sine culpa* rule must be recognised as a fundamental right of which infringements should be considered violations of the presumption of innocence.[170]

In relation to the recognition of the *nulla poena sine culpa* principle in the EU legal order, it should be mentioned that even though the Court did not address the said principle in detail, its existence in EU law could be inferred from the Court's case-law.[171] Firstly, in *Mazeina* the CJEU referred to the principle of *nulla poena sine culpa* as being a guarantee 'typical of criminal law'.[172]

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[167] ECtHR Application No. 10519/83 *Salabiaku v. France*, para. 27.
[168] ECtHR, Application No. 37334/08 *G. v. United Kingdom*, para. 26.
[169] G. Panebianco, *The 'Nulla Poena Sine Culpa' Principle in the European Courts Case Law: The Perspective of the Italian Criminal Law*, in S. Ruggeri, *Human Rights in European Criminal Law* (eds.), (Springer International Publishing 2015), pp. 48-76, 56 and footnote 30.
[170] S. Trechsel, (n 166), 158.
[171] Opinion AG Kokott in Case C-681/11 *Schenker and Others v. Commission*, ECLI:EU:C:2013:126, para. 41.
[172] Case C-137/85 *Mazeina v. BALM*, ECLI:EU:C:1987:493, para. 14.

Secondly, its recognition could be inferred from the reasoning of the Court in *Käserei*, whereby the Court analysed the compatibility of a penalty comprising in the loss of security with the said principle.[173] Thus, the Court noted that the penalty in question would infringe the aforementioned principle only if it is criminal in nature, and went on to analyse whether this was the case or not.[174]

After stating that the loss of security does not constitute a penalty of a criminal nature, it concluded consequently that the principle of *nulla poena sine culpa* is not applicable to the penalty in the case at hand.[175] It would seem thus that the said principle is applicable in relation to competition law penalties given their criminal law nature.[176] In this context, it is worth recalling the argument made by Advocate General Lenz in its opinion in *Van der Tas* case, whereby it noted that culpability in relation to the conduct is an essential requirement of criminal law liability, and that according to the *nulla poena sine culpa* as a general principle of law the existence of personal fault constitutes an essential precondition of criminal law liability.[177] Thirdly, in its opinion in *Michaeler,* Advocate General Colomo took the view that the principle of culpability constitutes a legislative construct applicable not only criminal but also to administrative penalties. [178]

Finally, with respect to the legal sources of the principle of *nulla poena sine culpa*, it should be recalled the argument made by Advocate General Kokott in her opinion in *Schenker* case in which it analysed whether an error of law

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[173] Case C-210/00 *Käserei Champignon Hofmeister GmbH v. Hauptzollamt Hamburg-Jonas*, ECLI:EU:C:2002:440.
[174] ibid. para. 35.
[175] ibid. para. 44.
[176] See Section 2.1.
[177] Opinion of AG Lenz in Case C-141/93 *Van der Tas*, ECLI:EU:C:1992:260, para. 11.
[178] Opinion of AG Colomo in Joined Cases C-55-6/07 *Michaeler and Others v. Amt für sozialen Arbeitsschutz and Autonome Provinz Bozen*, ECLI:EU:C:2008:42, para. 56.

as to the wrongfulness of an act could be invoked to evade liability.[179] Therefore, after acknowledging the criminal nature of antitrust penalties, it went on to state that in competition law account must be taken of some general principles derived from criminal law and which ultimately constitutes guarantees of each existence is required by the rule of law (such as the principle of culpability).[180] Moreover, it argued citing the opinion of Advocate General Van Gerven in *Charlton*[181] that the *nulla poena sine culpa* principle constitutes a fundamental right common to the constitutional traditions of the Member States.[182] Finally, it has concluded that the normative source of the principle is implicitly represented by the presumption of innocence as enshrined in Article 48(1) CFR and Article 6(2) ECHR noting that ultimately the said provisions could be regarded as constituting a particular application of the principle of culpability at the procedural law level.[183] It follows from the above that the existence of the *nulla poena sine culpa* as fundamental principle in the EU legal order instructing ultimately the definitional process of the offences (*in abstracto*) as well as their application *in concreto*.

The clash between the presumption of innocence and the ensuing principle of culpability with certain dogmas developed by the Commission and endorsed by the EU judicature in the application of Article 101 TFEU remains to be explored. This will be done in relation to the finding of infringement in the case of conducts that sit at the borderline between what is permitted or prohibited (e.g. information exchange) which, as it will be explained below,

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[179] Opinion of AG Kokott, (n 172). See also, Section V. A.
[180] ibid. para. 40.
[181] Opinion of AG Van Gerven in Case C-116/92 *Charlton and Others.*, ECLI:EU:C:1993:357, para. 18.
[182] Opinion of AG Kokott, (n 172), para. 41.
[183] ibid.

fails to take due account of the principle of culpability ultimately infringing the presumption of innocence.

4.2. The Application of Article 101 TFEU to Information Exchange: The Thin Ice of EU Competition Law

In assessing the law on infringements pertaining in information exchanges on strategic data (such as prices) between competitors a good starting point is represented by the Horizontal Cooperation Guidelines. In this respect, the Guidelines implicitly draw a distinction between information exchange that forms part of a cartel or facilitate the implementation of a cartel which will be treated as part of the cartel thereof, and information exchange which forms a self-standing infringement under Article 101 TFEU (i.e. facilitating practices).[184] The latter form is dealt under the framework of concerted practices as developed by the case-law of the EU judicature. In this connection, the Guidelines state that exchange of information could result in a concerted practice when it limits the strategic uncertainty in the market (i.e. when the information exchanged relates to strategic data).[185] Therefore, the Commission concludes that exchanges of strategic information among competitors constitutes concertation because it restricts the competitors' ability to adopt their market behaviour independently limiting thus their incentive to compete.[186] Additionally, it states that when an undertaking receives strategic data from a competitor, there is a presumption according to which the undertaking in question accepts the information and it adapts its market behaviour accordingly.[187] Moreover, the Commission treats

[184] Horizontal Guidelines, (n 146), para. 59.
[185] ibid., para. 61.
[186] ibid.
[187] ibid., para. 62.

information exchange on future prices as a practice having as its object the restriction of competition.[188]

It follows from these statements that the Commission in establishing whether an information exchange on prices constitutes an infringement under Article 101 TFEU, it infers from the mere sharing of future prices the existence of joint conduct on the market (i.e. concertation), and it categorise the conduct thereof as restriction of competition by object (i.e. it presumes anticompetitive effects). Thus, by using this set of presumptions the Commission establishes an automatic system of liability which infringes the presumption of innocence.[189] However, this approach could be traced from the case-law of the EU Courts which will be assessed in the following.

Firstly, it should be recalled the reasoning of the CJEU in *Anic* whereby it stated that the concept of concerted practice comprises two elements: (i) concertation between the undertakings, and (ii) subsequent conduct on the market in accordance with the concertation thereof as well as a relationship of case and effect between the concertation and the subsequent conduct.[190] As it has been mentioned above in the general context of legal characterisation of cartel infringements,[191] the Court established a presumption of causality between concertation and conduct on the market whereby the undertaking concerting together and remained active on the market exchanged information among.[192]

However, the findings of the Court have to be analysed according to the specificities of the case at stake. Thus, it has been argued that the presumption

[188] ibid., para. 74.
[189] M. Bronckers and A. Vallery, (n 50), 559.
[190] Case C-29/92 *Anic*, (n 146), para. 118.
[191] See Section 3.2.2.
[192] Case C-29/92 *Anic*, (n 146), para. 121.

was established by the Court in *Anic* to catch promiscuous forms of coordination in the presence of evidence of agreement having different degrees of intensity over a period of time.[193] In turn this culminated in that in the case of information exchange between competitors infringements could be found just adducing proof of the latter.[194]

It has been argued in relation to the presumptions thereof that their use is legitimate because they are based on common experience and are subject to rebuttal upon *cogent* proof adduced by the parties.[195] In relation to the first presumption (i.e. concertation based on information exchange), it has been pointed out that it applies even in the context of an unilateral disclosure of future prices and that the only available route to rebut the presumption is through the use of the opt-out rule (i.e. public distancing defence).[196] As it has been mentioned earlier in the context of the presumption of cartel participation, substantiating a public distancing defence is tantamount to *'probatio diabolica'*.[197] This also the case for the presumption of causality.[198] In this respect, it has been mentioned by the Court in *Solvay* that evidentiary data showing a reduction in the prices during the concerned period it is not sufficient to rebut the causality presumption as the such data does not prove that the company in question did not adapt its market behaviour following the exchange of information.[199] Thus, it has been argued that the relevant test to rebut the presumption is not based on the legal test of culpability, but instead

[193] J. Fos, (n 108), 151.
[194] ibid., 154.
[195] Opinion of AG Kokott in Case C-8/08 *T-Mobile Netherlands v. Raad van bestuur van de Nederlandse Mededingingsautoriteit*, ECLI:EU:C:2009:110, para. 89-90.
[196] F. Ghezzi and M. Maggiolino, *'Bridging EU Concerted Practices with U.S. Concerted Actions'*, (2014) Journal of Competition Law & Economics, 10(3), pp. 647-690, 661.
[197] A. Scordamaglia, (n 46), 26.
[198] Horizontal Guidelines, (n 146), para. 62.
[199] Case C-455/11 *Solvay v. Commission*, ECLI:EU:C:2013:796, para. 44.

it results in an economic test according to which the defendant acted in a way in which the practice would be seriously undermined.[200]

Secondly, as to the categorisation of information exchanges as restrictions of competition by object, it is worth recalling the reasoning made by the CJEU in *T-Mobile Netherlands*. Therefore, the Court noted that an exchange of information between competitors constitutes a restriction of competition by object whereby the exchange has the ability to remove the uncertainties as to the conduct of the undertaking concerned.[201] This would seem problematic as the finding of the Court does not necessarily follow the economic literature on exchange of information according to which there are instances in which information sharing on future prices does not raise anticompetitive issues.[202]

Moreover, the categorisation as by object restriction made by the Commission contradicts its own policy in relation to exchanges of information as self-standing infringements. Thus, in the Maritime Transport Guidelines the Commission stated that an information exchange on itself might constitute a restriction of competition by effect.[203] Moreover, the Court stated that restrictions of competition by object refer to those types of coordination which according to the experience by their very nature reveal a sufficient harm to competition that would not require further analysis of their effects on the market.[204] It would seem thus unreasonable to infer an anticompetitive object of information exchange given the lack of empirical evidence as to the universal anticompetitive effects of such practices.

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[200] J. Fos, (n 108), 170 and footnote 529.
[201] Case C-8/08 *T-Mobile*, (n 144), para. 43.
[202] J. Padilla, *The elusive challenge of assessing information sharing among competitors under the competition laws* in *Information Exchanges between Competitors under Competition Law*, DAF/COMP(2010)37, (OECD 2010), pp. 434-445, 437.
[203] Guidelines on the application of Article 81 of the EC Treaty to maritime transport services, OJ. C245, 26.9.2008, p. 2-14, para. 43.
[204] Case C-67/13 *CB v. Commission*, EU:C:2014:2204, para. 49 et seq.

However, what is important to the present inquiry is that the categorisation of information exchanges as restrictions of competition by object amplifies the issues created by the causality presumption.[205] In this regard, it should be recalled that according to the Horizontal Guidelines the possibility of an exemption under Article 101(3) it seem highly unlikely in the case of exchange of information on future prices.[206] Also, it has been argued that participation in concertation having an anticompetitive object leads to a 'strict liability' infringement as there is little room for rebutting the presumption by showing lack of actual effects.[207] Moreover, the case-law of the Courts stated that in determining the anticompetitive object the subjective intention of the parties does not constitute an essential requirement.[208] Accordingly, the EU Courts adopt an objective test in analysing whether a restriction is anticompetitive by object which in turn attach no importance to neither the parties' real intention nor their degrees of awareness.[209] This in turn leads to the conclusion that the presumption of innocence should correct the application of the presumption of effects only to those practices of which anticompetitive effects are demonstrated by compelling economic and empirical evidence.[210]

To sum up, in order to condemn infringements of competition in the case of information exchanges the Court has developed a legal framework based on a set of legal instruments that potentially infringe the presumption of innocence at both procedural and substantial level. Firstly, from a procedural law perspective, by equalling the mere sharing of information with

[205] M. Bronckers and A. Vallery, (n 50), 566.
[206] Horizontal Guidelines, (n 146), para. 74.
[207] A. Scordamaglia-Tousis, (n 27), 234.
[208] Joined Cases C-29-30/83 *CRAM v. Commission*, ECLI:EU:C:1984:130, para. 26.
[209] A. Scordamaglia-Tousis, (n 27), 217.
[210] M. Bronckers and A. Vallery, (n 50), 566.

concertation and then by establishing a presumption of causality in connection with the categorisation of information exchange as a by object restriction the Commission shifts the burden of proof to an unreasonable level.[211]

Secondly, at a substantive level, the causality presumption is inconsistent with the principle of fault.[212] In this regard, it has been pointed out that the presumption is based on the assumption that undertakings are rational agents implying that they will adapt their behaviour according to the information they gather choosing thus to abide or to distance itself from the practice envisaged by its competitors.[213] Moreover, whether a company leads its competitors to believe that it had accepted the terms of their anticompetitive arrangement, this gives the competitors an incentive to pursue the anticompetitive practice.[214] Consequently, in order to separate itself from the information received unintentionally the undertaking in question necessarily needs to make its rivals know that it does not pursue the same anticompetitive aim.[215] Nonetheless, it should be mentioned that the opt-out rule has been required in the context of cartels upon evidence of parallel behaviour.[216] Thus, it could be argued that the presumption is tailored on an economic test comprising those actions taken by the party which are capable of destabilising the cartel as it seems almost insurmountable for the defendant to prove that it did not take into account the information unwillingly received.[217]

[211] ibid.564.
[212] J. Fos, (n 108), 199.
[213] F. Ghezzi and M. Maggiolino, (n 197), 669.
[214] ibid., 660.
[215] ibid., 661.
[216] ibid.
[217] J. Fos, (n 108), 200

4.3. The Sufficient Degree of Culpability to Legitimise the Imposition of Competition Law Sanctions

The following subsection aims at tackling the issue regarding the level of culpability required to impose sanctions for antitrust infringements in the light of the criminal nature of competition law offences generally, and in particular cartel offences.

As it has been mentioned above, the retribution-based justification of criminal punishment presupposes the observance of two principles, namely culpability and proportionality.[218] The former relates to the state of mind of the defendant *vis-à-vis* conduct and its consequences, whereas the latter concerns the severity of the sanctions. In this regard, it has been pointed out with reference to cartel offences should be defined as to consider the blameworthiness of the offender, and to ensure that the punishment as respond to the unlawful conduct reflects the principle of proportionality.[219] Thus, a legitimate enforcement of criminal antitrust sanctions entails that the mentioned principles are respected. In the remainder of this subsection, it will be analysed whether the current EU competition law enforcement system fully respects the principle of culpability.

According to Article 23(2) of Regulation 1/2003, a fine can be imposed when undertakings commit infringement either with intention or negligence. At the outset, the system employed by the implementing regulation seems to respect the requirement of culpability. The relevant test for intention to be find is that the undertaking 'could not have been unaware that its conduct was aimed at

[218] P. Whelan, (n 6), 85.
[219] S. Braum, *'Taking a Chance on Per Se Cartel Crime?'* (2012) New Journal of European Criminal Law 3(2) 112, 113.

restricting competition'.[220] It follows that for an undertaking to be considered that it acts intentionally a certain level of awareness *vis-à-vis* the consequences (i.e. dangerousness) of its conduct.[221] An offender is considered to act negligently whereby it fails to foresee the results of his conduct in a situation in which a normally informed and diligent person could not fail to foresee the results thereof.[222] At the outset, it seems that the EU antitrust enforcement system when fines are imposed requires the observance of the offender's responsibility.

However, it has been mentioned that it cannot be argued that the system establishes a sufficient degree of fault to enable it to impose sanctions of a criminal nature as it punishes negligent conduct.[223] In this regard, it has been argued that in order to constitute a criminal offence the unlawful conduct should be committed with criminal intent and not with negligence.[224] Similarly, under the US regime, intent constitutes an essential requirement to establish criminal liability.[225] Thus, in a rule of reason case, the US Supreme Court established that the fault requirement is sufficient if it is represented either by an intention to cause unlawful results or at least knowledge that the actual unlawful consequences of the conduct are 'probable'.[226] Also, in Australia the required fault elements are intention or knowledge/belief.[227] Thus, from this perspective the current system in EU fails to provide for a sufficient degree of culpability.

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[220] Case T-143/89 *Ferriere Nord v. Commission*, ECLI:EU:T:1995:64, para. 41.
[221] J. Fos, (n 108), 194.
[222] Case C-26/75 *GM v. Commission*, ECLI:EU:C:1975:150, para. 1389.
[223] P. Whelan, (n 6), 87.
[224] J. Wils, *'Is Criminalization of EU Competition Law the Answer?'*, (2005) World Competition, Vol. 28, No.2.
[225] *United States v. US Gypsum Co*. (1978) 438 US 422, para. 435.
[226] ibid., paras. 444-446.
[227] C. Beaton-Wells and B. Fisse, *Australian Cartel Regulation: Law, policy and practice in an international context*, (Cambridge University Press 2011), 137.

Nonetheless, there may be instances where the intention test as developed the CJEU fails to consider properly the degree of culpability necessary to impose sanction of a criminal nature. It has been pointed out above that in order to punish the intention to pursue a certain behaviour it must exist some degree of knowledge as to the dangerous consequences of the conduct.[228] In this respect, in the context of condemnations of information exchanges as restrictions by object it seems unreasonably to infer an intention to commit the infringement. Firstly, given the lack of clarity regarding the potential effects of information exchanges it would seem unproportionate to punish a conduct which is not clearly anticompetitive.[229] Secondly, it does not fully respect the principle of culpability. Since the law on information exchanges does not provide for a sufficient clear rules to be followed, the offender does not have sufficient knowledge of the rule which in turn affects its willingness to violate such a rule.[230]

Thus, it would be appropriate that the Commission and the Courts assess these issues closely in future and provide for a clearer legal framework that would not clash with the culpability principle which ultimately stems from the rule of law.

5. Conclusion

This article has assessed whether the EU competition law raises concerns as to the legitimacy of the system designed to ensure its enforcement. In doing so, it analysed whether the current system sets a fair balance between two fundamental yet diverging interests: effectiveness and protection of fundamental rights. The approach followed essentially consisted in a gradual

[228] J. Fos, (n 108), 194.
[229] M. Bronckers and A. Vallery, (n 50), 566.
[230] J. Fos, (n 108), 131.

shift from the broad perspective of enforcement policy towards the narrower field of the legal mechanisms applying the policy.

Firstly, it has been analysed the theoretical foundations underpinning the sanctioning system which is based on a mixed approach of the theories of deterrence and retribution. In this regard, it has been argued that in the last two decades the Commission and the Courts pursued a more deterrence-based policy in order to increase the effectiveness of the enforcement efforts leading to an inherent disequilibria in the system. This in turn translated into a policy which fails to set a fair balance between effectiveness and protection of fundamental rights.

Secondly, the focus has shifted to the concrete legal mechanisms developed to ensure the enforcement of competition rules. It has been mentioned that the deficiencies stem from the fact that the current system has developed in way in which it has not been thought initially, namely a criminal sanctioning system. As such, it has been argued that Article 101 TFEU is a general principle rather than a clearly defined rule. This in turn points towards the inadequacy as to imposing fines based on the application of such general principle. Moreover, the implementing regulation has failed to develop a proper legal framework allowing for imposition of criminal sanctions in accordance with the basic principles stemming from the rule of law (i.e. legality, certainty and responsibility).

Thirdly, it has been illustrated that the Courts interpretation of the notions of agreement, concerted practice and restriction of competition by object is based on deterrence with a minimal consideration for retributivist concepts such as culpability. As such, in finding infringements the Courts rely on as series of legal instruments which potentially infringe the presumption of

innocence. This became more obvious in the context of the characterisation of cartels and information exchanges as stand-alone infringements. This particular scenario creates tensions with the presumption of innocence at both procedural (i.e. burden and standard of proof) and substantive level (i.e. principle of fault).

Finally, it has been tackled the issue regarding the level of culpability that ensures legitimacy in imposing sanctions of a criminal nature. In this context, it has been argued that it may be room for improvement regarding the degree of blame required to impose criminal sanctions. A comparative approach has been carried out to illustrate how two jurisdictions which have formally criminalised competition law offence dealt with the culpability requirement.

EU COMPETITION SOFT LAW, NATIONAL COURTS and MULTI-LEVEL ENFORCEMENT: CERTAINTY and CONSISTENCY SECURED?

Zlatina Georgieva*

This paper, using literature on the evolution of EU administrative governance, surveys and explains reactions of national courts to European Commission-issued soft law in the decentralized competition enforcement regime. While soft law in competition policy was used since the 1960's, decentralization[1] exposed the field to the dynamics of multi-level governance,[2] which gave a central role to said instruments in securing the consistent enforcement of the multi-layered regime. This paper empirically ascertains the workings of European Commission-issued competition soft law in national courts and shows more is needed to achieve the consistent enforcement through soft means envisioned by the European Commission.

Keywords: *soft law, competition, decentralized enforcement.*

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[1] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2002] OJ L 001/1.

[2] I. Maher, 'Regulation and Modes of Governance in EC Competition Law: what's New in Enforcement?' (2007) 31(6) Fordham International Law Journal, 1717.

1. Introduction

In the not so distant 2009, Maher pointed out that decentralized EU competition enforcement contains conflicting mandates, whereby, on the one hand, 'there is an emphasis on procedural and substantive consistency within and across jurisdictions',[3] while at the same time the regime generates 'soft law solutions that, although functional and often effective, have an uncertain legal status.'[4] She also acknowledged that the observed dichotomy underpins the tension between 'discretion and generality, functionality and normativity that is a characteristic of law in general'.[5] This duality is also at the core of the phenomenon of competition *soft law* that forms the main research interest of this contribution. Therefore, the question this paper explores is whether consistency and the certainty requirement that the European Commission **(*Commission*)** pairs it with[6] are advanced or hindered by soft law instruments now proliferating in the competition domain.

Answers to this quandary are to be obtained on the basis of empirical observations derived from a previously generated sample of 112 national judgments[7] that engage with Commission-issued competition soft law. [8] The

[3] I. Maher, 'Functional and Normative Delegation to Non-majoritarian Institutions: the Case of the European Competition Network' (2009) 7 Comparative European Politics, 425.
[4] ibid.
[5] ibid.
[6] Paragraph 22 of Regulation 1/2003, talks about certainty and uniformity (not consistency). Insofar as uniformity is defined as 'deterministic in terms of outcomes' by Sauter, it can be argued that the Commission attributes the same meaning to the term 'consistency' in para. 86 of the White Paper on Modernization of the Rules Implementing Articles 85 and 86 of the EC Treaty, [1999] OJ C 132/01. In this sense, the terms uniformity and consistency as employed by the Commission are synonyms. See W. Sauter, *Coherence in EU Competition Law* (OUP, 2016).
[7] Z. Georgieva, 'The Judicial Reception of Competition Soft Law in the Netherlands and the UK' (2016) 12(1) European Competition Journal, 54 and Z. Georgieva, 'Competition Soft Law in French and German Courts: a Challenge for Online Sales Bans Only?' (2017) 24(2) Maastricht Journal of European and Comparative Law, 175.
[8] The judgments are derived from the following influential EU jurisdictions: France, Germany, the UK and the Netherlands.

judgments identified have arisen in both public and private enforcement settings. National courts are the objects of this study as they are focal points of ultimate decision-making in the decentralized competition enforcement regime – it is at the judicial stage that competition law is given its final shape and where the ultimate decision as to the (legal) status of supranational soft law in the national legal setting is made. In particular, the focus of this paper is on the extent to which legal effects are attached to supranational soft law by national courts. To the extent that legal effects are recognized, national courts could be seen as deviating from the role of the 'formalist judiciary' and gearing towards a more flexible engagement with (legal) sources. The ultimate question, thus, is whether – if detected – such attitude by national judges undermines certainty and consistency or – on the contrary – enhances them.

This research setup is particularly suited to shed light on the assertion made by the Commission in its White Paper on Modernization more than 10 years ago – namely, that soft law instruments in the field of EU competition law are to further consistency and certainty in the new enforcement setup. [9] After having established its conclusions on this point, and having ventured to explain some of the observed outcomes, the current work questions whether and, and if so which, conditions should apply to national (and EU) courts in order for them to (better) serve the said principles.

For the execution of this setup, as a first step, the tensions within the concept of soft law at the supranational and national levels will be outlined (**Section 2**). In **Section 3**, the empirical sample of relevant national case law is presented and possible reasons for the observed empirical results are given.

[9] Commission White Paper on Modernization of the Rules Implementing Articles 85 and 86 of the EC Treaty, [1999] OJ C 132/01.

Section 4 in turn, tackles the implications for certainty and consistency of the presented sample, and takes a normative stance as to the level to which the observance of certainty and consistency in a decentralized system would impose duties on national and supranational enforcers with regard to their engagement with Commission-issued soft law. **Section 5** shall be the conclusion.

2. Commission-issued Competition Soft law, Multi-level Governance, and the Role of the Judiciary

2.1. The tensions within supranational competition soft law

The instruments hereby referred to as supranational (or Commission-issued) competition soft law fit into the category of administrative guidance that (1) serves as interpretative aid to rules already enunciated in hard law and/or (2) expresses rules by means of which the Commission circumscribes its decisional discretion. [10] In the context of decentralization of EU competition law, soft law instruments were intended by the Commission not just to restrict its discretion, but to also influence decision-making by national administrative authorities and national courts, which makes the study of soft instruments' possible legal effects at the national level all the more relevant.

In this context, it is important to note that the Commission does not always stay within the limits prescribed by hard law when issuing its administrative soft law. In particular, the institution has made use of soft law to introduce a

[10] Senden categorizes these administrative instruments as 'interpretative' and/or 'decisional'. See L. Senden, *Soft Law in European Community Law: its Relationship to Legislation* (Wolf Legal Publishers, 2003), 143-159. Senden believes that most competition soft law cannot be seen as either purely interpretative or purely decisional – usually it is a mix of the two. See also V. Korah, *Intellectual Property Rights and the EC Competition Rules* (Hart Publishing, 2006), 23-24.

'more economic' reading of EU competition law post decentralization.[11] This is visible in the content of, for instance, the Article 101(3) Guidelines (the ***101(3) Guidelines***), which were introduced in the aftermath of decentralization and which contain several novel additions to the existing status quo at the time.[12] This practice is even more obvious in the Article 102 Guidance Paper (the ***Guidance Paper***), which deviated from established hard law so much so that it was presented as a document enunciating prospective 'enforcement priorities', instead of containing the usual guidelines delineating the Commission's view on the law and binding its discretion. It can thus be argued that the Guidance Paper, although undoubtedly interpretative content-wise,[13] is not to produce the legal effects attributed to other administrative soft instruments issued in the field due to its form – namely, one cannot speak of a self-binding effect on the issuing institution since administrative authorities are generally not to be bound by their enforcement priorities.[14]

As argued by Pace, the only way in which the Guidance Paper can become binding on the Commission and indirectly bind national-level enforcers, is if the Commission follows it in its enforcement decisions, which will in turn have to be observed at the national level by virtue of Article 16 of Regulation 1/2003.[15] However, as will be shown in Section 3.2, the Commission has so far met resistance in gearing the enforcement of Article 102 in the direction

[11] F. Berrod, 'L'utilisation de la Soft Law comme Méthode de Conception du Droit Europeén de la Concurrence' (2015) 588 Revue de l'Union Europeéne, 288.
[12] P. Lugard & L. Hancher, 'Honey, I Shrunk the Article! A Critical Assessment of the Commission's Notice on Article 81(3) of the EC Treaty' (2004) 25 European Competition Law Review.
[13] G. Monti, 'Article 82 EC: What Future for the Effects-Based Approach?' (2010) 1 Journal of European Competition Law and Practice, 2. See also L.F. Pace, 'The Italian Way of Tackling the Abuse of Dominant Position and the Inconsistencies of the Commission's Guidance: not a Notice but a Communication' in Pace (ed.), *The Impact of The Commission's Guidance on Article 102* (Edward Elgar, 2011).
[14] Judgment of 18 September 1992, *Automec v Commission*, T-24/90, ECLI:EU:T:1992:97.
[15] Pace (n 13).

envisioned by the Guidance Paper. A reason for this can be the Guidance Paper's status of prospective enforcement priorities – essentially a 'weaker' instrument in the pool of administrative guidelines issued by the Commission.

The bottom-line is that adding novel elements to the interpretation of already existing law poses a problem from a rule of law perspective, undermining the same principle of certainty that soft law is supposed to further. This dichotomy is also reflected in the refusal of the Court of Justice of the European Union (***CJEU***) to engage with such instruments. As Senden testifies in her survey of the usage of soft law in various EU law domains, 'when a soft law act presents a subjective interpretation of Community law […] the Court is not willing to take it into account.'[16] Yet again, recent scholarly and practitioner's accounts on national judicial reactions to supranational competition soft law paint a different picture than the one detected in CJEU judgments by Senden. For instance, Schroeder observes that 'guidelines are needed for predictability and judges tend to accept such guidelines even where these have no legal value other than binding the authority that issued them.'[17] How can this discrepancy be accounted for? The answer could lie in the different institutional setup of EU policies.[18]

Certain EU domains are organized on the basis of concrete legislative mandates, with delegation of powers strictly delineated in appropriate legislative instruments. While EU action in such domains derives its strength from the principle of legality, in other fields – where mandates are broad and discretion is significant – EU action gets its strength from considerations of

[16] Senden (n 10), at 477.
[17] D. Schroeder, 'Normative and Institutional Limitations to a More Economic Approach' in Drexl et al. (eds.), *Competition Policy And The Economic Approach: Foundations And Limitations* (Edward Elgar, 2011), s. 283.
[18] J. Poulle, *Réflexion sur le Droit Souple et le Gouvernement d'Entreprise* (L'Harmattan / Entreprises et management / Les Intégrales, 2011), 59.

effectiveness[19] and fairness that are reflected by procedural rule of law guarantees.[20] This reasoning will be explained below.

The first account described above, espousing the CJEU attitude to soft law, is based on the idea that soft law can be engaged with by courts when issued on the basis of legislative delegation under a concrete mandate in accordance with the principle of legality (the 'legislative model').[21] However, in the context of EU competition law, where hard law rules are deliberately open-ended and leave the Commission (and other enforcers) broad discretion in the field, determining what lies within or without the law – unless it is an obvious deviation as the Guidance Paper – is a challenge. In this line of thinking, Larouche argues that competition enforcement is validated not by the workings of the 'legislative model', but is rather anchored in the so-called 'adjudicative model'.[22] According to this model, the Commission, issuing its decisions under a broad legislative mandate, is also subject to 1) the observance of procedural guarantees, 2) the obligation to set out reasons and 3) the possibility of judicial review.

In this sense, it could be argued that insofar as soft law concerning the Commission policy discretion and the way it views the law is indirectly subject to control on the basis of the procedural rule of law guarantees enumerated above, it does not pose a threat to rule of law values. However, how does this assertion play out under an enforcement model where the Commission is not the sole enforcer of EU Competition Law, and where national courts and authorities are supposed to cater for consistent EU-wide

[19] ibid., 61.
[20] Maher (n 2), 420.
[21] On the legality principle, see C. van Dam, 'De Doorwerking van Europese Adminitratieve Soft Law: in Strijd met de Nederlandse Legaliteit' (2013) NALL – Netherlands Administrative Law Library, S.1.
[22] P. Larouche, *Competition Law and Regulation in European Telecommunications* (Hart Publishing, 2000), 119.

application under generally phrased substantive legal provisions set at the supranational level? In the sections that follow, this question will be explored further and the implications its answer has for the principles of certainty and consistency will be outlined. Suffice to say that decentralization obfuscated enforcement, where the legal effects of supranational competition soft law for national actors are now subject to the vicissitudes of multi-level governance interactions. Therefore, in order to survey the legal effects of supranational soft law in national courts, it is only appropriate to apply a theory embedded in multi-level governance literature.

2.2. A multi-level governance perspective

Following Maher's definition, 'governance can be understood as the diffusion and fragmentation of governmental arrangements, which in this context is exemplified by the multi-level governance structures of the EU.'[23] In such a setup, traditional law and non-binding soft law coexist on the basis of interactions famously dubbed the 'hybridity', 'transformation' and 'gap' thesis by de Burca and Scott.[24] The idea behind this theory can be summed up as follows: the hybridity thesis presupposes coexistence between law and governance processes and instruments, the gap thesis assumes their mutual exclusion, and the transformation scenario hypothesizes that law and governance mutually influence and shape one another, with no clear boundaries between the two being acknowledged.

[23] I. Maher, 'Regulation and Modes of Governance in EC Competition Law: what's New in Enforcement?' (2007) 31(6) Fordham International Law Journal, 1713.
[24] G. de Burca and J. Scott, 'New Governance, Law and Constitutionalism' in G. de Burca and J. Scott (eds.), *Law and New Governance in the EU and the US* (Essays in European Law) (Hart Publishing, 2006).

As Korkea-Aho testifies, this theoretical framework also neatly depicts the ways in which courts engage –or fail to engage – with new governance processes, the issuing of soft law being such a process.[25] On the one hand, the gap thesis would reflect a formalist judicial attitude to soft law, whereby courts see themselves as interpreters of hard legal rules only, the aim being to either (1) lay out and enforce rights and obligations, or (2) provide doctrinal elaborations and clarifications, or (3) settle disputes.[26] On the other hand, both the hybridity and transformation thesis would signal a flexible judicial approach and courts willing to accommodate new governance processes in judicial practice.[27] On the basis of these insights, the current paper envisions four possible reactions of national courts to supranational competition soft law.

A rejection scenario that depicts a formalist judiciary pursuant to the gap thesis can be envisioned when courts explicitly refuse to engage with the contents of a soft law instrument. The argument that would be given in such a case (if at all) would be that the court does not interpret non-binding provisions (non-law).

A recognition category, depicting a more flexibly-oriented judiciary, would conversely encompass all instances where the court explicitly engages soft law in its reasoning – this engagement can constitute either agreement or disagreement with the contents of a soft law instrument. Pursuant to a hybridity thesis, this would likely happen through invocation of soft law together with hard law. It is also possible that judicial interpretation happens

[25] E. Korkea-aho, *Adjudicating New Governance: Deliberative Democracy in the European Union* (Routledge, 2015), 17-21.
[26] G. Shaffer & M. Pollack, 'Hard vs. Soft Law: Alternatives, Complements and Antagonists in International Governance' (2010) 94 Minnesota Law Review, 748.
[27] A theoretical approach to positively accommodate new governance in courts is developed in J. Scott and S. Sturm, 'Courts as Catalysts: Re-thinking the Judicial Role in New Governance' (2006) 13 Columbia Journal of European Law, 565.

through the usage of general principles of law as argued in a previous work of this author.[28]

The possibilities for indirect judicial recognition (persuasion) and indirect rejection (neglect) are also hypothesized. Persuasion is defined as the case where a court might not be explicitly citing a soft law instrument in its judgment, but the wording used therein closely resembles the one used in the soft law instrument. Neglect, on the other hand, is detected where the soft law instrument is ignored even if invoked in an argument made by the parties to the dispute.

In light of these theoretical insights, the paper now proceeds to examine the empirical sample of national judgments that engage with supranational competition soft law. The section will first offer a general discussion of the empirical results and then proceed to examine them in light of the gap, hybridity and transformation framework presented above. Since, for practical reasons, the full sample of judgments cannot be presented in detail, only select cases illustrative of particular important empirical observations will be discussed. The complete sample will, in turn, be presented in the form of graphs in Annex I.

3. National Judicial Treatment of Supranational Competition Soft Law

3.1. General Findings of the Empirical Inquiry: Results and Possible Explanations

The empirical dataset gathered consists of 112 national public and private enforcement competition cases of the judiciaries of several leading EU

[28] Z. Georgieva, 'The Judicial Reception of Competition Soft Law in the Netherlands and the UK' (n 7).

jurisdictions - France, Germany, the UK and the Netherlands.[29] The sample was derived through opting for an exhaustive examination of national judicial engagement with a selection of the numerous soft law instruments issued by the Commission in the field.[30] The search for judgments was performed on the basis of key terms, consisting of the title of each respective instrument translated into the target language, and several variations thereof.[31] Additionally, for exhaustiveness purposes, the search was performed through cross-checking on several national (public and private) case law databases.[32]

The empirical data presented in Table 1 below suggests that the overwhelming majority of judicial recognition of soft law happens with regard to the Guidelines on Vertical Restraints (the ***Vertical Guidelines***), which are also the most cited supranational competition soft instrument in the courts of the jurisdictions under observation. Slightly more than 60 per cent of all judicial soft law references are references to the said guidelines. France has a particularly strong contribution to this high total as 77 per cent of the judgments that mention substantive supranational competition soft law in that

[29] France, Germany and the UK were chosen for comparative empirical analysis because they are 'parent' jurisdictions within the terminology of modern comparative law introduced by the seminal work of Zweigert and Kotz; see K. Zweigert and H. Kötz, *An Introduction to Comparative Law* (translator Tony Weir ed., Clarendon Press, 1998). The Netherlands, on the other hand, besides being a founding EU Member State like France and Germany, is also often seen as a good case study because it 'usually tries to synthesize the best elements from its larger neighbors'. For this latter idea, see M. de Visser, *Network-based Governance in EC Law* (Hart Publishing, 2009), 7.

[30] Only those guidelines that contain the substantive principles for assessment of anti-competitive practices under Articles 101 and 102 TFEU are taken into account. These are: the Vertical (Agreements) Guidelines (2010/C 130/01), the Horizontal (Agreements) Guidelines (2011/C 11/01), the Technology Transfer Guidelines (2014/C 89/03), the (Article 102) Guidance Paper (2009/C 45/02) and the Article 101(3) Guidelines (2004/C 101/08). All soft law in the field can be consulted through the website of the Commission. European Commission Antitrust Legislation, available at <http://ec.europa.eu/competition/antitrust/legislation/legislation.html/>.

[31] The variations included partial searches with just a few of the words in the title (instead of the entire title) used as search terms.

[32] For France: Legifrance, Lamyline, Lextenso; for Germany: BeckOnline, Openjur; for the UK: Westlaw UK, Bailii.org; for the Netherlands: Kluwer, Rechtspraak.nl.

country deal with the Vertical Guidelines. By contrast, the Guidance Paper receives the lowest amount of references – a mere seven per cent – and is also often either rejected or neglected by the national judiciaries.[33] Other two soft instruments under observation in this study – the Guidelines on Horizontal Cooperation Agreements (the ***Horizontal Guidelines***) and the 101(3) Guidelines – are engaged with sparingly (they comprise 15 and 11 per cent of the total cases, respectively). As to the judicial attitudes towards the latter two instruments, it is interesting to observe that, while the Horizontal Guidelines have received their fair share of judicial rejection and neglect, the 101(3) Guidelines seem to be subject to judicial recognition only. The same is true for the Technology Transfer Guidelines (the ***Tech Transfer Guidelines***) – although they were mentioned in merely nine cases, possibly due to their very specific subject matter,[34] they were endorsed judicially on nearly all of these instances. These matters will be addressed further in the Section 3.2 below.

[33] While it is true that the Guidance Paper constitutes mere enforcement priorities for future case selection on the side of the Commission and can in no way bind even the Commission's discretion, this might not be the main reason why courts hesitate to engage with its provisions. A more likely explanation would be the obvious contradiction between the contents of the Guidance Paper and current case law in the dominance arena. In that respect, scholars submit that the Guidance Paper is an attempt by the Commission at changing the law as it stands under Article 102, which is of course going to be resisted by courts. In that respect, see L. Ortiz Blanco and A. Lamadrid de Pablo, 'Expert Economic Evidence and Effects-Based Assessments in Competition Law Cases' in J. Derenne and M. Merola (eds.), *The Role of the Court of Justice of the European Union in Competition Law Cases* (Bruylant, 6th Annual GCLC Conference), 305-312.

[34] O. Stefan, *Soft Law in Court. Competition Law, State Aid and the Court of Justice of the European Union* (Kluwer Law International, 2012). Section 3.04 in particular shows that more topically specific soft instruments tend to be cited less in supranational courts.

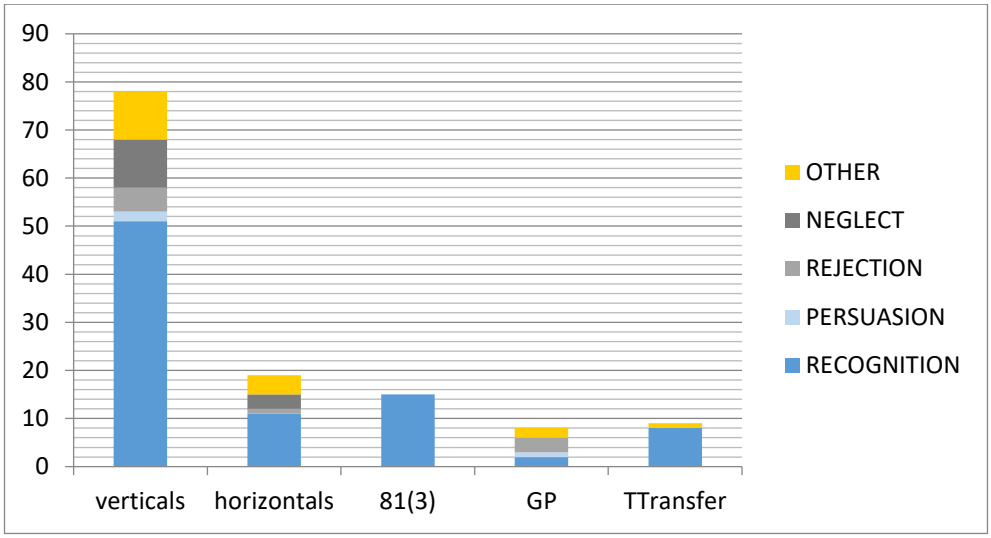

Table 1. Total soft law references per type of instrument

Overall, Table 1 reveals that – especially with regard to the Vertical Guidelines, the Technology Transfer Guidelines and the 101(3) Guidelines – there is significant convergence as to the total instances of judicial recognition, which is a positive outcome from the perspective of consistency and certainty. However, it is also notable that the same soft law instruments are not at all times treated similarly. While it is true that complete convergence is untenable, [35] contradictory treatment of the same soft law instrument – for instance rejection and recognition– that could in the end lead to contradictory decisions on the same subject matter is hereby seen as problematic from the perspective of certainty and consistency. This understanding is also the benchmark by which to assess whether the empirical sample contributes to, or detracts from, the principles of consistency and certainty. In that regard, it must be observed that a specific instrument in the empirical sample – the Guidance Paper – stands out as posing serious challenges. Specific provisions of the Vertical Guidelines, dealing with bans

[35] The same approach is adopted by Larouche. See P. Larouche, 'Contrasting legal solutions and the comparability of EU and US experiences', in F. Leveque & H. Shelanski (eds.), *Antitrust and Regulation in the EU and US: Legal and Economic Perspectives* (Cheltenham: Edward Elgar, 2009).

on online sales via platforms, are also contributing to clashing judicial interpretations between France and Germany and within Germany itself. While these points will be elaborated on in the following section, at the outset a couple of general remarks are in order with regard to the empirical results.

An initial intuition for the sample of judgments was that, in comparison with privately initiated disputes, competition judicial review cases would contain a lot more references to supranational soft law because there is evidence that National Competition Authorities do rely on these instruments in their enforcement practice. [36] It was initially reasoned, therefore, that is was highly likely that references to supranational soft law also figured prominently in judicial review cases. While such instances were indeed detected, they were significantly fewer than the cases in which civil courts engaged with the contents of Commission-issued competition soft law. As Table 2 suggests, references to the selected competition soft law instruments for this study are significantly more numerous in a private enforcement context. This finding is likely to simply reflect the higher total number of private enforcement decisions (vis-à-vis public enforcement ones) in the jurisdictions under observation.[37] In contrast to the 2004 *status quo* when the Ashurst study found competition private enforcement in the EU to be in a state of 'total underdevelopment',[38] private actions have indeed been stimulated by national

[36] M. de Visser (n 29), 260 at fn. 232; see also A. Kallmayer, 'Die Bindungswirkungen von Kommissionsmitteilungen im EU-Wettbewerbsrecht – Mehr Rechtssicherheit durch Soft Law', in C. Calliess (ed.), *Herausforderungen An Staat Und Verfassung: Völkerrecht – Europarecht – Menschenrechte* (Nomos, 2015), 662-682; C. Vincent, 'La Force Normative des Communications et Lignes Directrices en Droit Europeén de la Concurrence', in C. Thibierge et al (ed.), *La Force Normative* (LGDJ, 2009), 691-457.

[37] Tallying up the numbers provided by relevant empirical studies, one comes up with a figure of more than 1500 private enforcement decisions for the 4 jurisdictions in question. The relevant public enforcement figure is less than 500.

[38] D. Waelbroeck et al., 'Study on the Conditions of Claims for Damages in Case of Infringement of EC Competition Rules', available at <http://ec.europa.eu/competition/antitrust/actionsdamages/comparative_report_clean_en.pdf>.

and supranational initiatives and have been on the rise in the past years as observed in a recent OECD report.[39]

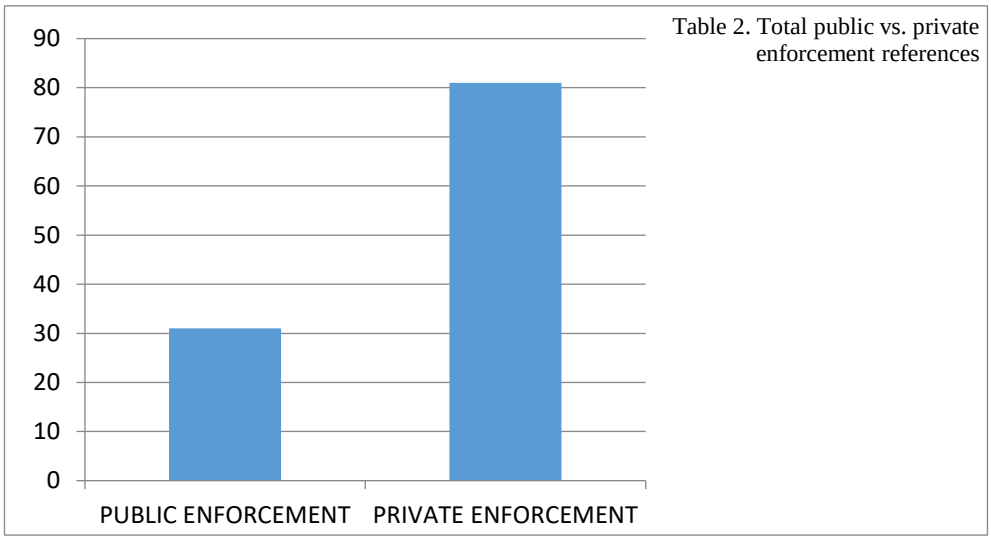

Table 2. Total public vs. private enforcement references

Another observation that merits discussion is the fact that a trend can be detected whereby the soft law instruments subject to this study are almost exclusively invoked in either specialist or higher courts. This finding is aligned with previous literature, [40] which indicates that the higher the instance of the court dealing with a particular competition dispute, the higher its willingness and ability to engage with arguments invoking supranational soft law. The data in Table 3 suggests the same observation applies with regard to specialist courts.

[39] Submission of the United Kingdom, 'Relationship between Public and Private Antitrust Enforcement', available at <http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP3/WD(2015)8&docLanguage=En>.

[40] T. Nowak et al., *National Judges as European Union Judges: Knowledge, Experiences and Attitudes of Lower Court Judges in Germany and the Netherland*s (Eleven International Publishing, 2011).

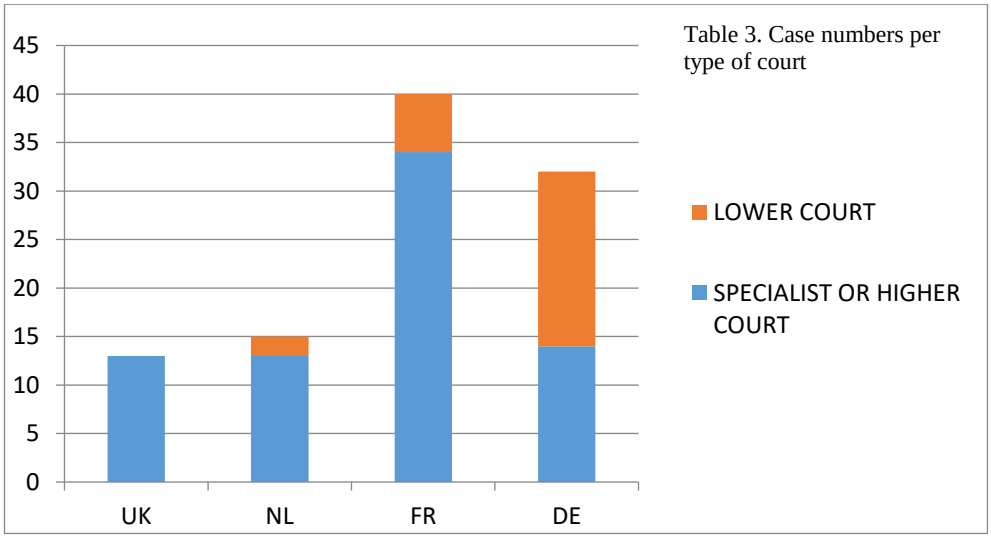

Table 3. Case numbers per type of court

The fact that Germany significantly deviates from the rest of the jurisdictions under observation is relatively easy to explain – in a private enforcement setting (to which all the German cases marked in red belong), claims are always initially lodged at the level of district courts, no matter what the value of the claim is.[41]

Finally, the empirical findings do not support the initial expectation of the author that judiciaries in civil – on the one hand – and common law jurisdictions – on the other hand – will significantly deviate in their engagement with supranational competition soft law (refer to Annex I). Instead, as explained below, the patterns in data suggest that what matters is the specific soft law instrument that courts have before them and whether or not it generally reflects principles already established in hard law.

3.2. Gap, Hybridity and Transformation in National Judicial Discourse

3.2.1. Hybridity

[41] GWB, § 87(1).

When the gap, hybridity and transformation framework is superimposed on the aggregated results presented above, several conclusions can be drawn. Firstly, national courts seem to recognize competition soft law by acknowledging its role as an aid for interpretation of hard law. This co-existence in judicial discourse is demonstrated by observations where the Vertical Guidelines were cited together with the Vertical Block Exemption Regulation.[42] It is also evident in the eight cases in which the Tech Transfer Guidelines were endorsed in the context of the provisions of the Technology Transfer Block Exemption Regulation, [43] or when the Horizontal Guidelines are interpreted together with the Block Exemption Regulations on Specialization[44] and R&D agreements.[45] What is important to emphasize in these scenarios is that – so long as soft law stays within the limits previously charted out by case law and Commission Regulations – its judicial recognition is guaranteed. When this is the case, soft law can even be cited on a 'stand-alone' basis (without reference to pertinent hard law) because it is seen by the court as a shorthand summary of principles already well established in hard law. This often happens with the 101(3) Guidelines[46] in

[42] Commission Regulation No 330/2010 on the on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices [2010] OJ L 102/01.
[43] Commission Regulation No 316/2014 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of technology transfer agreements [2014] OJ L 93/17.
[44] Commission Regulation No 1218/2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of specialization agreements [2010] OJ L 335/43.
[45] Commission Regulation No 1217/2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of research and development agreements [2010] OJ L 335/36.
[46] Some scholars had (erroneously according to the results of this study) hypothesized that the unworkability of the Article 101(3) guidelines will lead to stagnation in case law development at national level; see B. van de Walle de Ghelcke, 'Modernization: will it Increase Litigation in the National Courts and before National Authorities' in D. Geradin (ed.), *Modernization and Enlargement: Two Major Challenges for EC Competition Law* (Intersentia, 2004), 146-7; see also N. Petit, 'The Guidelines on the Application of Article 81(3) EC: A Critical Review' IEJE Working Paper No. 4/2009, available at <http://ssrn.com/abstract=1428558>.

their elaboration on, for example, the cumulative criteria for meeting the Article 101(3) test.[47] These types of treatment of soft law confirm the so-called 'hybridity' hypothesis put forward above and empirically ascertained for the supranational EU competition domain by Stefan.[48] It is thus maintained that the hybridity acknowledged by national courts points to their recognition of the Commission's broad mandate to steer EU competition policy as expressed in its soft law, while also not losing sight of the hard legal framework that comprises the backbone of the enforcement regime.

Another way for the achievement of hybridity in national judicial discourse is through general principles of law that can play the role of a hard law 'anchor' for Commission-issued competition soft law. This observation was empirically ascertained only for one particular general principle of EU law– community loyalty as expressed in Article 4(3) TEU, working together with the consistency principle enunciated in Article 3 of Regulation 1/2003 and the latter's mirror-images at the national level.[49] That the Article 3 consistency principle is related to the principle of community loyalty is

[47] For the indispensability criterion, see C.A. Paris, 13 mar. 2014, RG no. 2013/00714. For all the 4 conditions assessed through the use of the 101(3) guidelines, see C.A. Paris, 31 jan. 2013 , RG no. 2008/23812; OLG Düsseldorf, Beschluss v 13.11.2013 (VI - Kart 5/09 (V)), BeckRS 2015, 03537; OLG Düsseldorf, Beschluss v 09.01.2015 (VI Kart 1/14 (V), BeckRS 2015, 03467. These guidelines are also used for clarification of distinctions set in stone, such as the existence of a difference in market power needed for establishment of breach of Article 101 and 102 TFEU, respectively. In that regard, see Independent Media Support Ltd v Office of Communications [2008] CAT 13.

[48] Stefan (n 34), Chapter 5, 137-156.

[49] Competition Act 1998, SI 1998, c. 41, s.60 (3), available at <http://www.legislation.gov.uk/ukpga/1998/41/contents>; Memorie van toelichting tot de Mededingingswet van 9 mei 1996, Kamerstuk 24707 nr.3, available at <https://zoek.officielebekendmakingen.nl/kst-24707-3.html>. Pursuant to the consistency obligation of Article 1 of the Dutch Explanatory Memorandum, certain provisions of supranational hard law instruments (of the VBER for instance) have been implemented in the national legal system through Articles 12 and 13 of the Dutch Competition Act (Mededingingswet). For an explanation, see para. 2.40 of the Batavus decision of the Dutch Hoge Raad (ECLI:NL:HR:2011:BQ2213); GWB Novelle at <http://www.gesetze-im-internet.de/gwb/index.html>. No similar provision was found in Book 4 of the French Commercial Code.

suggested by the European Commission itself in the Notice on Cooperation between the Commission and National Courts.[50] This interaction allows the principle of community loyalty, which cannot create obligations on its own,[51] to enable the more concrete Article 3 obligation (taken together with parallel national obligations) to endow national courts with the ability to engage with the contents of supranational soft law.

A clarification is hereby in order – in cases which do not have community dimension, Article 3 of Regulation 1/2003 does not apply, but supranational soft law can nevertheless be interpreted by national courts by virtue of the above-quoted national-level (self-imposed) consistency obligations that mirror the substance of the latter provision.[52] For cases with a community dimension, national-level consistency principles also play a role in anchoring Commission-issued competition soft law[53] although – strictly speaking – they should not apply.[54] This phenomenon can be explained by the fact that some national consistency obligations – such as s.60 of the UK Competition Act – are even more specific than Article 3 of Regulation 1/2003 and thus play a facilitative role in grounding supranational soft law in national judicial discourse even in cases where they should not apply.[55]

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[50] Commission Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC [2004] OJ C 101/04.
[51] de Visser (n 29), 313.
[52] This phenomenon can be observed with regard to the usage of the Horizontal Guidelines in Germany. See, for instance, LG Hannover, Urteil vom 15.06.2011 - 21 O 25/11, BeckRS 2012, 00337.
[53] For the Netherlands, see Rechtbank Leeuwarden 04 october 2006, rolnr. 68134 / HA ZA 05-64 (first instance), Gerechtshof Leeuwarden 06 october 2009, rolnr. 107.001.584/01 (on appeal) and Hoge Raad 16 september 2011, rolnr. 10/00372 (cassation).
[54] For the UK, see Independent Media Support Ltd v Office of Communications [2008] CAT 13.
[55] Although no specific national-level consistency/convergence obligation exists in France, Vogel testifies to the fact that supranational competition soft law is used as an analytical guide (guide d'analyse) even in purely national cases; see L. Vogel, *Droit de la Concurrence* (Bruylant, 2015), Ch.2, S.1, para. 742.

The above-described judicial attitudes show that national judiciaries are creative in their approaches to supranational competition soft law and grant legal effects to soft instruments on the basis of legal constructions reflecting hybridity as defined by Scott and de Burca. So long as the supranational competition judgments, the decisional practice of the Commission, and the guidance given in soft law are not contradicting each other, national courts allow soft law to produce legal effects as interpreted together with hard law or in light of general principles of law. The achievement of consistency and certainty in that respect is shaped by the multi-level interactions of all the relevant national and supranational actors. In this broader sense, the regime can achieve consistency and certainty with respect to its soft law practice by aligning the way in which national and supranational actors engage with soft law and attribute legal effects to it.

In the alternative, as will be seen in the following section, engagement with these instruments remains fortuitous and can be compared with the practice of 'cherry-picking' observed by Elaine Mak in her study on the engagement of higher national courts with foreign sources of law.[56] However, unlike foreign legal sources, supranational competition soft law is embedded within a highly institutionalized EU law domain, where the strong call for consistency in the aftermath of decentralization suggests a more systematic approach. All this is not to suggest that soft law has to be complied with at all times, but that a dialogue between enforcement actors about its contents – what is seen as a viable or an unviable rule – has to be encouraged and made explicit. As will be argued in Section 4, such a course of action will not only enhance certainty and consistency, but also boost the regime's

[56] E. Mak, *Judicial Decision-Making in a Globalized World: A Comparative Analysis of the Changing Practices of Western Highest Courts* (Oxford: Hart Publishing, 2013).

effectiveness.[57] This suggestion and the concrete proposals for action that flow from its execution will be further delineated in Section 4 below.

3.2.2. Gap in the Shadow of the Preliminary Ruling Procedure

Currently, dialogue about the contents of soft law instruments that are not supported by supranational precedent or prior Commission decisions happens only occasionally and by means of the slow-paced preliminary reference procedure. While preliminary rulings are undoubtedly one way to enhance consistency and certainty by means of vertical 'signaling' between national and supranational enforcers,[58] it will also be shown that more often than not national courts decide not to refer. They often choose to distance themselves from soft law that does not have the backing of hard law. In this case, national courts, not having jurisdiction to judge on the legality of EU law and aware that a certain soft law instrument or a rule expressed within it goes beyond or against established hard law, adopt a non-motivated stance of rejection or neglect as defined in Section 2.2 above. Although such an attitude is understandable from the perspective of *legality,* it creates a 'gap' as described by Scott and de Burca – a gap which undermines the overall *effectiveness* of the decentralized enforcement regime by hampering dialogue as to the legal value and effects of the said instruments. Dialogue can be furthered either by more intensive use of the preliminary ruling procedure, which is slow and in that sense ineffective, or by the introduction of a legal obligation on national courts and authorities to 'comply or explain' their (dis)engagement with supranational competition soft law. While the concrete dimensions of the

[57] For the relationship between these concepts, see Sauter (n 6).
[58] F. Snyder, 'Soft Law and Institutional Practice in the European Community' in S. Martin (ed.), *The Construction of Europe* (Springer, 1994), 204. Snyder expresses the idea of 'signaling' happening horizontally (with regard to the interactions between the Commission and supranational courts); the current author suggests it is also happening vertically (as between the national and supranational courts).

'comply or explain' obligation will be delineated in Section 4, it is hereby important to observe that such an approach will enable a more streamlined (judicial) engagement with soft law, whereby its legal effects will be better cognizable. This proposal is all the more relevant in light of the fact that the 'harder' tools for inter-institutional communication envisioned by the Commission in Regulation 1/2003 (*amicus curiae* interventions, Article 10 declaratory decisions) seem to be used sparingly or not at all in practice.

Going back to the preliminary ruling procedure, it is readily observable that it constitutes a means of 'vertical' communication between the national and supranational levels about the value of Commission-issued soft law, which can secure consistency and certainty over time. To illustrate, after a prolonged uncertainty about the interpretation of the soft law policy of the Commission on online distribution via platforms,[59] the Higher Regional Court of Frankfurt sent a preliminary question to the CJEU, asking for a clarification on whether banning distributors from selling on third-party platforms could be seen as a hardcore restriction.[60] Although the question referred is not posed as a query on the validity of the soft law instrument in question – the Vertical Guidelines[61] – should the interpretation of the CJEU differ from the Commission's position in this instrument, the Vertical Guidelines will be

[59] Paragraph 54 of the Vertical Guidelines.
[60] Judgment of 26 July 2017, *Coty Germany GmbH v Parfümerie Akzente GmbH*, C-230/16, ECLI:EU:C:2017:603.
[61] The 'indirect bindingness' phenomenon observed by Pace with regard to the Guidance Paper has been asserted with regard to all Commission-issued competition soft law in other scholarly accounts. For instance, Kirchner maintains that 'The European Commission has in the past been very active in promoting the "more economic approach" and supporting this approach by a number of guidelines. It has become evident that the Commission is pursuing three goals simultaneously: (1) reducing frictions with the US antitrust authorities, (2) to better defend its decisions in merger cases against repeal by the European Courts, and (3) to indirectly bind the courts by guidelines.' See C. Kirchner, 'Goals of Antitrust and Competition Law Revisited' in D. Schmidtchen et al. (eds.), *Jahrbruch fur Neue Politische Okonomie* (Mohr Siebeck, 2007), 7-26.

implicitly rejected and could be revised in the light of the CJEU pronouncement.

This outcome is likely in light of previous vertical interactions with regard to soft law – namely, the 2001 version of *de minimis* notice[62] was changed in 2014[63] to reflect the CJEU's stance in the *Expedia* case[64] that 'object' agreements cannot be seen as *de minimis.* In this case, it was also the French Competition Authority that sent a clear signal that it was not inclined to apply the said soft law instrument.[65] A similar distrust of supranational soft law at the national level can be detected with regard to the Guidance Paper. As will be seen below, even before the 2015 ruling of the CJEU in the *Post Danmark II case,*[66] which confirmed that the instrument constituted nothing more than mere enforcement priorities, national courts were skeptical towards the Guidance Paper. This skeptical preliminarily attitude is also possibly due to the vocal criticism the instrument received after the publication of its initial version.[67] Another likely reason for such a response may be the interactions of national judges within the Association of European Competition Law Judges (AECLJ) – a governance-type forum for informational exchanges

[62] Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (*de* minimis) [2001] O.J. C 368/07.
[63] Commission Staff Working Document 'Guidance on restrictions of competition "by object" for the purpose of defining which agreements may benefit from the De Minimis Notice' [2014] O.J. C 4136 final.
[64] Judgment of 13 December 2012, *Expedia Inc. v Autorité De La Concurrence and Others,* C-226/11, ECLI:EU:C:2012:795.
[65] Décision No. 09-D-06 du 5 février 2009 relative à des pratiques mises en œuvre par la SNCF et Expedia Inc. dans le secteur de la vente de voyages en ligne, available at < http://www.autoritedelaconcurrence.fr/user/avisdec.php?numero=09-D-06>.
[66] Judgment of 6 October 2015, *Post Danmark A/S v Konkurrencerådet,* C-23/14, ECLI:EU:C:2015:651.
[67] European Commission, DG Competition. Discussion Paper on the Application of Article 82 of the Treaty to Exclusionary Abuses (Public Consultation), available at <http://ec.europa.eu/competition/antitrust/art82/discpaper2005.pdf>.

between EU judiciaries.[68] Indeed, in its judgment in *Post Danmark II*, the CJEU confirmed the Guidance Paper was of no relevance to the current state of the law (unlike other Commission guidelines and notices) as it 'merely sets out the Commission's approach as to the choice of cases that it intends to pursue as a matter of priority.'[69]

Although scholars express doubts about this reading[70] and put an emphasis on the interpretative tone of the Guidance Paper discussed in Section 2.1 above,[71] it is likely that national courts have now absorbed the stance of the CJEU and will only treat this instrument as future-oriented enforcement priorities of the Commission, which is of no further legal significance either for the issuing institution or other enforcement actors. The expected future judicial responses to the Guidance Paper (if any) are, therefore, rejection or neglect. However, the pressing need for substantive guidance and consistency in the area of Article 102 TFEU remains. It is therefore expected that a new (multi-level) cycle of interaction between the main stakeholders – the European Competition Network[72] and supranational courts, with a subsequent spill-over to national courts – is needed in order to solve the current informational deadlock in the area of abuse of dominance.

These cases show that a vertical feedback loop about the 'value' of supranational soft law does exist. With its competition judgments, the CJEU shows its position on Commission-issued competition soft law and thus sends

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[68] For more information on the AECLJ, see M. de Visser and M. Claes, 'Courts United? On European Judicial Networks', in B. de Witte & A. Vauchez (eds.), *Lawyering Europe: European Law As a Transnational Social Field* (Hart Publishing, 2013).
[69] ibid., para. 52.
[70] N. Petit, 'Rebates and Article 102 TFEU: The European Commission's Duty to Apply the Guidance Paper' SSRN Paper available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2695732>
[71] See L.F. Pace and G. Monti (n 13).
[72] For more information on the ECN, see de Visser (n 29), 32-34, 207-8.

a signal to the national level, which – in turn – absorbs/transforms the signal and sends it back to the supranational level. This iterative game is good news for the principles of consistency and legal certainty. However, its downside lies in the fact that a significant amount of time lapses before a definitive and legally binding answer by the CJEU surfaces. In the meantime, in the 'shadow' of the preliminary ruling procedure, uncertainties and contradictions arise at the national level.

For instance, although the Vertical Guidelines are usually judicially recognized through hybridity-based interpretation together with hard law, certain provisions concerning the Commission's treatment of distribution via the internet, added in 2011, have been subject to rejection – or a mix of rejection and recognition – in national courts. Additionally, in most of these cases, it is not clear if the court resists just a specific rule expressed in the guidelines, or the legal relevance of the instrument as whole. This distinction is significant as the former can be seen as recognition of soft law, allowing for an agreement or disagreement with a rule enunciated therein, while the latter would constitute rejection of the legal relevance of the instrument as a whole. The latter approach, making it impossible for soft law to be taken into account judicially, negates the possibility for inter-institutional dialogue to emerge, thus hindering its consistency- and certainty-enhancing potential. The former approach – by creating a dialogue about the scope of the rules – is good news for certainty and consistency.

An example of an unequivocal rejection attitude is a case decided by the Cologne District Court where the judge held that the Vertical Guidelines were not applicable in relations between private parties[73] while other civil courts – both within and outside Germany – had recognized this same instrument by

[73] LG Koln, BeckRS 2012, 19707, Entscheidungsgründe, para. 6.

interpreting it together with the Vertical Block Exemption Regulation. This situation – in supporting two alternative and incompatible outcomes with regard to the Vertical Guidelines – creates an issue from consistency- and certainty-enhancing perspective.

Such conflicting outcomes are also exhibited by national judicial references to the Guidance Paper, which – as discussed in Section 2 above – is perceived as an instrument with an unclear purpose[74] and a substance contradicting currently established case law.[75] In the few judgments in which the instrument was subject to recognition (or persuasion), parts of the Guidance Paper based on precedents were in question. For example, the 'As-Efficient-Competitor Test' described in the soft instrument[76] has been endorsed by the CJEU as a valid tool for assessment of foreclosure in predatory pricing cases[77] and was applied in such a way by a Dutch[78] and a French court,[79] both examining possible predation.

However, and similarly to the Vertical Guidelines discussed above, the Guidance Paper has more often than not been rejected in its entirety and dismissed as irrelevant. An illustrative example in that respect can be found in a judgment by the UK High Court, where Justice Mann stated "[…] as the document itself points in paragraph 3, it is not a statement of the law, and

[74] The discussion centers on the question of whether the Guidance Paper actually constitutes enforcement priorities or – to the contrary – is an attempt at a change of the law of Article 102 TFEU. For the former opinion, see R. Whish, 'Intel v Commission: Keep Calm and Carry on!' (2015) 6 Journal of European Competition Law and Practice, 2. For the latter view, refer to G. Monti (n 13), 5 at fn. 28.
[75] L. Gormsen, 'Why the European Commission's Enforcement Priorities on Article 82 EC Should Be Withdrawn?' (2010) 31 European Competition Law Review.
[76] Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings [2009] OJ C 45/7, paras.23-27.
[77] Judgment of 3 July 1991, *Post Danmark A/S v Konkurrencerådet,* C-62/86, ECLI:EU:C:1991:286.
[78] Rb Oost Brabant 7 augustus 2013, rolnr. 232816 / HA ZA 11-1168.
[79] C.A. Paris, 06 novembre 2014, RG no. 2013/01128.

paragraph 81 makes it clear that what is being referred to is an enforcement priority, not a definition of abuse. I do not think that this document assists the debate."[80] As discussed above, this judicial attitude sends a vertical signal of the unwillingness of national courts to be indirectly bound by rules through which the Commission essentially strives to change the law on abuse of dominance.[81] Indeed, this roundabout binding effect can happen, as Pace argues,[82] through Article 16 of Regulation 1/2003, which obliges national authorities and courts to strive not to deviate from the decisional practice of the European Commission. In other words, '[…] it is the decisions that the Commission adopts pursuant to Article 102 TFEU and which put flesh on the bones of the Guidance Paper that will bind the national authorities and courts as to the way in which Article 102 TFEU is to be interpreted.'[83]

Insofar as the Commission is expected to follow its own Guidance Paper in upcoming decisions – a proposition currently questioned by the *Intel* decision pending at the CJEU[84] – the provisions of the latter could indeed become indirectly binding. It seems, therefore, that national and supranational courts are already signaling their discord with such a (potential) option. Thus, it can be concluded that the type of judicial attitude to the Guidance Paper is directly related to whether or not a controversial or non-controversial part of this instrument is being discussed; in the former case, the outcome is rejection and in the latter – recognition. This type of contradictory treatment, as maintained

[80] [2011] EWHC 987 (Ch) supra n 123, 95.
[81] Monti (n 13), 5.
[82] Pace (n 13), 116.
[83] ibid.
[84] The *Intel* decision of the General Court (Judgment of 12 June 2014, *Intel v Commission*, T-286/09, ECLI:EU:T:2014:547) dismissed as superfluous an entire section of the Commission's decision under appeal. Non-coincidentally, this section dealt with the applicability of the 'as-efficient-competitor' test to rebates – a topic initially explored by the 102 Guidance Paper.

above, is precisely what needs to be avoided in order for consistency and certainty in enforcement to be furthered.

3.2.3. Transformation

Transformation as defined by Scott and de Burca was not empirically observed. Insofar as 'this approach suggests that the basic premises and normative presuppositions of law, legal form and legal function need to be rethought',[85] such a radical hypothesis is not supported by the data generated. In particular, if this theory could be observed in practice, soft and hard law would not have been treated as distinct (legal) forms in national courts of law. The results, on the contrary, clearly show that soft law is only recognized and endowed with legal effects when it can be fit within the system of hard law, including general principles of law. Another fact that detaches the interaction between competition soft and hard law from the possibility that they are seen as interchangeable pursuant to the transformation thesis is the empirically observed unwillingness of national courts to use soft law instruments as the *ratio decidendi* for their judgments, since the *ratio* can only be informed by a hard legal rule.[86]

The conclusion that transformation does not occur in the competition domain is also aligned with the results of studies on the use of soft law in other fields of EU activity. The results of Tamara Hervey's[87] study on the EU social welfare sector and, in particular, the relationship between adjudication and new governance-based informal arrangements, point to a similar conclusion

[85] Scott and de Burca (n 24), 17.
[86] Independent Media Support Ltd v Office of Communications [2008] CAT 13.
[87] T. Hervey, 'Adjudicating in the Shadow of the Informal Settlement?: The Court of Justice of the European Union, "New Governance" and "Social Welfare"'(2010) 63(1) Current Legal Problems.

as the one found here – namely, that 'mutual transformation' between formal and atypical sources of law (or legal interactions) does not occur in practice.

In light of the observed transformation, gap and hybridity interactions, the following section will chart out their implications for certainty and consistency, and the related principle of effectiveness. Suggestions for improvement of the current status quo will also be made.

4. Certainty, Consistency and their Relationship to Effectiveness: Current Status and Ways Forward

Since this section will further explore the issue of whether the observed judicial approaches advance or hinder the principles of certainty and consistency and how the end result influences their interaction with effectiveness, it is necessary to define these three concepts at the outset.

4.1. Consistency, Certainty, Effectiveness

The three principles of interest to the discussion are multi-dimensional and have more than one interpretation as pointed out in scholarship;[88] therefore, their interactions can be both harmonious and strenuous. The latter relationship is illustrated by the assertion of Maher described in the introductory section, who testifies that while effectiveness is served by means of soft law, consistency is undermined. This is so because, under the

[88] On the inter-relation between coherence/consistency, on the one hand, and legitimacy and effectiveness, on the other, see Sauter (n 6). On effectiveness, see F. Snyder, 'The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques'(1993) 56 Modern Law Review. On certainty, see J. van Meerbeeck, 'The Principle of Legal Certainty in the Case-Law of the European Court of Justice: from Certainty to Trust' (2016) 41(2) European Law Review and F. Preetz, 'Does the Notion of Legal Certainty Prohibit an Effects-Based Approach to Rebates?' (2017) 38(3) European Competition Law Review.

'legislative model' described in Section 2.1 above, consistency as tied with the principle of legal certainty in the Commission's discourse,[89] imposes on the legislator the strict process requirement that law is readily ascertainable and immutable to the benefit of the subjects of the law who need to 'know what the law is so as to be able to plan their actions accordingly'.[90] Departing from this view of certainty, the revisable and non-binding nature of instruments such as soft law is a difficult fit.

Effectiveness, on the other hand, accords with a more purposive, functional conception of law as a means to an end[91] and can therefore further and even encourage the use of soft law as a tool of regulation, leading to desired outcomes. This functional, purposive view, as discussed in Section 2.1, would also require that a rulemaking process under a broad legislative mandate such as competition law is surrounded by certain procedural rule of law guarantees so that its legitimacy is secured.[92] Such a guarantee of procedural nature[93] that can be applied in the vertical interactions between enforcement actors in a decentralized setting is the 'comply or explain' principle.[94] As will be explained below, the 'comply or explain' principle makes transparent the actions of participants in regimes operating under conditions of broad legislative mandates, soft norms and multiple stakeholders, which in the end contributes to both effectiveness and certainty and – by enhancing dialogue between enforcement actors – to consistency.

In that sense, it is important to note that effectiveness and certainty are seen as mutually reinforcing. As Preetz testifies, 'Ensuring the effective

[89] Refer to (n 6).
[90] T. Tridimas, *The General Principles of EC Law* (OUP, 1999), 163.
[91] Sauter (n 6), 17. See also J. Poulle (n 18), 58.
[92] Larouche (n 22).
[93] The procedural nature of the 'comply or explain' principle is ascertained in the 2013 Annual Report of the French Conseil d'État, 'Le Droit Souple', 73.
[94] J. Poulle (n 18), 62 *et seq*.

enforcement of competition law is an inherent second dimension of the principle of clarity and definiteness of the law.'[95] For the latter statement to hold true, however, one needs to adopt a flexible understanding of the principle of certainty as well. Such an understanding is proposed by the 'fiduciary (trust) logic',[96] whereby certainty is no longer secured by a monolithic state nor does it only cater for the protection of the individual. Instead, 'Once it is acknowledged that the law does not have the innate ability to determine its application fully in advance, the recipients of the standard will continue to obey as long as they have confidence in the fact that the authorities respect their expectations based on this standard. Trust plays—and should continue to play—a decisive role in any legal system.'[97] Such an understanding of legal certainty, aligned with the outcome-oriented principle of effectiveness – and the related concern for fairness – offers an avenue through which national courts can explore the legal effects of supranational soft law in a more uniform fashion by means of the 'comply or explain' principle.

This functional perspective is also in line with the interpretation of the empirical results described above – namely that national judiciaries can undermine certainty and effectiveness only if their interpretations of the same soft law instrument are contradictory. In that sense, whether courts engage – agree or disagree with – a certain soft instrument by means of interpretation together with legislation, case law, general principles of law or by means of persuasion, is immaterial so long as the attitude exhibited consistently reflects a flexible judicial stance to soft law across EU Member States. So long as this happens, the fiduciary logic of certainty – the trust of legal subjects that a certain set of rules will be discussed as relevant to their situation – will be

[95] F. Preetz (n 88).
[96] J. van Meerbeeck (n 88), 275.
[97] ibid., 286.

fulfilled; the effectiveness and consistency associated with the use of and dialogue about the contents of soft law will also be secured. Alternatively, if a formalist judicial stance of rejection or neglect is consistently applied to soft law by the EU judiciary, while the fiduciary logic of certainty will not be undermined, effectiveness and consistency associated with the use of soft law will necessarily be lost. As Snyder aptly puts it, soft law rules

> 'play a vital role today in Commission efforts to ensure the effectiveness of Community law. They identify what is settled and what is in dispute, circumscribe the arena for debate, and define the agenda for negotiation and, if necessary, litigation. In other words, they aim to provide guidelines for negotiating the effectiveness of Community law.'[98]

It is precisely these types of interactions that are confirmed by the above empirical findings that espouse judicial recognition; rejection – by contrast – does not further dialogue but stifles it. In light of Snyder's insight, fears that supranational competition soft law can be used as a substitute to legislation or that soft law constitutes hard law in disguise seem to be unfounded. As seen above, national courts never follow soft law blindly and are aware of the circumstances under which the instruments in question can be allowed to produce legal effects. In fact, the very means of judicial engagement with soft law some national courts employ, reflects their concern for furthering effectiveness – for instance, the principle of community loyalty used to anchor soft law in national judicial discourse is an enabler of the principle of effectiveness as confirmed by CJEU case law.[99]

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[98] F. Snyder (n 88), 33.
[99] G. Monti and D. Chalmers, *EU Law: Cases and Materials* (CUP, 2010), 1015.

In order for effectiveness and consistency to be better furthered in the decentralized competition enforcement regime, it will be argued here that – in alignment with a functional understanding of certainty – national and supranational enforcement actors need to adopt a common stance as to their treatment of supranational competition soft law. This stance should not constitute outright rejection or neglect since both attitudes thwart effectiveness and consistency as argued above, but it should not be 'blind recognition' either (that latter scenario does not materialize in practice anyway as shown in the discussion of the empirical results). In this sense, a rationale that strikes a middle ground, promotes dialogue between enforcers, and also fits squarely within the debate on effective enforcement is presented by the 'comply or explain principle' as introduced below.

4.2. The 'Comply or Explain' Principle – a Way Forward

The 'comply or explain' principle has gained prominence through its use in the corporate governance world in the UK, where it caters to effectiveness of enforcement by furthering new, hybrid – soft and hard – methods of regulation prompted by the dynamic regulatory environment. [100] This approach relies on transparency in order to incentivize the subjects of regulation – in this case listed companies – to take into account, for instance, non-binding corporate governance codes.[101] The idea is that each economic actor could either choose to (1) conform to or (2) deviate by means of explicitly stating reasons when presented with a certain non-binding regulatory instrument (soft law). The 'comply or explain' principle, with certain cross-jurisdictional variations, constitutes part of national

[100] J. Poulle (n 18), 44-45.
[101] That transparency is used a tool to secure objectives of consistency and effectiveness in fluid regulatory environments is also stipulated by Maher (n 2), 428.

administrative law in other EU jurisdictions as well.[102] At the EU level, according to van Dam, although there is no case law to that effect, the Commission does consider that its soft law needs to be taken into account by national administrative authorities and that deviation from it should be motivated.[103] In the competition realm specifically, although case law – the *Expedia* case[104] – has been clear on the fact that Commission soft law is not to be seen as binding on national authorities (nor courts), the Opinion of Advocate General (***AG***) Kokott does point towards a 'comply or explain' direction for national-level enforcers. That suggestion is going to be explored as a possible avenue for alignment of national and supranational treatment of supranational competition soft law.

In particular, paragraph 39 of the AG's Opinion states:

> 'Therefore, even though no binding requirements concerning the competition-law assessment of agreements between undertakings arise for national competition authorities and courts from the Commission's *de minimis* notice, those authorities and courts must nevertheless consider the Commission's assessment, as set out in the notice, of what constitutes an appreciable restriction of competition and must give reasons which can be judicially reviewed for any divergences.'[105]

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[102] For France, see 2013 Annual Report of the Conseil d'Etat (n 93), 44; for the Netherlands, see H.E. Broring and G. J. A. Geertjes, 'Bestuursrechtelijke Soft Law in Nederland, Duitsland en Engeland' (2013) 4 Nederlands Tijdschrift voor Bestuursrecht, 5.
[103] See C. van Dam (n 21), S.2.2.2.2.
[104] Judgment of 13 December 2012, *Expedia Inc. v Autorité De La Concurrence and Others,* C-226/11, ECLI:EU:C:2012:795
[105] Opinion of 6 September 2012, *Expedia Inc. v Autorité De La Concurrence and Others,* C-226/11, ECLI:EU:C:2012:544, para. 39.

This reasoning, in essence, charts the dimensions of the 'comply or explain' principle discussed above. What is of additional importance, and potentially makes the 'comply or explain' interpretation of AG Kokott even stricter, is the argument that the reasons given for a deviation from supranational competition soft law should be *judicially reviewable*. The AG suggests two possible avenues in this respect[106] – national competition authorities should either issue their own soft law which will bind them by means of national law or should motivate their reasoning with regard to supranational soft law in each individual decision that is then subject to review. Insofar as only the latter option retains the flexibility of the 'comply or explain' logic, it will be the preferred solution from the perspective of effectiveness and the fiduciary view of legal certainty that this paper is preoccupied with. By contrast, the former idea – issuing national soft law that reflects the contents of its supranational counterpart – can hamper the principle of effectiveness (although it does enhance formal legal certainty).[107] As Senden argues, '[…] depending on the national follow-up given to soft law acts, rights and obligations ensuing therefrom may vary from one Member State to another. This is problematic […] from the viewpoint of effectiveness, in particular uniform application […].'[108]

4.2.1. Duties on National Courts

Insofar as this paper argued that national competition authorities should be subject to the 'comply or explain' principle when engaging with supranational competition soft law, the same duty should also apply to national courts. This

[106] Those two avenues can be found in footnote 40 of AG Kokott's Opinion in the Expedia case (n 104).
[107] In her work, van Dam (n 21) proposes precisely the adoption of national-level guidelines to solve the problem of the legitimacy of the supranational ones.
[108] Senden (n 10), 26.

conclusion can be drawn from the parallel duties of uniform application of EU competition law that national courts and authorities have under Article 16 of Regulation 1/2003.

As seen in the empirical results, national courts do already – in great part – comply with (recognize by means of explicit agreement or disagreement) supranational soft law instruments. In this way, they further inter-institutional dialogue on the direction of EU competition law and help the effectiveness- (and consistency-) enhancing function of soft law as described by Snyder. What national courts never do, however, is motivate their deviation when they opt for explicit rejection of the said instruments – as argued above, this attitude hampers dialogue and it is precisely here that the 'comply or explain' principle can nudge outright judicial rejection and convert it into motivated disagreement. In this way, the 'rejection' category will give way to 'recognition by means of disagreement', the latter being a significantly better option from the perspectives of effectiveness and consistency.

The 'comply or explain' logic – by its emphasis on transparent motivation – can also work towards making explicit the currently implicit 'persuasion' and 'neglect' attitudes that national courts seem to exhibit. In this line of argumentation, it is important to emphasize that national courts – much as administrative authorities – operate under an obligation to motivate the legal grounds on which they take their decisions and the reasoning used in that regard.[109] In that sense, there is an alignment between the requirement of transparency embedded within the 'comply or explain' principle and the obligation for justification of national judicial decisions stemming from

[109] I. Opdebeek, S. de Somer et al., 'Duty to Give Reasons in the European Legal Area: a Mechanism for Transparent and Accountable Administrative Decision-Making? A Comparison of Belgian, Dutch, French and EU Administrative Law' (2016) 2 Public Administration Yearbook, 97-148.

national law. This further enhances the potential of the ‘comply and explain’ logic as a tool for inter-institutional communication.

4.2.2. Duties on Supranational Courts

In order for inter-institutional dialogue to be furthered in the interest of effectiveness, consistency and certainty, supranational courts should be subject to a duty of interpretation similar to their national counterparts. In light of the ‘constitutional’ role of appellate or preliminary reference instance played by the CJEU in competition policy, we suggest the standard ‘explain or review’. In particular, if different standards as to engagement with competition soft law are to be applied by supranational courts, effectiveness but also certainty and consistency in enforcement are undermined. Especially in light of the above-identified important vertical feedback loop by means of the preliminary reference procedure, and given the scarcity of interactions between the Commission and national courts under Regulation 1/2003, a common standard for judicial engagement with Commission-issued competition soft law is warranted. Otherwise, by using lax standards of interpretation for soft law, the CJEU risks undermining the effectiveness and consistency-securing function of the preliminary reference route. This is why it is suggested that if supranational courts envision a different substantive interpretation of Commission-issued soft law instruments than the one provided therein, they should explicitly engage with the reasons for deviation or – in the alternative – review the soft law instrument for legality as a legislative community act.

The use of a uniform standard for engagement with supranational competition soft law is also prompted by the principle of community loyalty that works hand-in-hand with effectiveness as established above. Although Article 4(3)

TEU is drafted as imposing a top-down obligation of sincere cooperation on Member States only, case law over the years has confirmed that the same obligation applies bottom-up with equal force as argued by Mortelmans.[110] In this sense, the institutions of the EU – and the CJEU in particular – can and should be held to the same standard as national courts when it comes to engagement with Commission-issued competition soft law. Another argument in the same vein can be made on the basis of the principles of subsidiarity and proportionality as suggested by Senden. Given that soft law reflects the impetus of the Union for better regulation made closer to the citizen, 'one can argue that the Court should take account of, for instance, a decision of the legislature to use soft law rather than hard law for reasons of subsidiarity and proportionality.'[111]

Although the legislature is not involved in the drafting of supranational competition soft law, an argument on the basis of subsidiarity and proportionality can also be made in light of the Commission's role as the enacting institution in the context of decentralization of competition enforcement. In particular, the point can be made that the increased importance of soft law in the field is largely due to decentralization, which was – among others – motivated by an appeal to the latter two principles.[112] In taking due notice of competition soft law, thus, the CJEU can be seen as answering to the demands of subsidiarity and proportionality in the decentralized EU competition enforcement model.

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[110] K. Mortelmans, 'The Principle of Loyalty to the Community (Article 5 EC) and the Obligations of the Community Institutions' (1998) 5 Maastricht Journal of European and Comparative Law, 67.
[111] Senden (n 10), 414.
[112] C.D. Ehlermann, 'The Modernization of EC Antitrust Policy. A Legal and Cultural Revolution' EUI Working Paper No. 2000/17, available at <https://www.peacepalacelibrary.nl/ebooks/files/00_17.pdf>.

4.2.3. Duties on the European Commission

Lastly, the European Commission – as the drafter of supranational competition soft law – is the primary agent responsible for securing the effectiveness, and the certainty- and consistency- enhancing functions of the said instruments. As already established in Section 2 above, since the Commission is situated at the apex of EU Competition Policy under an enforcement, and not under a legislative mandate, the output it produces – its decisional practice – is subject to procedural rule of law guarantees. Its soft law output, insofar as it reflects the latter decisional practice, should also not be subject to classical legality tests. In order to further the above principles of effectiveness, certainty and consistency, instead, supranational competition soft law should be engaged with in a spirit of dialogue and cooperation, whereby the 'comply or explain' principle serves as a vehicle for motivated deviation.

For this model to function, soft law rules that are proposed by the Commission need to be constantly and consistently endorsed by the drafting institution in its decisional practice and on appeal in courts of law. Because this latter condition was not fulfilled with regard to the Guidance Paper – the Commission was not assertive enough of its guidance before the GC in the *Intel* case– the Guidance Paper is now largely dismissed as an instrument that can inform the debate on a 'more economic' reading of Article 102 TFEU. This trend of credibility loss can also transfer to other soft law instruments – a point of interest in that regard is the preliminary reference case *Coty Germany* that deals with the interpretation of paragraph 54 of the Vertical Guidelines – another Commission-introduced innovation.[113] The danger in this line of cases lies in the fact that – should the Commission fail to convince

[113] Judgment of 26 July 2017, *Coty Germany GmbH v Parfümerie Akzente GmbH*, C-230/16, ECLI:EU:C:2017:603.

the CJEU of its approach – the latter will likely go in a different direction, thus creating an alignment between itself and national courts and undermining the Commission's policy initiative in the competition domain. In light of the enforcement mandate of the Commission given to it under the Treaties, this is certainly not a desirable development.

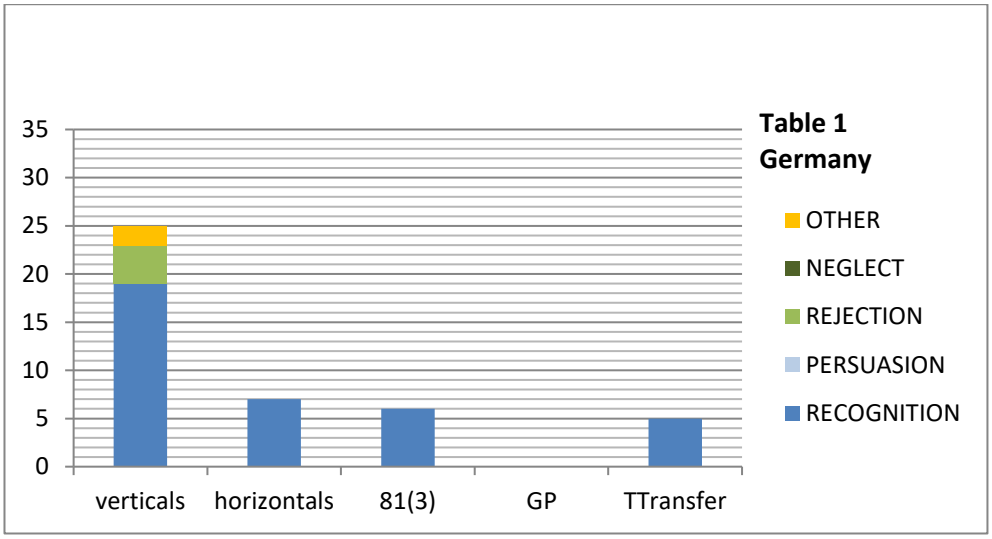
5. Concluding Remarks

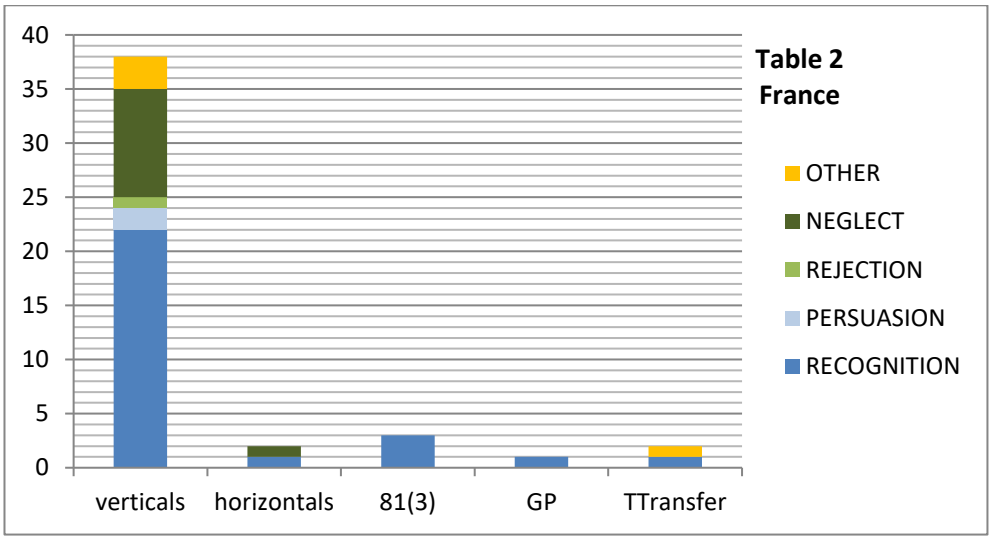
By way of conclusion, it is argued that this study showed that there is a range of techniques that the judiciaries of the jurisdictions under observation use in order to engage with Commission-issued competition soft law. National courts are not agnostic to hybrid interpretation of soft law together with hard law, by which means judicial recognition is achieved. However, when faced with soft law not strictly following established hard law principles, national judges tend to shy away from creative interpretations, this attitude resulting in judicial rejection of the said instruments that reflects the gap thesis proposed by Scott and de Burca. These different judicial attitudes are clearly contradictory and thus incompatible; what is more, their cohabitation in the same enforcement system (the EU) is certainly not compatible with the principles of effectiveness, enforcement consistency and legal certainty that were taken as the normative points of departure for this study. In order to further those goals, therefore, a more structured and internally consistent judicial approach towards Commission-issued competition soft law is warranted.

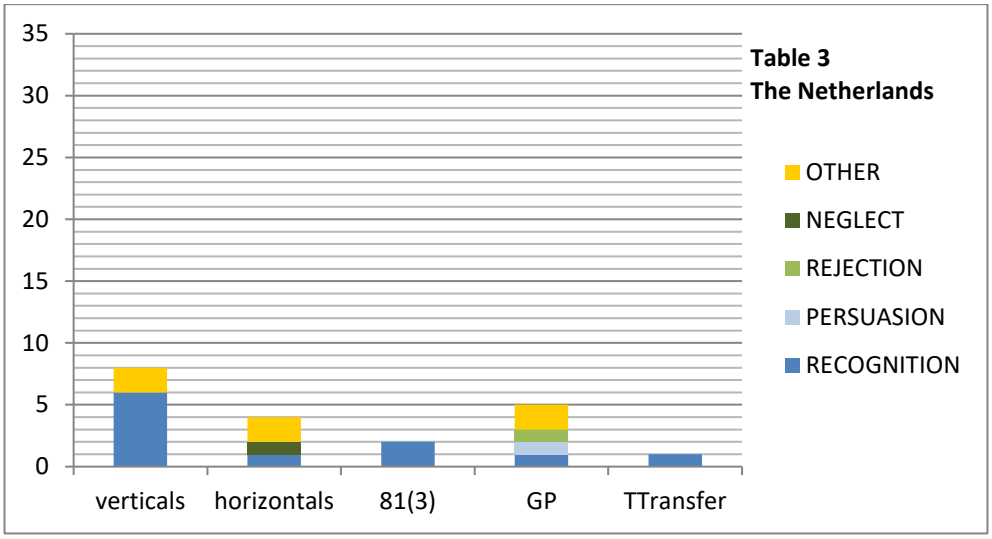
In that respect, it was argued that the 'comply or explain' principle as articulated in paragraph 39 of AG Kokott's Opinion in the *Expedia* case can be used as an anchor for the achievement of better alignment in national and supranational (judicial) attitudes to Commission-issued competition soft law.

Whether national and supranational enforcement agents are prepared to embrace such an obligation in the name of more effective and certain (in its fiduciary sense) enforcement is yet to be established by further studies.

ANNEX 1. JUDICIAL ATTITUDES TO SOFT LAW PER JURISDICTION



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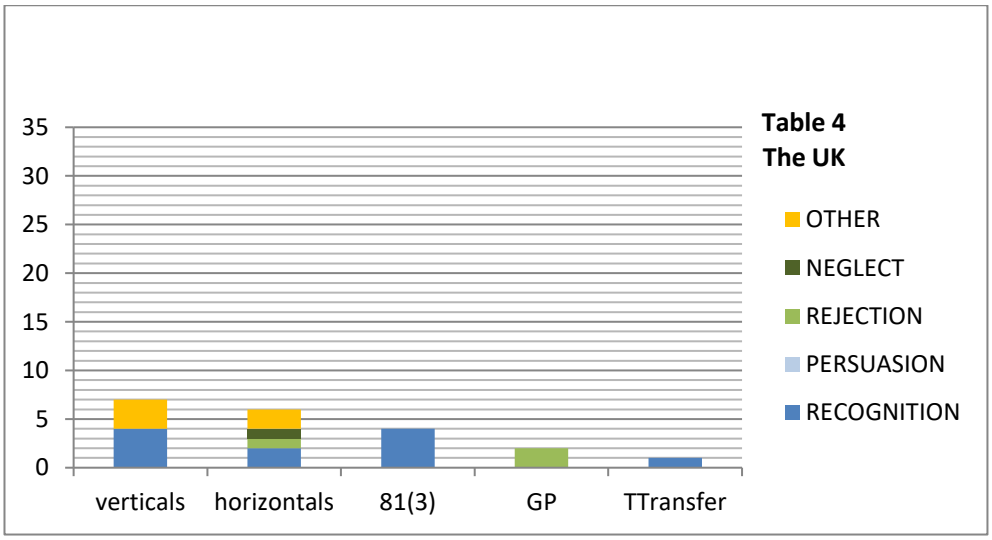
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AGGREGATE CONCENTRATION IN THE CONTEXT OF COMPETITION LAW: THE SUITABILITY OF REGULATION AGAINST EXCESSIVE CONCENTRATION OF MARKET POWER

Kosuke Shiozawa*

Aggregate concentration increases the risk of anticompetitive behaviour, and some jurisdictions in the world regulate excessive aggregate concentration. However, major jurisdictions such as those of the EU and the US have focused rather on relevant markets than on economy-wide issues like aggregate concentration. Considering the recent trend of increase in the degree of aggregate concentration and decrease in the productivity growth, regulation to tackle aggregate concentration would be worthy of discussion. In this context, attitude of the Japanese jurisdiction which regulates size of aggregate concentration could be suggestive due to its uniqueness and directness. This article will discuss appropriacy of Article 9 of the Antimonopoly Act in Japan with respect to regulation against aggregate concentration by comparing both the background of legislation and its achievements. It finds that its background is very different from western history and its achievements are too ambiguous to be suggestive for major jurisdictions.

Keywords: *aggregate concentration, Antimonopoly Act Japan, market power.*

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1. Introduction

The study of the Organisation for Economic Co-operation and Development (OECD) finds that the productivity growths have declined in general in recent years in the European Union (EU) and the United States (US).[1] Some factors could have played a role as background of this trend. Especially, the increase of market concentrations across several markets in each economy would be worthy of attention, because the increase of such concentrations occurred in the same duration of slowdown of productivity. One of the most serious examples of this concern is the US. In its domestic economy, while markets had been getting more and more concentrated in recent decades,[2] its productivity growth had constantly declined.[3] This might mean that the increase in degree of market concentrations across the domestic economy had led to the negative effect despite the potential of the scale of its economy.[4] Such causal linkage between these two tendencies could be created by weakened deterrence of anti-competitive merger and conduct, increased common ownership between rivals by diversified investors, generalised oligopolies, and decreased economic dynamism, which have been recognised as the main risks of negative development caused by multiple market

[1] OECD, 'OECD Compendium of Productivity Indicators 2019' (OECD Publishing, Paris, 29 April 2019). <https://doi.org/10.1787/b2774f97-en> accessed 30 May 2019.

[2] Adil Abdela and Marshall Steinbaum, 'The United States Has A Market Concentration Problem Reviewing Concentration Estimates in Antitrust Markets, 2000-Present' (*The Roosevelt Institute*, September 2018), <http://rooseveltinstitute.org/wp-content/uploads/2018/09/The-United-States-has-a-market-concentration-problem-brief-final.pdf> accessed 10 May 2019.

[3] OECD, 'Productivity Indicators: Overview' (*Compare your country*) <www.compareyourcountry.org/productivity-indicators> accessed 30 May 2019 (OECD, Productivity Indicators).

[4] Jonathan B. Baker, 'Market Power And Market Concentration In The Us', (*OECD Competition Committee Hearing on Market Concentration*, Paris, 7 June, 2018). <www.slideshare.net/OECD-DAF/market-concentration-baker-june-2018-oecd-discussion> accessed 1 June 2019.

concentrations.[5] This means that, even if each market concentration would lead to no serious legal and economic concern in each relevant market, such tendency on several market structures could collectively affect the whole domestic economy.[6] Considering that the abovementioned shifts on market structures could be irreversible, it would be recommended for policymakers to pay attention to current economic slowdown which seems to have been triggered by aggregate concentration.

Additionally, considering that the degree of aggregate concentration would be positive proportionality to total degree of multiple market concentrations,[7] the above negative development of productivity could be identified as a result of aggregate concentration at the same time. In this context, aggregate concentration is the concept which is adopted by economists and political scientists to illustrate the degree of economic power of big business in an economy.[8] According to the calculation of Feinberg, aggregate concentration of the US market had increased for several decades.[9] In its latest data, more than half of the share of value-added in manufacturing sector were held by the largest 0.05% players in the whole domestic economy. While serious aggregate concentration and its harm has mostly affected the developing countries, such kind of inequality may mean economic barriers for new

[5] Jonathan B. Baker, 'Market power in the U.S. economy today' (*Washington Centre for Equitable Growth*, March 2017).
<https://equitablegrowth.org/market-power-in-the-u-s-economy-today/> accessed 31 May 2019.
[6] Michal S Gal, 'Aggregate Concentration: A Study Of Competition Law Solutions' (2016) 4 *Journal of Antitrust Enforcement* 2, pp. 282–322.
[7] Roger Clarke and Stephen W Davies, 'Aggregate Concentration, Market Concentration and Diversification' (1983) 93 *The Economic Journal* 369, pp. 182-192.
[8] OECD, 'Glossary Of Industrial Organisation Economics And Competition Law' (*OECD Publishing*, Paris, March 2003).
<www.oecd.org/regreform/sectors/2376087.pdf> accessed 26 June 2019 (OECD, Glossary).
[9] Robert M. Feinberg, 'On the Measurement of Aggregate Concentration' (1981) 30 *The Journal of Industrial Economics* 2, pp. 217-222.

business and harm the competition environment even in the US as well.[10] The modern tendency seems to have led to the appearance of certain groups of super-firms which may translate into economy-wide concern.

The other important example is the EU. On one hand, the declining of productivity growth in the EU would not be so alarming as that in the US since a small recovery had been observed from 2010.[11] However, on the other hand, the scores of two decades ago in the EU have dropped in half as per the most recent data of same statics. Additionally, the increase in the degree of market concentrations has been observed in the statistics of the OECD in the same period in which the abovementioned decrease of productivity growth had been found, while its degree has been not so serious as those of the US.[12]

Due to the following three factors, these statistics might play a role as supporting evidences for the hypothesis that negative development of productivity growth in domestic economy has causal linkage with multiple market concentrations. First, in economies of both the US and the EU, the increase of market concentrations and the decrease of productivity growth had occurred in the same duration.[13] Second, the negative tendency on productivity growth in the EU is less serious and more stable than those in the US which has been subjected to more stable market concentrations in recent

[10] Nathaniel H Leff, 'Industrial Organization and Entrepreneurship in the Developing Countries: The Economic Groups' (1978) 26 *Economic Development and Cultural Change* 4, pp. 661-675.
[11] OECD (n 1).
[12] OECD, 'OECD Productivity Working Papers: Industry Concentration in Europe and North America' (*OECD Publishing*, Paris, January 2019) <https://doi.org/10.1787/2ff98246-en> accessed 1 June 2019 (OECD, Industry Concentration).
[13] OECD (n 1); OECD, Industry Concentration (n 12).

years.[14] Third, the small recovery of productivity in the EU had occurred in the timeframe following the small drop of degree of concentrations.[15]

Some researchers opine that the accumulation of market concentrations is the main negative effect on entire economies.[16] Although such concentrations could be recognised as lawful under current competition law in many cases, these hypothesises seem to be rather confident now, considering the above statistics. As mentioned above, this means the seriousness of aggregate concentration, as well as those of multiple market concentrations, may distort competition and harm the economic growth due to the appearance of excessive economic power. Considering that some Member States have suffered the rising aggregate concentration, for example the United Kingdom (UK) and some nations of east Europe,[17] it would have reason to concern that it may translate into some kind of EU-wide aggregate concentration. Therefore, as the OECD roundtable for competition policy discussed,[18] it would be recommended to recognise not only market concentration but also aggregate concentration as serious concerns for entire economy of western world like the US and the EU.

In order to tackle this issue and ensure productivity, the relevant governments would need to introduce appropriate policy to optimise the competition environment regarding economic power via aggregate concentration which

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[14] OECD (n 1).
[15] OECD (n 1); OECD, Industry Concentration (n 12).
[16] Abdela and Steinbaum (n 2); Alex Baker, 'Why Concentration Isn't A Good Measure Of Competition' (*Fingleton Associates*, July 31, 2018).
<https://medium.com/fingleton-associates/why-concentration-isnt-a-good-measure-of-competition-d0d284871c33> accessed 1 June 2019.
[17] Aleksandar B Todorov, 'Foreign Investment and Aggregate Concentration: Evidence from Southeast Europe' (*Bulgarian Economic Papers*, December 2018)
<www.bep.bg/> accessed 2 July 2019; Clarke and Davies (n 7).
[18] OECD, 'Market concentration' (*OECD Directorate for Financial and Enterprise Affairs*, June 2018).
<www.oecd.org/daf/competition/market-concentration.htm> accessed 1 June 2019.

affects market structures across several relevant markets. Even though many jurisdictions of western world do not recognise aggregate concentration as one of the concerns of competition law beyond the concept of market concentration,[19] such a concern would have direct connection to competition policy because this situation means that markets might fail to ensure the economic efficiency.

Additionally, considering that one of the main purposes of competition law is to protect consumer welfare as noted by the International Competition Network (ICN)[20] this situation needs to be dealt by competition policy, because the small productivity would harm consumer welfare by increase of prices and worse qualities of products. However, academics and several National Competition Authorities (NCAs) showed that the existing tools of competition law which focus on relevant market will not provide the sufficient solution for the anti-competitive concern in regard with these kinds of concentration which needs to be analysed for the whole economy of each relevant country.[21]

Furthermore, considering the necessity of tools which can analyse and control the appearance of super-firms harming the efficiency of economies, the role of competition law could be important due to its richness in interventionist tools. Indeed, some jurisdictions adopt their own methods to deal with this issue of aggregate concentration. Especially, an approach of Japanese jurisdiction would be worthy of discussion because of its uniqueness. Namely, it directly regulates certain size of conglomerates by limiting the

[19] Gal (n 6).
[20] ICN, 'Report on the Objectives of Unilateral Conduct Laws, Assessment of Dominance/Substantial Market Power, and State-Created Monopolies' (the 6th Annual Conference of the ICN, Moscow, May 2017) <www.internationalcompetitionnetwork.org/wp-content/uploads/2018/07/UCWG_SR_Objectives.pdf> accessed 30 May 2019.
[21] Gal (n 6).

concentration of economic power via several indicators including volume of asset and voting rights in other entities across several relevant markets. Such approach is called 'prohibition of excessive concentration' of economic power which is represented by Article 9 of the Antimonopoly Act, 1947 (AMA).[22] This provision focuses on the influence of economic power which could suppress the autonomies of other businesses across several markets through shareholding.

On the other hand, the historical situation of Japan which required the regulation on the volume of economic power might have similarity with the current situation of western economies which obtain high concentrations and less productivities at the same time. If so, this means that the evaluation of this kind of regulation could be suggestive for policymaking of western world.

Due to above situation, this article will seek to make proposals for western 'two major jurisdictions of competition law', namely those of the US and the EU,[23] about the way and necessity to regulate the aggregate concentrations via comparison of legal and economic situations between today's western world and Japanese society which has required the regulation against excessive size of conglomerate. Firstly, in order to understand the current legal framework and its historical context of Japan, section 2 will describe the historical background and legal framework of the relevant provisions of AMA from enactment to latest amendments. After that, it will try to find similarities of situations of major jurisdictions in context of market powers with those of

[22] Hideaki Kobayashi, 'Competition Policy Objectives -- A Japanese View' (Competition Workshop, Florence, June 1997) <www.jftc.go.jp/en/policy_enforcement/speeches/1997/97_0613.html> accessed 3 June 2019.

[23] Thomas K Cheng, 'Sherman vs. Goliath?: Tackling the Conglomerate Dominance Problem in Emerging and Small Economies—Hong Kong as a Case Study' (2017) 37 *Northwestern Journal of International Law & Business* 1, pp. 35-105, p. 35.

then-current situation of Japan, in order to discover how suggestive this legislation would be expected to be. Second, section 3 will analyse the legal and economic advantages of this provision in both practical and theoretical aspects. In order to make further discussion, section 4 will analyse the achievements of this provision. Section 5 will, according to preceding sections, critically discuss the appropriacy of frameworks of prohibition of excessive concentration in Japan via comparison of the opinions from both industry and authority in Japan. It will try to find pros and cons of current legal framework of Japanese jurisdiction, by referring to the achievements of this legislation and the criticism from stakeholders. Section 6 will provide recommendation for major jurisdictions. This will seek to address the hypothetical shortages of method of competition law suffered by major jurisdictions and try to find whether the Japanese approach could provide any kinds of appropriate solutions for them or not. This section will analyse the problems of recent tendency of market structure of western countries including those of digital economy.

Additionally, it would be necessary to discover with what kind of effect the relevant provisions of AMA had provided in Japanese market, in order to discuss the appropriacy of Japanese approach for major jurisdictions. The purpose of this article is to provide proposal for major jurisdictions about the control of aggregate concentration via regulating excessive concentration of market power as a conclusion in section 7.

2. The legal framework and historical context of the provisions of the AMA

The provisions on excessive concentration are stated in Articles 9 and 11 of the AMA. Article 9 is constituted by two main prohibitions (paragraphs 1 and

2), and other paragraphs which stipulate the definition of terminologies and the operational scheme of this prohibition. Paragraph 1 defines the creation of the entity 'which would cause an excessive concentration of economic power' as its target of prohibition.[24] Namely, Japan Fair Trade Commission (JFTC), as the NCA of Japan, can intervene through the clearance process of either merger control or joint venture. For example, during the clearance process of merger of the business of three major banks (Dai-Ichi Kangyo Bank, Fuji Bank, and the Industrial Bank of Japan) via jointly-established parent company (Mizuho Financial Group) in 2000, JFTC conducted review on the scale of their subsidiaries in the whole domestic economy in accordance with the prohibition of excessive concentration of economic power as well as the context of competition within relevant market.[25]

In addition, paragraph 2 has prohibition target on the conduct of existing company. According to the wordings of this provision, 'no company may become a company that causes excessive concentration' through acquiring shareholding of the other company in the domestic market.[26] The example of this provision was given in the case in which two major banks (Daiwa Securities Group and Sumitomo Bank) in Japan planned to establish a joint venture in 1998.[27] In this case, as such the joint venture was to become a

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[24] Antimonopoly Act 1947 (JP), Translation of the original in Japanese, published on the website of the Ministry of Justice, Japan: <www.japaneselawtranslation.go.jp/law/detail/?id=2746&vm=04&re=01&new=1> accessed 30 May 2019.

[25] JFTC,'（株）第一勧業銀行，（株）富士銀行及び（株）日本興業銀行の持株会社の設立による事業統合 (Decision on Merger of Businesses of Dai-Ichi Kangyo Bank, Ltd., Fuji Bank, Ltd., and the Industrial Bank of Japan, Ltd. via Establishing Holding Company)', translation, [Japan] (Case No. 1/2000) <www.jftc.go.jp/dk/kiketsu/jirei/h12mokuji/h12jirei1.html> accessed 6 July 2019 (JFTC, Case No. 1/2000).

[26] AMA (n 24).

[27] JFTC, '大和證券（株）と（株）住友銀行の業務提携 (Decision on Joint Venture of Daiwa Securities Group Inc. and The Sumitomo Bank, Limited)', translation, [Japan] (Case No. 11/1998)

subsidiary company of the Daiwa Group because Daiwa was going to hold 60% of share of this joint venture. An administrative review by JFTC was conducted on the question whether Daiwa 'may become a [holding] company that causes excessive concentration of economic power in Japan' due to this transaction.[28]

According to the categorisation of Cheng, these approaches can be recognised as a form of 'direct regulation of conglomerate'.[29] Contrary to this approach, the majority of jurisdictions adopt methods to tackle aggregate concentration in context of regulation of market behaviour, if any.[30] In order to enable these paragraphs to work appropriately, paragraph 4 of Article 9, AMA requires any entity whose consolidated assets of their own group exceeds certain volume to submit an annual report to the JFTC.[31]

In addition to the Article 9, AMA as a general provision regarding aggregate concentration, paragraph 1 of Article 11, AMA as the *lex specialis*, gives the company 'engaged in banking or insurance business' stricter provision which prohibits such company from obtaining the voting rights in other entities exceeding a certain percentage. This is the case unless the exemptions which are stipulated in the other paragraphs are applicable.[32]

<www.jftc.go.jp/dk/kiketsu/jirei/h10mokuji/h10jirei11.html> accessed 6 July 2019 (JFTC, Case No. 11/1998).

[28] The above two cases were made before the most recent amendment of the Article 9 of AMA. Therefore, a couple of wording of the provisions were different from current version. However, the concept of 'excessive concentration of economic power' was not amended.

[29] Cheng (n 23), p. 75.

[30] ibid, p. 78.

[31] The most recent data which is available in English shows that 22 companies submitted reports due to its scales pursuant to the Article 9 of AMA in 2002;
JFTC, 'Trends in the Notifications Related to Chapter Four of The Antimonopoly Act in Fiscal Year 2002' (30 May 2002)
<www.jftc.go.jp/en/pressreleases/yearly_2003/may/2003_may_30_files/2003-May-30.pdf> accessed 7 July 2019.

[32] AMA (n 24).

The purpose of prohibition against excessive concentration is intended as a safeguard for competition and market mechanism.[33] This concept was created by the awareness of risk that the rules on monopoly and concentration via relevant market might fail to sufficiently protect the competition environment if serious distortion would arise from the activity of conglomerates beyond a single relevant market.[34] Additionally, the rules on abuse of dominant position would not provide appropriate tools to control the situation in such cases, because a conglomerate could exercise its power even in the market in which it has no dominant position.[35] The provisions on excessive concentration are expected to deal with such concerns.

As the paragraph 3 of Article 9 of the AMA stipulates the definition of excessive concentration of economic power as the extreme size of group companies across the considerable number of business fields, the main target of this provision is to regulate the power of conglomerates. Therefore, the law on excessive concentration could be recognised as the one of the examples of the jurisdictions which tries to deal with aggregate concentration.[36] However, as Gal discovered through questionnaire on NCAs, the several different tools to tackle aggregate concentration are possible as well. Moreover, the Japan Business Federation argues that the prohibition of excessive concentration could reduce the incentive of Japanese entities to obtain competitiveness in global market.[37] In addition, the overburdening of paperwork on businesses

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[33] Shuichi Sugahisa and Wataru Kobayashi, 平成14年度改正独占禁止法の解説～一般集中規制と手続き規定等の整備～*(The review on modification of 2002 on Antimonopoly Act: the modifications on excessive concentration and operation rules)*, translation, [Japan] 2002, Shojihomu.

[34] Takayuki Suzuki and Kiyofumi Koutani, *事例で学ぶ独占禁止法 (Competition law and case study in Japan)*, translation, [Japan] 2017, Yuhikaku.

[35] ibid.

[36] Gal (n 6).

[37] Japan Business Federation, '一般集中規制（独占禁止法第９条）について' (Opinions about prohibition of excessive concentration of economic power (Article 9 of Antimonopoly

for the annual report which is stipulated in the paragraph 4 of Article 9 of the AMA is considerable, because it needs to include detailed information about all of the subsidiaries for various data like the full assets and the percentage of total voting right in such subsidiaries.[38] This means that such a way to regulate economy has certain costs and disadvantages as well. As a preparation for the further discussion about the appropriacy of this provision, it would be necessary to discuss the reasons behind the existence of this legislation.

In order to understand why Japanese jurisdiction adopts 'globally rare example' of provision, the historical background needs to be understood.[39] At first, it would be recommended to understand that the history of industrialisation of Japanese economy in the era of the Empire of Japan had been the process of concentration. Namely, due to the depression after the World War I and the Great Kanto Earthquake, imperial government introduced new legislations as a part of its economic policy.[40] Such legislations encouraged formation of cartels and gave authorities the discretion to force the outsiders to join the relevant cartels, in order to protect the net exports and accelerate the reconstruction.[41] Contrary to the belief of the today's world, the Empire of Japan had thought that cartels and oligopoly 'should be welcomed'.[42] The legislative control was strengthened after the

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Act)), translation, [Japan] (the 18th working group for entrepreneurship and IT, Tokyo, February 2014) <https://www8.cao.go.jp/kisei-kaikaku/kaigi/meeting/2013/wg2/sogyo/140224/item1-2.pdf> accessed 10th May 2019.

[38] ibid.

[39] Masahiro Shimotani, *持株会社の時代 (The era of shareholding companies)*, translation, [Japan] 2006, Yuhikaku Publishing, p. 112.

[40] Export Union Act 1925 (JP); Industrial Organisations Act 1925 (JP).

[41] Osami Tanihara, *独禁法9条の改正と問題点 (The amendment of the article 9 of AMA and the concerns about it)*, translation, [Japan] 1997, Chuokeizai.

[42] Tsunehiko Yui, '戦前日本における競争と独占ないし統制について (Competition, Monopoly and Control in Japan of prewar days)', translation, [Japan] 396 *Fair Trade Institute*, p. 35.

Great Depression through the Important Industrial Control Act.[43] This legislation stipulated the cartel's duty to notify the contents of horizontal and vertical agreements which would be concluded within each cartel, and discretion of government to order on business entities to follow such agreements. During such period of economic oligopolisation, the conglomerates which are called *zaibatsu* obtained the extreme percentages of capital and resources in the domestic economy, and the connection to political and governmental power.[44]

According to the report of the Mission on Japanese combines which was organised as one of the policies for post-war process via occupation body of the US, such encouragement of concentration created barrier for new business to enter domestic economy and shrunk the domestic consumption.[45] As a result, the business sector fell in the situation in which it required the continuous market expansion in order to deal with shrinking domestic market.[46] Therefore, the extreme concentration was the crucial factor of Japanese invasion and colonialism.[47] It was no wonder that the elimination of such aggregate concentration and its fruit were not only the economic policy but also the post-war process of nation restructuring in governmental system.[48]

Due to the above situation, after the surrender of Japan in 1945, economic legislation which stipulates competition matter including criminalisation of

[43] Important Industries Control Act 1931 (JP).
[44] Christopher Goto-Jones, *Modern Japan: A very Short Introduction* (OUP 2009) p. 76.
[45] United States Mission on Japanese combines (1946), 'Report of the Mission on Japanese combines: a report to the Department of State and the War department' [Washington]: [U. S. Govt. Print. Off.].
[46] ibid.
[47] ibid.
[48] Tanihara (n 41).

monopoly and illegalisation of anti-competitive agreement was required,[49] in order to achieve the goals of US occupation body which were defined as 'Democratization of Japanese Economic Institutions' including the termination of cartels and the elimination of barriers for free entry of new business.[50] In this context, the reformation of market structure including dissolution of *zaibatsu* and the legislation process of competition law were inseparable each other. Otherwise a newly created NCA would not have sufficiently functioned in the situation which had been structured by the excessive concentration of economic power from *zaibatsu*-conglomerates, even if the new economic legislations could succeed to authorise NCA with appropriate power.[51]

Depending on such understanding, AMA, as the newly introduced legislation of competition, adopted a provision in Article 9 which prohibited the company to hold shares of another entity. As a result, no existence of holding company had been allowed until the modification of the Articles 9 and 10 of the AMA in 1949.[52] This means that the Article 9 of the AMA was the final step of dissolution of *zaibatsu*, because shareholding companies had been the crucial method for them to ensure the concentration and the control of groups of conglomerates throughout various fields of markets.[53]

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[49] Posey Thornton Kime, 'An Act to Promote and Preserve Free Trade and Fair Competition (draft)' National Diet Library Microforms, GHQ/SCAP ESS(A)-03406 (as cited in Harry First, 'Antitrust in Japan: The Original Intent' (2000) 9 PAC. RIM L. & POL'Y J. 1, p. 37).
[50] The Joint Chiefs of Staff of U.S. Department of Defence, 'Basic Initial Post Surrender Directive to Supreme Commander for the Allied Powers for the Occupation and Control of Japan' (J.C.S 1380/15, 3 November 1945) <www.ndl.go.jp/constitution/shiryo/01/036/036tx.html> accessed 16th June 2019.
[51] Eleanor M Hadley, *Antitrust in Japan* (Princeton University Press 1970), p. 127.
[52] After the modification of relative provisions in 1949, operating companies have been allowed to obtain share of other companies (holding-operating company) and the prohibition target had been limited to pure holding company.; Tanihara (n 41).
[53] Corwin D Edwards, 'The Dissolution of Japanese Combines' (1946) 19 *Pacific Affairs 3*, pp. 227-240, p. 230.

AMA had been modified several times and such modifications almost always led to the loosening of prohibition of holding company.[54] However, the concept of prohibition of holding company had survived in general aside from couple of exceptions, until the radical amendment of the Article 9, AMA in 1997.[55] Hashimoto opines that the prohibition of holding company had been supported due to the following four risks which might plague the domestic economy.[56] First, multilateral shareholding among conglomerates might create complex structure of business relationships. Considering that such structure would reduce the transparency, the risk of anticompetitive behaviour would increase in such a situation. Second, holding company could play a role as an upward pressure on price in the stock market. In such a market, the participation of a new business and individual buyer would be futile. Third, aggregate concentration could be accelerated by holding companies like it had been in pre-war era. Finally, the boom of emergence of holding companies might cause income gaps among citizens and such situation might lead to political risk.

The most recent modification on the Article 9, AMA was made in 2002.[57] As a result, the limit of volume of shareholding by 'Large Company', which is the concept defined in Companies Act as the entity whose scale exceeds certain volume, was abandoned.[58] This means that the condition of shareholding is not the main concern of legislation anymore but no more than one element of purpose of prohibition of excessive concentration of economic power.[59] Due to this modification, the purpose of legislation is clarified in the

[54] Tanihara (n 41).
[55] ibid.
[56] Ryogo Hashimoto, *獨占禁止法と我が国民経済 (Antimonopoly Act and domestic economy)*, translation, [Japan] 1947, Nikkei, p. 78.
[57] Tanihara (n 41).
[58] Companies Act, 2005 (JP).
[59] Shimotani (n 39).

wording of the Article 9, AMA as the prohibition of excessive concentration of economic power, and the details of prohibited condition is stipulated in guideline which is issued by JFTC.[60]

As this section explained, the prohibition on excessive concentration via scale of conglomerates including asset volumes and percentage of shareholding had been moulded by historical discourse of legislation. Two special backgrounds of Japan would be found in the history of this legislation. First, the history of competition law in Japan had been founded on the economic condition which had been extremely concentrated. The top four conglomerate groups occupied almost quarter of total paid-in capital in whole domestic economy.[61] Especially, its percentages on financial sector (49.7%) and heavy industry (32.4%) were extremely high.[62] Such concentrations had been reflected in total output. For example, 69% of aluminium, 88% of steam engines, and 69% of steam locomotives had been produced by top 15 groups of *zaibatsu*.[63] Additionally, *zaibatsu* companies owned 57% of the assets and 71% of the loans and advantages of all ordinary bank across the domestic market.[64] With regard to the foreign investment, top 4 groups had invested in 80.1% of volume of total foreign investment.[65] This means that the process of growth and concentration could have continued to be on the progress, even though the then-current phase had already shown extreme degree of their sizes. In such situation, all movements toward aggregate concentration should have needed to be avoided, in order to ensure the function of competition. Due to

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[60] JFTC, 'Guidelines Concerning Companies which Constitute an Excessive Concentration of Economic Power' (12 November, 2002) <www.jftc.go.jp/en/legislation_gls/imonopoly_guidelines_files/Company_Concentration.pdf > accessed 4 June 2019 (JFTC, Guidelines).
[61] Holding Company Liquidation Commission, *日本財閥とその解体 (Japan's Zaibatsu and their Dissolution)*, translation, [Japan] 1973, Harashobo.
[62] ibid.
[63] Edwards (n 53).
[64] ibid.
[65] Hadley (n 51).

such an understanding, the prohibition of holding company had survived and the size of conglomerate is still regulated. Second, such concentrations had been encouraged by economic legislation until the introduction of AMA. Before the introduction of AMA, the policies of economic legislation had been completely opposite to those of competition law of nowadays. Even though all legislation which encouraged cartels has already been removed by post-war process, business culture of competitive behaviour is younger than those of coordinative behaviour which had history with considerable length.

Considering the above situation, the background which needed the prohibition of holding company seems not common in today's western society. First, the legislation which encouraged concentration and cartel would not currently be found in western modern society. This means that no emergency to counteract the public movement toward the concentration would be found and no radical legislative aid against coordinative culture would be necessary. Instead of coordinative culture, western culture had adopted competition system in economy.[66] Secondly, the structure of concentration of former Imperial of Japan was quite different from those of today's concentration. For example, while US statistics show that the large volume of employment of the US is owned by large firms,[67] those of Japanese employment share was occupied by numerous small and medium-sized enterprises (SMEs) in pre-war era.[68] This had been caused by the structure in which only SMEs were required to compete with each other.[69] Namely, SMEs in Japan had been satellite manufacturers to large conglomerate groups and had provided such giant firms, which had enjoyed the market structure

[66] Robert A Fearey, *The Occupation of Japan, Second Phase: 1948-1950* (The Macmillan Company 1950) pp. 69-71.
[67] Lawrence J White, 'Trends in Aggregate Concentration in the United States.' (2002) 16 *The Journal of Economic Perspectives* 4, pp. 137–160.
[68] Hadley (n 51) p. 18.
[69] ibid, p. 17.

without pressure of competition due to pyramidal structure of ownership of conglomerates, with component parts or finishing services.[70] These were the reasons why the deconcentrating program needed to destroy such structure by prohibition of holding company. Therefore, the history of creation of this provision seems not to be suggestive for western society, even though it inspired South Korea as a tackling against aggregate concentration.[71]

Accordingly, a suggestive aspect of this provision could exist due to its effect, if any, but not to background. This means that the discussion whether and in what degree Japanese approach could be a roadmap for major jurisdictions would depend on the analysis what kind of effect this provision has provided. The following sections will try to delineate the pros and cons of this approach by referring to statistics and opinions from several stakeholders. After such analysis, its appropriacy for western economy will be discussed.

3. Advantages of the scheme of prohibition of excessive concentration of economic power

One of the advantages of scheme of prohibition of excessive concentration of economic power would be found in the flexibility of timing of intervention. According to the Article 9,AMA the assessment of this kind of concentration could be conducted during the process of merger clearance, registration of incorporation under Companies Act,[72] assessment of application for exemption about shareholding under the Article 11 of the AMA, and review

[70] ibid.
[71] Jeong-Pyo Choi and Dennis Patterson, 'Conglomerate Regulation and Aggregate Concentration in Korea: An Empirical Analysis.' (2007) 12 *Journal of the Asia Pacific Economy* 2, pp. 250-271.
[72] Companies Act (n 58).

of annual reports which are stipulated in Article 9 of the AMA.[73] Contrary to Clayton Act[74] of the US and the regulation 139/2004 of the EU (EUMR),[75] this scheme allows JFTC to intervene both before and after the concerned transaction.

The foreseeability would be another example of advantage of the scheme of this prohibition. Even though the wording of 'excessive concentration of economic power' has large ambiguity, the details of prohibition are clarified by JFTC's guidelines.[76] According to these guidelines, the basic condition of excessive concentration would be divided into three categories. First, if business activity of a whole group including parents and subsidiaries has excessive scale and covers considerable number of different markets, such business could be recognised as excessive concentration. Second category of excessive concentration is described as the case in which the business of a whole group involves a high degree of influence over other companies. Third, the business which occupies important position of considerable numbers of several interrelated markets could be an excessive concentration.

Ownership of shares of other companies which triggers one of the above three condition is prohibited. The further details of prohibited situation are described in the same guideline.[77] Such prohibited situations have various categories corresponding to the types of business. For example, in regard with the situation of over-scaled business, the excessive concentration is the case

[73] JFTC, Case No. 1/2000 (n 25); JFTC, Case No. 11/1988 (n 27); JFTC, '（株）ダイエーホールディングコーポレーションの持株会社化 (Decision on Registration of Holding Company for K.K. Daiei Holding Corporation)', translation, [Japan] (Case No. 10/1998) <www.jftc.go.jp/dk/kiketsu/jirei/h10mokuji/h10jirei10.html> accessed 9 July 2019.
[74] Clayton Act 1914 (US).
[75] Council Regulation (EC) 139/2004 on the control of concentrations between undertakings (EC Merger Regulation) [2004] OJ L24/1.
[76] JFTC, Guidelines (n 60).
[77] ibid.

when a company group has total assets exceeding JPY 15 trillion, and has in five or more different markets its subsidiaries whose individual assets are larger than JPY 300 billion.[78] Due to its detailed foreseeability, in the history of competition law in Japan, very few cases have been brought before JFTC, and no concern has arisen from the annual reports of companies pursuant to the Article 9, AMA.[79]

4. Disputable achievements of the Article 9, AMA

As the concept of this provision illustrates and the above example of prohibited situation which requires subsidiaries in five or more different markets for existence of concern clarifies, the most important advantage of this provision would be given in the uniqueness of ability to tackle aggregate concentration by conglomerates which have potential to influence the autonomies across the domestic economy through the structure of shareholding. Therefore, it would be important to study whether this provision has succeeded in dealing with the aggregate concentration of Japanese economy or not, in order to assess the effect of this provision.

Due to such point of view, following two tendencies would be worthy of note. First, according to the recent study of market structure of the Japanese economy, the degree of market concentrations has been more serious in the recent years.[80] Specifically, the indicator which is called concentration ratio

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[78] ibid.

[79] JFTC, '独占禁止法第4章改正問題研究会中間報告書 (Interim Report of Working Group on the Amendment of Section 4 of the Antimonopoly Act)', translation, [Japan] (27 December 1995).

[80] Hiroyuki Odagiri, 'Market Concentration and Competition Policy: General Issues with an Application to Japan', (*OECD Competition Committee Hearing on Market Concentration*, Paris, 7 June, 2018) <www.slideshare.net/OECD-DAF/market-concentration-odagiri-june-2018-oecd-discussion> accessed 1 June 2019.

(CR) shows serious tendency of Japan. For example, almost 60% of markets experience the expansion of the CR3 indicator,[81] which means the share of top three firms of each target market.[82]

Additionally, more than 100 product markets face rapid increase in concentration as proven by not only Herfindahl-Hirschman Index (HHI) which means the squares of total market shares of all firms operating in target market,[83] but also CR4.[84] On the other hand, no data of continuous statistic of aggregate concentration in the most recent years of Japan by fixed method of calculation is provided. However, considering that the degree of market concentrations could be a factor of positive proportionality to the existence of aggregate concentration as mentioned in section 1, it seems to be a sufficient reason to recognise the increase of aggregate concentration in recent years in Japan, due to the expansion of degree of the abovementioned market concentrations. Secondly, according to the statistics of the OECD, the productivity growth of the Japanese economy had constantly declined from 2002 to 2010.[85] Considering such two tendencies, Japanese condition in regard with aggregate concentration has similarity with those of western countries in spite of the existence of prohibition of excessive concentration of economic power which is stipulated in Articles 9 and 11 of AMA.

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[81] OECD, 'Market Concentration Issues: paper by the Secretariat' (*OECD Directorate for Financial and Enterprise Affairs*, April 2018) DAF/COMP/WD(2018)46, para 28 <https://one.oecd.org/document/DAF/COMP/WD(2018)46/en/pdf> accessed 11 July 2019 (OECD, Market Concentration).

[82] Glowacky Law Firm, 'European Union Electricity Market Glossary: Concentration ratio (CR)' (*Emmissions-EUETS.com*, 18 January 2019). <www.emissions-euets.com/internal-electricity-market-glossary/2077-concentration-ratio-cr> accessed 11 July 2019.

[83] Commission Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings [2004] OJ C 31/5, para 16.

[84] OECD, Market Concentration (n 81).

[85] OECD, Productivity Indicators (n 3).

In order to make further detailed assessment, it would be recommended to recognise two periods between before and after the radical amendment of Article 9, AMA in 1997 as different phases of prohibition. Namely, as the current prohibition stipulated in Article 9 does not prohibit merely shareholding itself, it is nowadays able to focus on prohibition of aggregate concentration. Contrary, before the amendment in 1997, Article 9 had prohibited the existence of holding companies, as long as such companies could be recognised as 'pure holding companies'.[86] The terminology of 'pure holding company' has been defined as the holding company whose main purpose of business is to control other entities in Japan through the benefit of voting right from shareholding.[87]

In order to make assessment on the prohibition of pure holding company as a previous scheme, it would be necessary to pay attention to economic development in Japan after 1950, because the dissolution program by US-controlled occupation against *zaibatsu* shareholding network had been completed in 1949.[88] As mentioned in section 2 of this article, such operation was conducted both to establish competition in Japanese economy and to ensure the functionality of AMA. Therefore, the functionality of competition policy would be assessed without the disorderly influence of extraordinary power of *zaibatsu* only when the focus is given on the duration after the *zaibatsu*-dissolution program.

[86] Toshiaki Takigawa, 'Competition law and policy of Japan' (2009) 54 *Journal of Antitrust Enforcement* 3, pp. 435–515.
[87] Andrew H Thorson and Frank Siegfanz, 'THE 1997 DEREGULATION OF JAPAN'S HOLDING COMPANIES' (1999) 8 *Pacific Rim Law & Policy Journal* 2, pp. 261-349.
[88] Yoshiro Miwa and Mark J Ramseyer, 'Does Ownership Matter? Evidence from the Zaibatsu Dissolution Program' (2003) 12 *Journal of Economics & Management Strategy* 1, pp. 67–89.

According to Iguchi, the CR10 in manufacturing sector had been calmly declined from 1950 to 1960 and stable after that.[89] Additionally, CR100 in the same sector had constantly dropped from 1950 to 1958 and, thereafter, stable as well.[90] Therefore, even considering that the impact of *zaibatsu* dissolution might have been remaining on market structure soon after the completion of its operation, it would be certain that the Article 9, AMA seems to have functioned in some degree in the period of this statistics (1950-1980), because the aggregate concentration had not increased in such period.[91]

On the contrary, Japanese economy had recently experienced significant increase of aggregate concentration, considering the expansion of market concentrations in several different markets in recent years (2001-2010), in spite of the drop of degree of such concentrations between 1991 and 2000.[92] This might have room to mean that the current scheme of prohibition of excessive concentration of economic power is not the right solution against aggregate concentration. If so, despite the opinion of JFTC which believed that overall prohibition of pure holding company had been too strict in comparison of its purpose,[93] the previous scheme seems to have been more appropriate way of regulation than the current version of wording with more

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[89] Tomio Iguchi, 'Aggregate Concentration, Turnover, and Mobility among the Largest Manufacturing Firms in Japan' (1987) 32 *Antitrust Bulletin* 4, pp. 939-965.
[90] ibid.
[91] ibid.
[92] Yuji Honjo and others, '**モビリティー指数を利用した我が国主要産業の市場構造の変化の検証と競争政策の実務への利用可能性の検討－生産・出荷集中度データに基づく分析－**' (Consideration on Changes of Market Structure of Major Industries in Japan by the Use of Mobility Index, and the Applicability to the Competition Policy: An Analysis Based on the degree of concentration of production and shipment), translation, [Japan] (*JFTC and Competition Policy Research Center Report*, 2014) < www.jftc.go.jp/cprc/reports/index_files/cr-0114.pdf> (as cited in OECD, 'Market Concentration and Competition Policy - Note by Hiroyuki Odagiri: Hearing on Market Concentration' (*OECD Directorate for Financial and Enterprise Affairs*, May 2018) DAF/COMP/WD(2018)68, <https://one.oecd.org/document/DAF/COMP/WD(2018)68/en/pdf > accessed 11 July 2019.
[93] Keiko Unotoro, '**独占禁止法一部改正法の概要** (Overview of partial amendment of Antimonopoly Act)', translation, [Japan] (1997), *Bessatsu Shojihomu* 197, pp. 1-20, p. 7.

accurate definition of prohibition target as shareholding which can trigger excessive concentration.

However, at the same time, it would be recommended to focus on the aggregate concentration of manufacturing sector in the US in the relevant period from 1947 to 1982 which is calculated by White via very similar indicator as those of CR100 of Japan which is mentioned above.[94] According to this statistic, while the small increase was found in 1947-1954, the degree of aggregate concentration in manufacturers of the US had been always stable between 30% and 33% for 42 years from 1954.[95] On the other hand, in regard with the CR100 of manufacturing sector of Japan, the degree of concentration had been stable between 27% and 30% from 1959 to 1980, while the significant drop of such degree existed from 1950 to 1958 and it achieved the score of 25% at bottom.[96] This means, excluding the duration from 1950 to 1958, the movement of degree of aggregate concentration in manufacturing sector was same as those of US in spite of the existence of unique policy against aggregate concentration via prohibition of pure holding company. Therefore, it is not clear how effective this unique provision has been. In addition, it would be worth noting that the significant increase of degree of aggregate concentration in Japanese manufacturers had occurred from 2001 to 2010 in which only minor amendment of wording of the Article 9, AMA was changed in 2002.[97]

Furthermore, considering that significant drop of degree of aggregate concentration was given in the decade (1991-2000) in which the most radical loosening of the Article 9, AMA to allow the existence of pure holding

[94] White (n 67).
[95] ibid.
[96] Iguchi (n 89).
[97] Honjo and others (n 92).

company was legislated, it would remain unclear if the scheme of the Article 9, AMA had played a role as important factor of trends of aggregate concentration in each period.[98] This could mean that the Article 9, AMA had failed to prove its obvious importance as a legislation against aggregate concentration in the duration of above statistics.

Even though the achievement of the Article 9, AMA is not so obvious, JFTC believes that this provision remains necessary for Japanese economy.[99] According to its opinion, the importance of the Article 9, AMA is that it acts as a safe haven for competition authority to intervene in the anticompetitive situation regarding aggregate concentration.[100] This means that JFTC agrees that aggregate concentration has unique risk on the competition environment. The opinion of JFTC regarding aggregate concentration via conglomerate is quite similar to the understanding of Hashimoto which is mentioned in section 2. Namely, JFTC believes that three major harms could be brought to domestic economy in the situation in which the excessive gaps of overall bargaining power, collusive relationships of entities within or beyond the relevant markets, serious volume of intra-group transactions, or foreclosure effects would be led by the aggregate concentration.[101] First, in such situation, entry barriers to the new market would exist. Second, many business players would lose the free choice of counterparty and condition of transaction. Third, markets would be anticompetitive in price and quality. Furthermore, JFTC argues that these three harms would be seriously widespread in the case that

[98] ibid.
[99] JFTC, '独占禁止法第９条に基づく一般集中規制が廃止された場合に実際に生じ得る現実的な弊害について' (Opinion about the practical disadvantage which could exist if the prohibition of excessive concentration of economic power pursuant to the Article 9 of Antimonopoly Act is abolished), translation, [Japan] (March 2005) <www.jftc.go.jp/houdou/pressrelease/h27/mar/150331_1_files/270331_bessi3.pdf > 14 July 2019 (JFTC, Opinion).
[100] ibid.
[101] ibid.

the ties between financial sector and either manufacturer or commercial sector are established.[102] In their opinion, the possibility of such situation is more than zero, considering that the inequality among the entities which had submitted annual report about their assets pursuant to the Article 9, AMA remains high.[103]

Additionally, JFTC found that Japanese entities tend to hold shares of the entities of its buyer and seller in order to establish long-term transaction by the interdependent relationship which would be strengthened via bilateral influence of bilateral shareholding.[104] Therefore, JFTC strongly argues that the Article 9, AMA is necessary. Furthermore, JFTC seems oblivious about the discussion whether or not the Article 9, AMA could provide the effect which functions in practice of economic policy.

5. Critical discussions from viewpoints of deregulation and business sector

The above concern from JFTC seems to be no more than hypothetical because it is not proved about either actual harm of aggregate concentration or functionality of the Article 9, AMA in reality. As a result, Japanese business sector insisted that the Article 9, AMA is an 'outdated' provision.[105]

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[102] JFTC, '一般集中規制の概要(General Overview of Provisions on General Concentration)', translation, [Japan], (the 18th working group for entrepreneurship and IT, Tokyo, February 2018) <https://www8.cao.go.jp/kisei-kaikaku/kaigi/meeting/2013/wg2/sogyo/140224/item1-1.pdf> accessed 10 May 2019.

[103] JFTC, Opinion (n 99).

[104] ibid.

[105] The Council for Regulatory Reform (2014) '公正取引委員会、事業者からのヒアリング 「一般集中規制の見直し」' (Hearing from JFTC and business sector: review on prohibition of excessive concentration of economic power), translation, [Japan] *Minutes of the 18th working group for entrepreneurship and IT 24 February 2014*, Cabinet Office of Japan, Central Government Building No. 4 <https://www8.cao.go.jp/kisei-kaikaku/kaigi/meeting/2013/wg2/sogyo/140224/summary0224.pdf> accessed 16 July 2019.

According to their opinion, deterrence effect of the Article 9, AMA has played a negative role for Japanese businesses as it eradicates incentives to be active in several markets including new and innovative area.[106] Japan Business Federation argues that such situation leads to an inactive attitude to enter the global market because Japanese entities normally obtain significant share in domestic market before they enter the global market.[107] Depending on such point of view, the business sector believes that the Article 9, AMA has hindered Japanese business to be efficient and global.[108]

JFTC did not agree with this idea, because no case has been prohibited by the Article 9, AMA in Japanese history and the borderline of prohibited size of conglomerate which is stipulated in the guideline is far larger than realistic expectation and therefore could hardly be a concern in practice.[109] However, such facts could be the reason to doubt the appropriacy of existence of this provision, in the first place. In addition, business sector argues that the annual reports pursuant to the Article 9, AMA have been a huge burden of paperwork for many conglomerates.[110] For example, one of the conglomerates in Japan was obliged to submit annual report about the details of assets of all of its subsidiaries, and total number of its subsidiaries exceeded no less than 300, while only ten odd of their subsidiaries had considerable assets.[111] Even if such scheme of operation regarding annual report could be tuned and improved to obtain more efficiency and appropriacy in the future, it remains ambiguous whether the scheme of the Article 9, AMA is worthy to survive in spite of its cost of operation.

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[106] Japan Business Federation (n 37).
[107] ibid.
[108] ibid.
[109] The Council for Regulatory Reform (n 105).
[110] ibid.
[111] ibid.

In the opinion of Japan Business Federation and the Council for Regulatory Reform of Cabinet Office of government, the concept of prohibition of excessive concentration of economic power is different from competition law perspective. Namely, focus of this regulation is not given in single relevant market, and the wording of 'fair and free competition' which is defined in paragraph 3 of the Article 9, AMA as one of the purposes of the provision is pointless in such context.[112] Additionally, they disagreed with the opinion of JFTC which is concerned about multi-market contact.[113] The multi-market contact is a concept from the US competition study which illustrates behaviours of conglomerates to enable collusive conduct across several markets.[114] Even though the Council for Regulatory Reform (one of the specialist teams of Cabinet Office of Japan) believes that multi-market contact have already been proven to be harmless by economical study,[115] its risk seems to remain considerable in competition practice according to some academics.[116] Considering that the most important aspect of the Article 9, AMA which is supported by JFTC would be given on its potential to function as safe haven in the case that JFTC has no alternative method of intervention, neither business sector nor cabinet office have succeeded to prove that this provision needs to be abolished.

As obviously observed from above analysis, discussion of the Article 9 tends to be rather theoretical than practical. According to the business sector, the disadvantages are the potential deterrence effect on the activeness of players

[112] ibid.
[113] ibid.
[114] Federico Ciliberto and Jonathan W Williams, 'Does multimarket contact facilitate tacit collusion? Inference on conduct parameters in the airline industry' (2014) 45 *The Journal of Economic Perspectives* 4, pp. 764-791.
[115] The Council for Regulatory Reform (n 105).
[116] Ciliberto and Williams (n 114); Robert M Feinberg, 'Mutual Forbearance as an Extension of Oligopoly Theory' (1984) 36 *Journal of Economics and Business* 2, pp. 243-249; Beatriz Domínguez and others, 'Multimarket contact and performance: Evidence from emerging economies' (2016) 19 *Business Research Quarterly* 4, pp. 278-288.

and the cost of paperwork. On the other hand, JFTC's aim is the possibility to intervene in the case of distorted structure of whole domestic economy in the way in which no other provision allows JFTC to intervene. Indeed, even though no case had been prohibited pursuant to the Article 9, AMA couple of transactions had triggered investigation of JFTC pursuant to this provision. However, it would be difficult to sufficiently prove that such concern of JFTC about potential of shortage of tools of intervention is reasonable, considering that the concern itself is just hypothetical. At the same time, considering that neither a concentration nor a transaction has been prohibited by the Article 9, AMA in the history, it is not clear as well whether or not Article 9, AMA could sufficiently function in the very case about which JFTC is concerned. It would be difficult to recommend either abolition, amendment, or conservation of the Article 9, AMA due to such theoretical discourses which do not take cognisance of the practice in the market.

6. Recommendations for the two major jurisdictions - the US and the EU

In order to decide how the Article 9, AMA could be suggestive for other jurisdictions, it would be recommended to note that the definition and calculation of aggregate concentration has been understood in various ways. First, while the OECD defines this concept as a principal position of large business,[117] some academics define it as a multimarket seriousness of effect of large conglomerate.[118] In other cases, Cheng and Gal believe that the impact of shareholding as a method through which large conglomerates execute their influence should be included in the definition of aggregate concentration,[119] like the definition of excessive concentration of economic

[117] OECD, Glossary (n 8).
[118] Gal (n 6).
[119] Thomas Cheng and Michal S Gal, 'Aggregate Concentration: Regulation by Competition law?' (4th Meeting of the UNCTAD Research Partnership Platform, Geneva, 7 July 2013)

power by JFTC does.[120] Secondly, as a natural result of such confusion, the calculating methods for aggregate concentration which are adopted by researchers have not been unified. On one hand, some use concentration ratio to calculate aggregate concentration, and others use shares of value added from top firms.[121] On the other hand, some academics accept sales or assets of large conglomerates as an indicator of aggregate concentration and, sometimes, share of employment is important as well.[122] Japanese researchers tend to focus on the frequency of changes in list of companies which constitute top firms in market share.[123] It is recognised that the less frequent such change has occurred, the more serious the likelihood of existence of aggregate concentration becomes.[124] Additionally, during the policymaking of *zaibatsu* dissolution, paid up capital, employment share, and total assets of certain families who owned and operated each *zaibatsu* conglomerate had been thought to be important for analysis of seriousness of degree of aggregate concentration.[125]

Such confusions on the understanding of aggregate concentration would mean that no continuous quantitative calculation of aggregate concentration would be available in current situation, like Todorov understands that the indications of aggregate concentration which were referred in his paper were

<https://unctad.org/meetings/en/Presentation/RPP2013_GalCheng_en.pdf> accessed 17 July 2019.

[120] JFTC, Guidelines (n 60).

[121] Frank A Cowel, *Measuring Inequality* (3rd edn, OUP 2011); White (n 67); Honjo and others (n 92); Iguchi (n 89).

[122] David W Penn, 'Aggregate Concentration: A Statistical Note' (1976) 21 *Antitrust Bulletin* 1, pp. 91-98; Lawrence J. White and Jasper Yang, 'What Has Been Happening to Aggregate Concentration in the U.S. Economy in the 21st Century?' (30 March, 2017) <http://dx.doi.org/10.2139/ssrn.2953984> accessed 19 July 2019.

[123] Yuji Honjo and others, 'The Turnover of Market Leaders in Growing and Declining Industries: Evidence from Japan' (2018) 18 *Journal of Industry, Competition and Trade* 2, pp. 121-138.

[124] OECD, Market Concentration (n 81).

[125] Hadley (n 51).

'relatively rough' estimates.[126] In such situation, it would be difficult to take concerns of aggregate concentration into account of policymaking, contrary to the understanding of Gal which believes that aggregate concentration is worthy to be target of competition policy in general.[127] It would be recommended to note the above situation, in order to make recommendations for major jurisdictions.

Furthermore, due to the above data in section 4, it would remain unclear whether or not aggregate concentration could lead sufficient risk to be regulated by competition law in way of an *ex ante* regulation, even when the existence of such aggregate concentration could be proven by at least one indicator. First, even though some statistics prove that the degree of aggregate concentration in Japan has increased recently,[128] the productivity growth of Japanese economy has experienced significant positive progress in the most recent duration (2011-2016).[129] Secondly, while the degree of aggregate concentration dropped from 1991 to 2000 in Japan,[130] the trend of growth of multi-factual productivity had been almost constantly declined in such duration.[131] On the other hand, it would be recommended to note that the negative development of scores of productivity growth had been sometimes observed at the same time of duration in which the degree of aggregate concentration increased, for example a period from 2001 to 2010. Therefore, at least, it seems that the aggregate concentration could be in some degree captured as one of factors of negative effect on domestic economy.

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[126] Aleksandar B Todorov, 'AGGREGATE CONCENTRATION, MARKET SIZE AND EU INTEGRATION: EVIDENCE FROM SOUTHEAST EUROPE' (2018) 62 *Izvestiya Journal of Varna University of Economics* 3-4, pp. 185-199, p. 197.
[127] Gal (n 6).
[128] Honjo and others (n 92).
[129] OECD, Productivity Indicators (n 3).
[130] Honjo and others (n 92).
[131] OECD (n 1).

Nonetheless, the above discussion might mean that the seriousness of connection between productivity and aggregate concentration would not be obvious enough to be always prohibited. In addition, some researchers believe that the main factor of inefficiencies of Japanese economy would be in the existence of too much small firms which survived only due to the governmental policy to guarantee their debt in order to support their credit procurement.[132] Such understanding could create conflict with the idea to pay attention to the harm of aggregate concentration.[133] Furthermore, a similar discussion of ambiguousness of causal linkage between aggregate concentration and productivity growth could be applicable to a western economy such as that of the US. Namely, while the degree of aggregate concentration had been stable between 1954 and 1996 in US manufacturing sector,[134] the annual growth rate of multifactorial productivity had been unstable and constantly climbing on 'trend growth' since 1991.[135]

As long as the relationship between productivity and aggregate concentration remains unclear, it will be ambiguous whether or not it should be recommended for other jurisdictions to prohibit according to the degree concentration of economic power. This means that it will not be possible to decide in what size aggregate concentration should be prohibited. At least, it would be clear that the concentration which is sufficiently serious to be prohibited would be highly exceptional, considering that no obvious threat

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[132] Leonard J Schoppa, 'Japan, the Reluctant Reformer.' (2001) 80 *Foreign Affairs* 5, pp. 76-90.
[133] William J Kolasky, Deputy Assistant Attorney General Antitrust Division DoJ, 'CONGLOMERATE MERGERS AND RANGE EFFECTS: IT'S A LONG WAY FROM CHICAGO TO BRUSSELS' (Speech at the George Mason University Symposium Washington DC, 9 November 2001) <www.justice.gov/atr/file/519041/download> accessed 30 July 2019.
[134] White (n 67).
[135] OECD (n 1).

regarding aggregate concentration had been observed in the modern history in the world excluding pre-war domination of *zaibatsu* in Japan.

At the same time, even though the aggregate concentration which could be serious for domestic economy and competition would be the exceptional case, it should be noted that such case truthfully existed in history of Japanese economy during *zaibatsu* domination. This might mean that the uniqueness of the Article 9, AMA has been led by the uniqueness of experience of Japanese economy. In addition, considering that legislative discussion has not reached the decision either in support for or to deny the existence of the Article 9, AMA this provision seems to have survived due to passive background which means that no one had found the sufficient evidence to demolish it. If so, such provision would not be worthy to be recommended for other jurisdictions, considering that such point of uniqueness of Japanese economic history had been created by the exceptional fact that both market and aggregate concentrations had been encouraged by government for a long time in Japan as mentioned in section 2 of this article.

According to the report from Cheng and Gal at the meeting of United Nations Conference on Trade and Development (UNCTAD), only two jurisdictions (South Korea and Japan) were observed to have specific target of prohibition on high level of aggregate concentration.[136] In addition, while the majority of the other jurisdictions have some kind of methods to take aggregate concentration into account, the timing of intervention must be limited to the point of transaction because such intervention is adopted in merger law.[137] Considering that even the majority of such jurisdictions have no experience of intervention against aggregate concentration,[138] it is still ambiguous if it

[136] Cheng and Gal (n 119).
[137] ibid.
[138] ibid.

would be recommended in general to have legislative control for aggregate concentration.

6.1. Recommendation for the US

In order to make some recommendations for major jurisdictions, relative jurisdictions need to be analysed. It would be necessary to understand the interpretation of Section 7 of Clayton Act, 1914 for analysis of US competition law in regard with the aggregate concentration. As this provision prohibits any acquisition which would substantially lessen competition or tend to create monopoly, it could take cross-market extensions of conglomerates into account.[139] For example, the Federal Trade Commission (FTC) of the US challenged the acquisition of Clonox by Proctor and Gamble (P&G) due to the concern of lessening competition in household products market.[140] In this case, FTC believed that the pressure of existence of P&G as potential rival of Clonox and the P&G's ability to be competitor of Clonox in the future would be important to ensure the consumer welfare, even though P&G had not operated in the relevant product market of Clonox at that time.[141] Considering such importance of existence of the two independent potential competitors, the above transaction would be elimination of competitiveness and harmful for consumer welfare. Such concept of understanding of transaction by conglomerates is called 'potential competition doctrine' and had been supported by courts in the US.[142] This concept had been further

[139] Joseph P Bauer, 'Challenging Conglomerate Mergers Under Section 7 of the Clayton Act: Today's Law and Tomorrow's Legislation' (1978) 58 *Boston University Law Review* 2, pp. 199-245.
[140] *FTC v. Procter & Gamble Co.*, 386 U.S. 568 (1967).
[141] ibid.
[142] Keith N Hylton, *Antitrust Law: Economic Theory and Common Law Evolution*, (Cambridge University Press 2010), p. 345.

developed in *Bendix* case.[143] In this case, while the acquirer company was not potential competitor of the acquired company, FTC believed that the merger was anticompetitive, considering that the acquirer planned the acquisition of its third principal competitor and this transaction could act as a bypass towards a new market as a 'toehold'.[144]

However, at the same time, potential competition doctrine has a fundamental logical flaw. First, according to this concept, undertakings would be required to always maximise the consumer welfare.[145] Such belief contradicts with the value of competition law which intends to reduce anti-competitive behaviour, but not to force undertakings to compete.[146] Secondly, this concept could reduce competition in spite of its intention, considering that conglomerate merger could sometimes play a role as efficient and reasonable way to enter a new market. Namely, as long as this concept intends to prohibit conglomerate acquisition of potential competitor as a method to enter new market, it means the elimination of efficient entry and such situation would lead to higher barriers which would protect existing players of relevant market.[147] This means that the potential competition doctrine needs to be interpreted in a strict way. According to the guideline of US Department of Justice (DoJ), the intervention against such transaction could be justified only when the HHI score of destination market of such entry exceeds 1800.[148]

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[143] The Bendix Corporation, Petitioner, v. the Federal Trade Commission, Respondent, 450 F.2d 534 (6th Cir. 1971, US Court of Appeals).
[144] Hylton (n 142), p. 349.
[145] Hylton (n 142).
[146] Harry First, 'Antitrust Law' in Alan B. Morrison (ed), *Fundamentals of American Law* (OUP 1996).
[147] Hylton (n 142).
[148] DoJ, '1984 Merger Guidelines' (US Department of Justice, 14 June 1984), paragraph 4.131 <www.justice.gov/sites/default/files/atr/legacy/2007/07/11/11249.pdf> accessed 22 July 2019.

Furthermore, both potential competition doctrine and toehold doctrine are recently understood in sparing way.[149]

In spite of sparing attitude of recent authorities in regard with conglomerate merger, the Section 7 of Clayton Act,1914 remains important to discuss aggregate concentration. Even though the DoJ's interpretation of potential competition doctrine focuses on each relevant market as mentioned in above guideline,[150] there are several underpinnings of this provision which more directly deal with cross-market effect of aggregate concentration. For example, the shift of policy which could be found in legislative modification and attitudes of the Supreme Court might imply that this prohibition needs to be applied to aggregate concentration of assets.[151] Furthermore, DoJ might believe that this provision could be applied to purer form of conglomerate acquisitions.[152]

In this context, one of former attorney generals of DoJ has concerns regarding domestic politics, economics, and social tendency being potentially corrupted by vivid increase of conglomerate mergers in the future, which has similar reasoning with the legislation of Article 9, AMA of Japan.[153] Such similarity would be rather confident because he further argued that the active trend of conglomerate mergers could lead the necessity to directly regulate business players and the elimination of tradition of US business culture based on self-

[149] Hylton (n 142).
[150] DoJ (n 148).
[151] Luther C McKinney, 'Section 7 of the Clayton Act as Applied to Conglomerate Mergers: Incipient Antitrust Doctrine' (2012) 44 *St. John's Law Review* 5, pp. 635-654.
[152] ibid.
[153] John N Mitchell, the Attorney General of US, 'THE SPECIFIC DANGERS OF CONGLOMERATE MERGERS ' (Speech at the Georgia Bar Association, Desoto-Hilton Hotel, Savannah, Georgia, 6 June 1969) <www.justice.gov/sites/default/files/ag/legacy/2011/08/23/06-06-1969b.pdf> accessed 22 July 2019.

regulation.[154] As a result of this understanding, FTC believes that the amendment of Clayton Act has its objective on prohibition of aggregate concentration which goes beyond the market concentration,[155] contrary to the interpretation of the Distinct Court (Connecticut) which believes that such amendment does not take aggregate concentration into account.[156]

Namely, following two understandings which are incompatible with each other have existed. On one hand, the decision of the court believes that only exceptional situations could allow authorities to intervene against aggregate concentration due to Section 7 of Clayton Act.[157] On the other hand, according to the opinion of the FTC, each merger between firms whose assets exceed USD 250 million are sufficiently serious to be challenged by the authority.[158] Additionally, DoJ temporarily believed that increase of degree of aggregate concentration could trigger intervention without evidence of existence of effect on certain relevant market.[159] These approaches of the US authorities have similarities with those of the Japanese scheme of prohibition of excessive concentration of economic power, because they are concerned about the centralisation of economic resources and they focus on the scale of assets of the merging parties. Furthermore, in 1979 and 1980, a draft legislation which prohibited certain size of aggregate concentration by conglomerates was submitted.[160] Even though such legislation had been

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[154] ibid.
[155] Hylton (n 142); The Celler-Kefauver Act 1950 (US).
[156] *United States v. International Telephone & Tel. Corp.*, 306 F. Supp. 766 (United States District Court D. Connecticut. 1969).
[157] ibid.
[158] Wallace M Rudolph, 'The Conglomerate Merger Tangle' (1970), 50 *Nebraska Law Review* 1, pp. 1-14.
[159] Bundeskartellamt (Germany), 'Conglomerate Mergers in Merger Control: Review and Prospects' (the meeting of the Working Group on Competition Law, 21 September 2006) <https://www.bundeskartellamt.de/EN/AboutUs/Conferences/AntitrustWorkingParty/antitrustworkingparty_node.html > accessed 30 July 2019.
[160] David Boies, 'International Implications of Limitations on "Aggregate Concentration"' (1981) 2 *Michigan Journal of International Law* 1, pp. 42-61.

declined, its concept was quite similar to the Japanese attitude which is represented by the Article 9, AMA. This might mean that the style of the Article 9, AMA is not completely new for US society. However, at the same time, it would be necessary to note that the abovementioned approaches of US competition authorities which showed proactive movement against aggregate concentration had been recently not supported by the Supreme Court.[161] Its decisions have tended to rely on rather potential competition doctrine.[162]

While it would be worthy to take a look at above similarities between the concept of Japanese jurisdiction and the belief of FTC of the US, the differences are still significant. First, the borderline of asset volume of merging parties which triggers review under the Article 9, AMA in Japan is far higher than those of above understanding of FTC regarding the merger control pursuant to Section 7 of Clayton Act. Namely, according to the example in JFTC's guidelines which is mentioned in section 3 of this article, the trigger of review of JFTC is given in the scale of acquirer's asset exceeding JPY 15 trillion (almost USD 140 billion at the rate of 23rd July 2019).[163] Considering the additional conditions like operation of large-scaled subsidiaries in several different important markets, the regulation of Japanese scheme is far stricter than those of US, contrary to its appearance. Therefore, the intervention of JFTC regarding aggregate concentration would be more exceptive in comparison to the approach of FTC in the US which recognises asset beyond USD 250 million as a trigger for intervention.[164] This might mean that the opinion of JFTC which believes that the prohibition of

[161] Bundeskartellamt (n 159).
[162] Kolasky (n 133).
[163] JFTC, Guidelines (n 60).
[164] Rudolph (n 158).

excessive concentration of economic power is the only possible method to intervene in emergence case would not be suggestive for the US.[165]

In addition, considering that the connectivity between the degree of aggregate concentration and productivity growth is not so clear both in Japan and the US,[166] it would remain ambiguous from what point of degree of aggregate concentration the domestic economy could be obviously harmed. Therefore, the necessity of prohibition of aggregate concentration in *ex ante* way would be indeterminate as well. Furthermore, if such obvious harm can be occurred only in exceptional situation in which concentrations had been encouraged by government like pre-war era of Japan,[167] the provision of the Article 9, AMA would have no suggestive point for the US. According to above analysis, the sole obvious advantage of the AMA would be given in flexibility of timing of intervention due to annual report system. However, considering that this system of annual report leads overburden of paperwork on business sector,[168] such advantage would not be decisive as well. Therefore, even though the Article 9, AMA of Japan has no obvious serious disadvantage, it would not be suggestive for US jurisdiction, considering that NCA of the US already has the required wherewithal for intervention.[169]

6.2. Recommendation for the EU

Contrary to the Japanese and US jurisdictions, EU jurisdiction is not focused on the control of degree of aggregate concentration. This feature was more

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[165] JFTC, Opinion (n 99).
[166] OECD (n 1); Honjo and others (n 92); White (n 67).
[167] Yui (n 42).
[168] Japan Business Federation (n 37).
[169] Peter C Carstensen and Nina H Questal, 'Use of Section 5 of the Federal Trade Commission Act to Attack Large Conglomerate Mergers' (1978) 63 *Cornell Law Review* 5, pp. 841-878.

obvious in previous version of EUMR.[170] Considering that the assessment of existence of dominant position always requires market definition,[171] the previous version of regulation which stipulated creation and strengthening of dominant position as a requirement of intervention in paragraph 2 of the Article 2 of the EUMR seems not to have permitted the European Commission (Commission) to tackle aggregate concentration beyond each relevant market. However, at the same time, some critics had argued that such attitude would be 'meaningless' because dominant position would have no direct connection with economy.[172] As a result, during the discussion of amendment of EUMR, an alternative method of assessment for merger called 'substantial lessening of competition' had been discussed.[173] This method has similar idea with current scheme of Clayton Act and does take overall economy into account. However, this scheme was not adopted as final draft of amendment and the current version of EUMR has 'Significant Impediment of Efficient Competition' (SIEC) test instead of it.[174]

While SIEC test could pay attention to broader element of economy than former criteria,[175] neither Court of First Instance (CFI) nor the Court of Justice of the European Union (CJEU) tend to agree with the attitude of Commission which focused on the effect on overall economy following the concerned

[170] COUNCIL REGULATION (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings [1989] OJ L 395/1.
[171] Case 27/76 *United Brands Co and United Brands Continental BV v Commission* [1978] 1 CMLR 429.
[172] Lars-Hendrik Röller and Miguel De La Mano, 'THE IMPACT OF THE NEW SUBSTANTIVE TEST IN EUROPEAN MERGER CONTROL' (*European Competition Journal*, April 2006), p. 11 <https://ec.europa.eu/dgs/competition/economist/merger_control_test.pdf> accessed 31 July 2019.
[173] Commission, 'GREEN PAPER on the Review of Council Regulation (EEC) No 4064/89' COM(2001) 745 final.
[174] Alison Jones and Brenda Sufrin, *EU Competition Law: Text, Cases, and Materials* (6th ed., OUP 2016).
[175] Röller and De La Mano (n 172).

merger.[176] Röller and De La Mano believed that the newly adopted SIEC test would bring no significant impact regarding both over and under-enforcement.[177] This might mean that the attitudes of judicial powers which tend to require evidence of obvious circumstances regarding competition in relevant market would be conserved. For example, in 2005, the relevant courts annulled the Commission's decision which required remedy regarding the merger transaction between two players, which operated in different product markets and shared the cluster of customer entities at the same time.[178] In this case, as Tetra Laval, the merging party, had a dominant position in carton package product market, Commission adopted potential competition doctrine in production of PET bottle market, because both markets had similar clients. In addition, considering the advantages of information and incentive to conduct tying and bundling due to Tetra Laval's significant share on its dominant market, Commission opined that Tetra Laval could easily transfer its dominant position into bottle facilities market which was the relevant market of the merged party.

Both the CFI and the CJEU did not uphold this decision due to the lack of quantitative evidence about market situation regarding the incentive and likelihood of concerned practices in the relevant markets. This logic has meant that, even though Commission could make assessment about economic situation, such situation needs to be explained by quantitative analysis of the relevant market.[179] Due to such logic, Commission has been able neither to be free from relevant market nor to directly tackle the pure economic issues like aggregate concentration by conglomerates.

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[176] Bundeskartellamt (n 159).
[177] Röller and De La Mano (n 172).
[178] Case T-5/02 *Tetra Laval v Commission* [2002] ECR II-04381; Case C-12/03 P *Tetra Laval v Commission* [2005] ECR I-00987.
[179] Röller and De La Mano (n 172).

Therefore, even though it takes conglomerate merger into account, Commission has focused on the increase in the risk of anti-competitive behaviour such as abuse of dominant position especially tying and bundling, instead of the scale of assets of parties.[180] This might mean that EU jurisdiction has no clear method to deal with aggregate concentration which has economical width in whole single market. Additionally, EU jurisdiction tends not to pay so much attention on merely conglomerate concentration.[181] Therefore, considering that Commission focuses on the expansion of incentive and ability of foreclosure conduct in regard with conglomerate merger such as portfolio power and strategical feasibility of anticompetitive conduct like tying and bundling,[182] EU jurisdiction seems to have no policy to problematise the EU-wide aggregate concentration beyond the distinction of each relevant market.

Considering that the EUMR adopts one-stop shop principle in the situation in which the merging parties has certain size of turnovers,[183] it would not be recommended to rely on Member States' regulation concerning aggregate concentration. Namely, due to the provisions which do not allow the NCAs to intervene in the case of merger between the parties with large economic power in sufficient degree to be caught under EUMR,[184] no Member States would be able to deal with aggregate concentration, even if they had specific regulation to tackle aggregate concentration under their national laws. In such a scenario, EU jurisdiction could be recommended to adopt its own method to intervene in the situation in which concerns of aggregate concentration would arise.

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[180] Commission Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings [2008] OJ C 265/6.
[181] Paul Lasok and J. Holmes, 'European Union' in Maher M Dabbah and Paul Lasok (ed), *Merger Control Worldwide* (2nd edn, Cambridge University Press 2014).
[182] Commission Guidelines (n 180).
[183] Council Regulation (n 75).
[184] ibid.

At the same time, considering that the aim of EU competition law is to create single market, the merging of players between different geographic markets needs to avoid deterrence effect.[185] Additionally, as mentioned in introduction of this article, both concentration and negative development of growth of productivity are not so serious in the EU.[186] Considering that no increase of seriousness of such economic phenomenon has been observed,[187] there seems to be no emergency to introduce special policy to deal with aggregate concentration. According to the above analysis, the priority of new legislation would be low.

6.3. Summary of the Discussion

As discussed above, due to the fact that neither the effectiveness of the Article 9, AMA nor the sufficient seriousness of aggregate concentration has been sufficiently proven, there seems to be no sufficient reason to recommend the Article 9, AMA for other jurisdictions in current stage. Especially, considering that the US has certain understanding of interpretation of Clayton Act, 1914 to deal with aggregate concentration and the EU has lower priority to tackle aggregate concentration, the Article 9, AMA would not be so important example of legislation for them.

First, the size of conglomerate which is stipulated by the guidelines of JFTC is too huge. The prohibited size is far larger than the proposal of FTC regarding the prohibition of conglomerate's size under Section 7 of Clayton Act, 1914 which was thought to be exceptional case as well.[188] Indeed, even

[185] Commission Guidelines on Vertical Restraints [2010] OJ C130/1.
[186] OECD (n 1); OECD, Industry Concentration (n 12).
[187] OECD (n 1).
[188] JFTC, Guidelines (n 60); Rudolph (n 158).

JFTC believes that the size which is stipulated in JFTC's guidelines is far larger than realistic expectation.[189] Secondly, considering that no case in Japan has been prohibited by the Article 9,AMA there has been no existence of excessive concentration of economic power which is defined in this provision. Therefore, even if this provision has succeeded to bring deterrence effect in some degree, its ability to deal with the existence of excessive concentration seems not to be proven. These disadvantages would be the main reasons not to recommend current Japanese scheme of the Article 9, AMA for other jurisdictions.

On the other hand, it would be worth noting that a worrisome tendency has been brought to competition in global aspect regarding aggregate concentration in a digital economy. According to the report of Bourreau and de Streel, players of digital markets have significant tendency to expand with diversification.[190] They also found that such tendency is created by economy of scope due to the features of digital products which require knowledge of both hardware and software for production side and provide consumer side with synergies in combined usage of different services.[191]

Additionally, this sector is so active in mergers that more than 400 acquisitions have been conducted by merely five tech-giants (Amazon, Apple, Facebook, Google, and Microsoft) in recent decade.[192] Such

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[189] The Council for Regulatory Reform (n 105).
[190] Marc Bourreau and Alexandre de Streel, 'Digital Conglomerates and EU Competition Policy' (*Telecom Paris Tech*, March 2019) <http://ses-perso.telecom-paristech.fr/bourreau/papers/Digital_Conglomerates.pdf> accessed 12 August 2019.
[191] ibid.
[192] Andrea Coscelli, Chief Executive of the Competition and Markets Authority (CMA), ' Competition in the digital age: reflecting on digital merger investigations' (Speech at the OECD/G7 conference on competition and the digital economy, 3 June 2019) <www.gov.uk/government/speeches/competition-in-the-digital-age-reflecting-on-digital-merger-investigations> accessed 12 August 2019.

tendencies have led to the fact that aggregate concentration has highly increased in areas of digital economy. For example, in the UK, CR2 of three important markets of digital economy hit a higher score than 90%.[193] These features of digital sectors have several reasons. First, no significant increase of cost of delivery would be created by increase of customers in product and service markets of digital sector.[194] This means that the larger scale one entity has, the more efficient its business would become. Such a feature creates incentive for players to aim for a higher business scale. Second, due to the nature of two-sided platform of digital services such as communication and data sharing, the larger numbers of customers one entity has, the more sophisticated services it can bring.[195] In this context, customers are providers of services at the same time. Such feature of two-sided platforms creates incentives for existing players to monopolise, and barriers for outsiders to enter.

As a result, the above two features accelerate concentration because of a winner takes all tendency. A report from Stigler Centre for study of economy send warning that this situation might mean powerful incentive for anti-competitive behaviour and violation against antitrust law.[196] According to this report, market powers of this sector has become entrenched in the UK,

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[193] Jason Furman, 'Unlocking digital competition' (*Report of the Digital Competition Expert Panel*, March 2019) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf> accessed 12 August 2019.

[194] Jacques Crémer and others, 'Competition policy for the digital era' (*Publications Office of the European Union*, 20 May 2019) < http://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf > accessed 12 August 2019.

[195] ibid.

[196] Stigler Center Committee on Digital Platforms, 'Report: Economy and Market Structure' (*George J. Stigler Center for the Study of the Economy and the State*, 1 July 2019) <https://research.chicagobooth.edu/-/media/research/stigler/pdfs/market-structure-report.pdf?la=en&hash=E08C7C9AA7367F2D612DE24F814074BA43CAED8C> accessed 12 August 2019.

Germany, Austria and the EU. Indeed, entry rate in digital sector has significantly dropped across twelve countries.[197] This means that aggregate concentration of digital economy might have reduced dynamism and innovation in this sector.

Even in this context, direct regulation of size of conglomerates which is represented by the Article 9, AMA seems not to efficiently function. For example, the guidelines of JFTC require target groups to operate different subsidiary entities in more than five different important markets in Japan as a requirement for intervention.[198] However, the tech-giants do not always separate their legal personality in each relevant market. This means that, even though Google and Facebook have high market shares in several relevant markets of digital sector,[199] the scheme of the Article 9, AMA would not be able to investigate them as long as these groups do not own different subsidiary entities for each market. Additionally, even by the moderate requirements of prohibition of JFTC's guidelines for conglomerate constituted by neighbouring markets (Type 3),[200] the shares of each subsidiaries need to exceed 10% in their relevant markets for a prohibition.[201] Therefore, it seems that the target of this provision is limited to the domination of domestic economy by small numbers of players with small risk and investment through pyramidal structure of business ownership. Therefore, a scheme similar with the Article 9 would not be a powerful method to control tech-giants regarding aggregate concentration. Indeed, Bourreau and de Streel recommend taking advantage of existing tools.

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[197] Chiara Criscuolo, 'What's Driving Changes In Concentration Across The OECD?', (*OECD Competition Committee Hearing on Market Concentration*, Paris, 7 June, 2018) <www.slideshare.net/OECD-DAF/market-concentration-criscuolo-june-2018-oecd-discussion> accessed 1 June 2019.
[198] JFTC, Guidelines (n 60).
[199] Furman (n 193).
[200] JFTC, Guidelines (n 60), p. 4.
[201] JFTC, Guidelines (n 60).

According to their opinion, Commission needs to tackle this issue by paying more attention to potential competition than to the existing one.[202] Additionally, they recommend amendment of the Notice of Market Definition which had been prepared in the context of regulation of horizontal agreement and technology transfer agreement,[203] in order to include the point of view from awareness of concern of concentrations.

In general, as mentioned in above discussions, the requirement for intervention in the scheme of the Article 9, AMA seems to be too strict. In order to make this provision more efficient, the requirement of total assets of group and minimum number of subsidiaries in different markets needs to be relaxed. However, if such an amendment would be brought in practice, the foreseeability of this scheme would be reduced, while such foreseeability has been an important advantage of this provision.

Rather, it is recommended to focus on the fact that the experience of extreme seriousness of aggregate concentration had been created in history by the governmental policy to encourage concentration in pre-war era of *zaibatsu*-domination in Japan. This might mean that the most important policy to avoid the harm of excessive level of aggregate concentration would be to appropriately operate existing competition law, rather than to introduce a new policy or a legislation to deal with aggregate concentration.

7. Conclusion

This article has argued that the direct regulation of aggregate concentration by scheme of the Article 9, AMA of Japan would not be suggestive idea for

[202] Bourreau and de Streel (n 190).
[203] Commission Notice on the definition of relevant market for the purposes of Community competition law [1997] OJ C372/5.

major jurisdictions of competition law, considering that both borderline of seriousness of aggregate concentration and functionality of this scheme of prohibition are ambiguous. In regard with the former point, while the degrees of aggregate concentrations have been increasing in both the US and the EU, their degrees of linkages to economic developments and competition remain unclear. In such a situation, it would be difficult to decide whether and how the direct regulation should set the size of conglomerate which triggers intervention. In regard with the latter point, considering that no decision of prohibition has been created under the Article 9, AMA the sole effectiveness of this provision would obviously exist in its deterrence effect, if any. However, the degree of aggregate concentration in Japan has achieved similar scores with those of the US and its trend has shown no causal linkage to amendments of this provision. Considering that the degree of aggregate concentration has significantly increased in recent years in Japan, the deterrence effect of this provision seems not to have been quite powerful as well. This means that nothing has been able to prove the functionality of this provision.

While some academics of competition law recognise this scheme of prohibition of Japanese jurisdiction as unique attitude against aggregate concentration which is recently discussed and difficult to be tackled by traditional schemes of competition law, the historical background of this provision was different from such awareness of competition issue. The uniqueness of this scheme has been created by exceptional situation of history of pre-war era of Japan in which concentration had been encouraged by government and almost whole industrial and financial sector had been extremely concentrated by few conglomerates called *zaibatsu*. Due to its purpose to tackle such market structure, the scheme of Article 9, AMA has been designed for concerns of concentration of autonomic power through

shareholding of several multi-sectoral entities. However, considering the existence of competition law in modern global societies, the likelihood of phenomenon of above market structure which could be similar with situation of *zaibatsu* era is rather small.

On the other hand, current tendencies of western economies have created awareness against the risk of aggregate concentration. Some negative linkage between aggregate concentration and productivity has been reported and digital sector has shown extreme speed and degree of aggregate concentration in its own area. However, even though some solutions would be necessary to deal with this problem, the scheme of the Article 9, AMA would not be appropriate, considering that the methods of domination of this sector could be different from influence of voting right through shareholdings. Therefore, as Bourreau and de Streel recommended for Commission, it would be rather appropriate to pay more attention on potential competition and to intervene in conglomerate mergers more actively. More interventionist usage of current toolbox of competition law would be a more appropriate solution than a special legislation against aggregate concentration.

In addition, the size of conglomerates which is stipulated in current scheme as a trigger of intervention in Japan would be far larger than realistic expectation. Even JFTC as main advocate of this provision agrees that its requirement of intervention is too strict to bring a powerful deterrence effect. A proposal of interpretation of Section 7 of Clayton Act,1914 from FTC of the US expected gentler requirement of intervention in regard with the size of conglomerate, even though the US has neither historical experience of domination of domestic economy by conglomerates nor special policy against aggregate concentration. In this context, the Article 9 would be too weak to tackle aggregate concentration.

At the same time, EU has one-stop shop principle. Therefore, it could be recommended for the EU to introduce some provision to deal with aggregate concentration, because Member States cannot tackle this issue by national laws due to the one-stop shop principle as long as the merger exceeds certain size. However, it would be worthy to note that, especially between different geographic markets, conglomerate mergers would need to be in some degree encouraged for the purpose of single market principle. Therefore, it would be recommended to amend the method of market definition or definition of SIEC test in order to actively and accurately intervene in conglomerate mergers, rather than to introduce radical interventionist tool like the Article 9, AMA.

As a conclusion, the scheme of prohibition of excessive concentration of economic power of AMA in Japan would not be recommended for major jurisdictions, because these two jurisdictions have the appropriate toolbox in competition law scheme without new legislation. Undeniably, the concern of aggregate concentration has been relatively newly recognised. Nonetheless, as long as sufficient awareness and attention would be paid to this problem, there is no necessity to adopt new radical category of legislation. While the sparing interpretations of merger law have been conducted for conglomerate mergers after movement of the Chicago School, such attitude would need to face turning point again, considering the recent awareness of aggregate concentration. However, such efforts need to tackle with an interpretation of existing scheme, rather than on legislation of a new one.

SECURING COMPETITION IN LNG MARKETS: ANALYSIS OF THE ANTI-TRUST ISSUES IN LNG CONTRACTS

Metincan Kaban*

This article briefly describes the Liquefied Natural Gas (LNG) industry and examines the effects of the removal of anti-competitive provisions in LNG sale and purchase agreements (LNG SPAs) on the global LNG market. This article focuses on the contractual aspect of LNG trade and analyses SPA clauses considered anticompetitive by regulators in Europe and Japan and compares the efforts made by regulators to remove them in these jurisdictions, first in Europe and more recently in Japan. The article concludes by assessing the extent to which regulation shaped the current LNG trading practices compared to normal market forces.

Keywords*: Liquefied Natural Gas, LNG contracts, energy law.*

1. Introduction

Liquified Natural Gas ("**LNG**") trading has changed substantially in the last few decades and is expected to change even more in the upcoming years.[1] Both the continuing growth of the global LNG trade—fueled by strong demand, especially in the Asian market—and an increasing number of short-term and spot trades are together boosting the liquidity of LNG markets worldwide. Historically, the necessity of long-term contractual commitment

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[1] Niall Trimble, 'Changing LNG Markets and Contracts' (2018) 11 The Journal of World Energy Law & Business 427.

from each party to an LNG project and the regular use of restrictions in contracts resulted in only a small volume of uncommitted LNG in the market.[2] The presence of such restrictions, such as strict take-or-pay obligations, minimal quantity flexibility, and destination restrictions imposed on the buyer in most LNG sale and purchase agreements ("**LNG SPAs**"), prevented short-term and spot LNG markets from growing.[3] Moreover, the high costs and significant technical and financial requirements of liquefying and re-gasifying natural gas resulted in very few players participating in the market from either the seller or buyer sides.[4] Under these circumstances, the market mostly stayed closed to competition and only developed through bilateral trades.

However, several events led to unprecedented trading methods of LNG.[5] For example, , the growth of short-term and spot trades accelerated after the first generation of long-term contracts started to expire because the producers were able to sell the uncommitted LNG in the market freely.[6] In addition, the number of market participants increased as technological developments enabled efficient smaller-scale projects.[7] Also, the growth of the LNG carrier fleet size increased LNG trade capacity. Not least of all, liberalization of energy markets around the world, increasing competition, and the growing number of liquefaction and regasification facilities resulted in more global, competitive, and liquid LNG markets. The effects of these changes in the industry on LNG contracts were new customs that included more flexible

[2] Michael D. Tusiani, *LNG: A Nontechnical Guide* (PennWell Corporation 2007) 203.
[3] ibid 200.
[4] ibid 207.
[5] ibid 204.
[6] Ruchdi Maalouf, 'The Essential Evolution of LNG Trading—Moving to GTCs' (2018) 11 The Journal of World Energy Law & Business 410, 412.
[7] Tusiani, (n 3) 204.

terms.[8] Some of the common provisions in LNG SPAs were particularly affected by the changes.[9]

This article will examine a contractual aspect of the developing LNG industry, specifically, the effects of the removal of anti-competitive provisions in LNG SPAs on the global LNG market. Firstly, this article will briefly describe the growing natural gas industry. Then, it will analyze LNG projects and the SPA clauses considered anti-competitive by regulators in the EU and Japan.[10]. Secondly, this article will examine two distinct LNG markets: Europe and Asia. Because Europe started to remove those provisions in the early 2000s, the article will study the European investigations into those provisions and the effects of their removal on the market. Next, this article will analyze the efforts to remove those provisions in Japan, where the anticompetitive provisions are still prevalent. The focus will be on the Japan Fair Trade Commission ("**JFTC**")'s Survey on LNG trading. Finally, after analyzing and comparing the two markets, the article will examine the effects of the removal of anti-competitive clauses in Asia on the LNG industry worldwide.

2. The Rise of Natural Gas

Global demand for energy is increasing as a consequence of the growing world economy.[11] As the solution is not only to supply more but determining where and how companies supply the energy, the energy industry is going

[8] Trimble (n 2) 427.
[9] ibid 428.
[10] For the purposes of this article, LNG SPA refers to term contracts, including the contracts that agreed on a number of cargoes rather than annual quantity.
[11] OECD (ed), Energy (OECD 2012) 1.

through an evolution which affects the prioritization of energy resources.[12] Increasing awareness with regards to the issue of climate change is changing the dynamics of the sector and pushing the energy industry to even abandon abundant and efficient energy resources because they are not environmentally friendly.[13] The positive effects of this evolution on the environment and climate is yet to be seen because of the slow-paced change.[14] However, the effects on the market and market participants have been visible for some time. Both states and major oil and gas companies are in a hurry to move towards more "diverse" and "clean" energy portfolios.[15]

In the process of making energy more diverse and greener, natural gas is considered to be the transition fuel of choice by the International Energy Agency ("**IEA**"), as it is more advantageous with respect to carbon emissions than other comparable fossil fuels and still has a high energy value per unit.[16] Contrary to the past, the relative cleanliness of natural gas together with the vast amount of proven natural gas reserves encouraged states to add this source to their long-term energy plans.[17] As the authors of 'LNG- A Nontechnical Guide' remarked, "*Long gone are the days when the geologist returned home to report the good news and the bad news about his recent*

[12] Richard A Clarke and others, 'The Challenge of Going Green' (Harvard Law Review, July-August 1994) https://hbr.org/1994/07/the-challenge-of-going-green accessed on 18 July 2019.
[13] Caineng Zou and others, 'Energy Revolution: From a Fossil Energy Era to a New Energy Era' (2016) 3 Natural Gas Industry B 1.
[14] John Browne, 'The energy industry must engage with climate change' Financial Times (London, 30 December 2018) https://www.ft.com/content/23afc7fe-ffb3-11e8-b03f-bc62050f3c4e accessed on 19 July 2019.
[15] Natural Resources Defence Council, 'NRDC's Sixth Annual Energy Report: America's climate crossroads: pushing clean energy higher and faster' (October 2018) https://www.nrdc.org/sites/default/files/energy-environment-report-2018.pdf accessed on 19 July 2019.
[16] Marie-Claire Aoun And Aurélie Faure, 'Is Natural Gas Green Enough for the Environment and Energy Policies?' (2015) IFRI 4-5.
[17] Geoffrey Picton-Turbervill (ed), Oil and Gas: A Practical Handbook (2. ed, Globe Law and Business 2014) 160.

exploration endeavours—the bad news being that he didn't find oil, but the good news being that he didn't find natural gas."[18]

This advantageous nature of natural gas, which fits the context of today's energy market, makes it a highly preferred and demanded fuel. As market data shows, the share of natural gas in the global energy arena continues to increase. For example, the global production of natural gas was 1973 Billion cubic meters ("**Bcm**") in 1990; and it increased to 3768 Bcm in 2017.[19] The share of natural gas in the world's total energy supply increased from 16% to 22.1% while the annual total energy Mtoe increased by more than 50% in the same period.[20] However, several other important factors also supported natural gas in becoming a significant business, including the development of LNG industry.[21] The correlation between the LNG and natural gas industries can be described as mutually supportive as the LNG industry is also benefiting from the booming natural gas demand.

Along with the rise of natural gas, the trade capacity of LNG has increased regularly from the first international trade in 1964.[22] The LNG supply, which constituted around one-third of the global gas supply in 2017,[23] is the fastest

[18] Tusiani (n 3) 2.
[19] BP, 'Statistical Review of World Energy 2019' 2019 https://www.bp.com/en/global/corporate/energy-economics/statistical-review-of-world-energy accessed on 18 July 2019.
[20] IEA, 'Key world energy statistics' 2018 https://webstore.iea.org/key-world-energy-statistics-2018 accessed on 18 July 2019.
[21] John S Adams, 'US LNG Exportation: The Regulatory Process and Its Practical Implications' (2014) 7 The Journal of World Energy Law & Business 582.
[22] Philip R Weems and Monica Hwang, 'Overview of Issues Common to Structuring, Negotiating and Documenting LNG Projects' (2013) 6 The Journal of World Energy Law & Business 267.
[23] IGU, '2019 World LNG Report' 2019 https://www.igu.org/news/igu-releases-2019-world-lng-report accessed on 20 July 2019.

growing among other natural gas supply sources with an average growth of 6% each year between 2000 and 2016.[24]

When the rapid development and continuous evolution of the LNG industry are taken into account, naturally, the contractual arrangements between LNG sellers and buyers are correspondingly affected. Although the contractual arrangement in any transaction is highly consequential, LNG contracts tend to be long-term and consist of multiple highly risky phases, and so it is vital for parties to have appropriate contracts.

In addition, there are occasional alterations to the regulations related to LNG trading in various jurisdictions. The rapid transformation of the way LNG is traded is giving rise to greater regulatory oversight, especially with regards to the anti-competitive terms. An increasingly strict regulatory regime can be explained by the relatively nascent LNG industry,[25] and the contracts are revised in response to regulatory alterations. Therefore, to understand both the propensity of the LNG market and its players it is essential to analyze changes in LNG SPAs due to changes in industry trends and regulations.

2. LNG Projects and the Contracts

Production of natural gas mostly occurs in remote areas and thus, it must be transported a substantial distance to a market where it will reach the end consumers.[26] There are several ways to transport natural gas, including pipelines, LNG and compressed natural gas.[27] Among all the options of

[24] IGU, '2018 World LNG Report' 2018 https://www.igu.org/news/2018-world-lng-report accessed on 20 July 2019.
[25] Maalouf (n 7) 411.
[26] James G Speight, Handbook of Natural Gas Analysis (John Wiley & Sons 2018) 104-105.
[27] Sydney Thomas and Richard A Dawe, 'Review of Ways to Transport Natural Gas Energy from Countries Which Do Not Need the Gas for Domestic Use' (2003) 28 Energy 1461.

transporting natural gas, LNG is one of the most used methods due to its physical advantages and efficiency.[28] However, the most suitable option for a specific project mainly depends on the volume and distance that the natural gas is expected to be transported.[29] In the case of LNG, it is the most advantageous and economical way to transport natural gas if the volume is significant and the distance is long.[30]

Additionally, LNG provides an advantage for states that are looking to diversify their energy suppliers. This is especially the case when a country mostly depends on a few energy suppliers, as this might affect the country's energy security. For example, during the gas crisis between Ukraine and Russia, Russia disrupted its gas supply to eastern European countries. This caused great turmoil in Europe and showed that depending heavily on one supplier has a profoundly negative impact on energy security.[31]

3. LNG Value Chain and Projects

The LNG value chain consists of three phases, with 'upstream' being exploration and production, 'midstream' being liquefaction and transportation, and 'downstream' being regasification and consumption of natural gas.[32] While the flow of gas molecules in the chain is from exploration to consumption, the profit moves the other way around.[33] After all, the revenue from the project is produced only after the sale of gas in the final market.[34]

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[28] ibid 1465.
[29] Picton-Turbervill (n 18) 161.
[30] ibid.
[31] Aleksandar Kovacevic and Oxford Institute for Energy Studies, The Impact of the Russia-Ukraine Gas Crisis in South Eastern Europe (Oxford Institute for Energy Studies 2009) 18.
[32] Picton-Turbervill (n 18) 160.
[33] ibid.
[34] Tusiani (n 3) 68.

To comprehend the LNG industry better, it is important to acknowledge the value chain because each step of the chain is highly capital intensive and the ultimate success of a project depends on the success of every step of this chain.[35] As opposed to the oil industry, the LNG industry mostly adopts integrated project models in which each step of the chain is developed cooperatively.[36] As a result, because the overall aim of each integrated activity is to connect remote natural gas reserves to markets, they are often linked with durable and long-term contractual arrangements.[37]

Depending on various factors, such as (i) the expected cost of the project and financing conditions, (ii) the level of host government participation, and (iii) the interests of the parties involved in the project, the industry has generally followed three main models when financing LNG projects.[38] These are (i) a fully integrated LNG structure; (ii) an LNG project company structure; and (iii) an LNG tolling structure. The structure of a project is often identified by who owns/operates the facility and conducts the upstream activities.[39]

Under these circumstances, LNG SPAs between the project company and the buyers, become one of the most important aspects of the project from both commercial and financial standpoints.[40] Moreover, in situations wherein the LNG project company is not involved with the upstream activities and gathers natural gas via gas supply agreements, it is crucial to arrange SPAs consistently with gas supply agreements. Otherwise, any discrepancies would subject the company to legal, commercial and financial risks.[41] Therefore,

[35] Weems and Hwang (n 23) 279.
[36] Tusiani (n 3) 69.
[37] ibid 67.
[38] Picton-Turbervill (n 18) 166.
[39] ibid.
[40] Picton-Turbervill (n 18) 179.
[41] ibid 184.

parties devote a significant amount of time in negotiating the terms and conditions, as well as tailoring the contract, for specific requirements.[42]

4. LNG SPAs

In the LNG industry, sale and purchase agreements can be classified under several different categories.[43] The classification depends on whether the agreements are long or short term, for a spot sale, or whether the sale is based on annual quantity or number of cargoes.[44]

Long-term contracts are often structured as a single document.[45] On the other hand, short term and spot agreements are structured as two different documents, master sale and purchase agreements ("**MSPA**") and confirmation notices, which together form a legally binding contract.[46] While MSPAs consist of the general terms and conditions of the agreement, confirmation notices specify the details of each sale in accordance with the MSPA.[47] The approach aims to streamline the contractual configuration and reduce negotiation time and costs.[48]

In LNG sales, shipping is typically carried out with either free on board ("**FOB**") or delivery ex-ship ("**DES**") arrangements.[49] Under the FOB arrangement, the buyer bears all the costs for transportation, assumes the risks, and holds title from the moment the LNG passes to the ship in the

[42] Picton-Turbervill (n 18) 179.
[43] Maalouf (n 7) 414.
[44] ibid.
[45] Tusiani (n 3) 323.
[46] Arne-Martin H Sorli, 'Short-Term LNG Sale and Purchase Agreements - Main Components' 3 European Energy Law Report (Ulf Hammer & Martha M Roggenkamp, Eds) 149-150.
[47] ibid.
[48] ibid.
[49] Sorli (n 47) 150.

loading port.[50] The seller is only responsible for delivering the LNG to the loading port and assumes the risks and holds title until the LNG passes to the ship's rail.[51] On the other hand, under the DES arrangement the seller is responsible for delivering the LNG to the previously agreed upon unloading port. Consequently, the seller bears all the costs and risks of transportation to the moment when the LNG is taken by the buyer at the receiving terminal.[52]

LNG SPAs embrace many of the common provisions of other oil and natural gas contracts.[53] These provisions include contract duration, allocation of liabilities, price for each cargo, price review, price indexation, choice of law, dispute resolution and force majeure. However, due to the nature of the LNG industry, these contracts contain terms that are peculiar to it. Distinctive clauses in an LNG sale contract include quantity and number of cargoes sold, specification of the LNG, strict take-or-pay obligations, transportation arrangements (including the delivery point, delivery schedule and destination), and resale restrictions.[54]

Among the commonly used terms in LNG SPAs, some clauses aroused the attention of regulators around the world due to their possible negative effects on the LNG market's development and competition. As the market started to evolve, regulators in Europe, and later in Asia, became increasingly interested in certain terms. These terms included destination (territorial restriction) clauses, profit-sharing mechanisms, resale restrictions, take-or-pay clauses with resale restrictions, and strict oil price indexations. The actions of the European regulators from the beginning of the 2000s towards those

[50] ibid.
[51] ibid.
[52] ibid.
[53] Picton-Turbervill (n 18) 179.
[54] Maalouf (n 7) 416.

problematic provisions prompted a need for reform on the contractual structures of LNG trades with Europe.

A destination clause (or territorial restriction) is a contractual term that prevents the buyer of LNG from reselling it to markets other than the appointed one, which is usually the buyer's home market.[55] The main purpose behind a destination clause is to avert the buyer from competing with the seller itself in different markets.[56] There are two major outcomes for the seller from this clause. The first is that these clauses allow the seller to sell the LNG for different prices to different customers in the same market.[57] The second is that they allow the seller to generate the maximum rent out of the source as they prevent buyers from participating in arbitrage opportunities.[58] Additionally, there are some other mechanisms used in contracts, such as profit-sharing mechanisms or use restrictions, which result in similar outcomes as the destination clauses but not as distinct.

Profit-sharing mechanisms allow the seller to control the buyer's reselling of LNG by obliging them to split the profit made out of reselling the LNG to markets outside of the agreed territory.[59] Use restrictions, on the other hand, limit the areas in which the LNG can be used by the buyer.[60] For example, if the LNG is sold to an importer for heat generation purposes, the importer cannot use the LNG for any other purposes than heat generation. This limit

[55] Peter Roberts, Gas and LNG Sales and Transportation Agreements: Principles and Practice (Fourth, Sweet & Maxwell / Thomson Reuters 2014).
[56] J William Rowley, R Doak Bishop and Gordon E Kaiser, The Guide to Energy Arbitrations (2018) 224.
[57] K Talus, 'Long-Term Natural Gas Contracts and Antitrust Law in the European Union and the United States' (2011) 4 The Journal of World Energy Law & Business 260, 281.
[58] A Konoplyanik, 'Russian Gas to Europe: From Long-Term Contracts, On-Border Trade and Destination Clauses to …?' (2005) 23 Journal of Energy & Natural Resources Law 282.
[59] Talus (n 58) 281.
[60] ibid.

includes the reselling of the LNG as well.[61] As in the territorial restrictions, the use of these clauses also create barriers between markets and negatively affect competition and liquidity.[62]

A take-or-pay clause is simply an obligation on the buyer that requires the buyer to pay the price of cargo, regardless of whether the LNG is taken or not.[63] If the buyer fails to take the annually agreed amount, it is often referred as annual contract quantity ("**ACQ**"), the buyer will have to pay for it regardless, which is called the take-or-pay payment.[64] Normally, the take-or-pay obligations are accepted by regulators as they divide some of the risks between parties.[65] The problem, however, occurs when a take-or-pay clause is combined with a resale restriction; in that scenario, arguably, the risk division between parties becomes unjust.[66]

Likewise, an oil price indexation clause by itself is not considered as problematic an issue for market competition.[67] Normally, this clause allows buyers to be compensated for their losses due to price changes. However, a strict oil price indexation in the buyer's downstream supply contracts might negatively affect the market, and that is why it has been examined by the European courts.[68]

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[61] ibid.
[62] Rowley, Bishop and Kaiser (n 57) 225.
[63] Daniel R. Rogers and David Y. Phua, 'Re-examining the Take-or-Pay Obligation in LNG Sale and Purchase Agreements'(November,2015) https://kslawemail.com/77/429/pages/article8.asp accessed on 27 July 2019.
[64] ibid.
[65] Talus (n 58) 287.
[66] ibid
[67] ibid.
[68] ibid.

4. Outcome of the European Investigations and Decisions on Anti-Competitive Provisions

From the early 2000s, the European Commission ("**EC**") conducted a series of investigations on long-term natural gas supply contracts between non-European Union ("**EU**") suppliers and EU buyers.[69] The reason behind these investigations was to examine the compatibility of several commonly used provisions in those contracts with EU competition law.[70] The companies that were part of the investigations included Gazprom, Sonatrach, Nigerian LNG, and ENI, among others.

This development was part of the ongoing change in the regulatory structure applied to gas trades, as the EC's policy with regards to the energy markets aimed towards forming a fully integrated energy market within the EU.[71] In order to generate the free flow of energy within the EU, the EC questioned the validity of territorial and use restrictions as well as profit-sharing mechanisms in long-term gas supply contracts.[72]

Additionally, competition authorities and courts of some EU member states examined these long- term contracts' compatibility with the relevant competition rules when they included strict take-or-pay obligations with resale restrictions or strict oil price indexations.[73] Before looking into these

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[69] Paul Greening and others, 'Revisiting LNG Resale Restrictions – Implications of Recent EU Decisions' (2 August 2018) https://www.akingump.com/en/experience/industries/energy/speaking-energy/revisiting-lng-resale-restrictions-implications-of-recent-eu.html accessed on 27 July 2019.
[70] ibid.
[71] Kim Talus, 'Joint Purchases of US LNG by European Consortiums: Potential Antitrust Issues' (2016) 9 The Journal of World Energy Law & Business 437, 439.
[72] European Commission, 'Antitrust: Commission opens investigation into restrictions to the free flow of gas sold by Qatar Petroleum in Europe' (21 June 2018, Brussels) https://europa.eu/rapid/press-release_IP-18-4239_en.htm accessed on 27 July 2019.
[73] Talus (n 58) 268.

cases, it is important to understand why these clauses are commonly used in long-term LNG SPAs in the first place.

4.1. Historical background of the anti-competitive provisions

Even though some European countries produce natural gas, the EU is a net importer of the good.[74] The share of natural gas in EU's 2018 energy imports was around 25%, and more than 60% of that natural gas came from non-EU suppliers.[75] As a result of this external dependency, the EU's gas trade has a political element as well as a commercial and legal one.[76] As mentioned earlier, the seller in an LNG SPA often asks for a long-term contract due to the substantial financial commitments required to develop the infrastructure necessary for a viable LNG project. Considering that the EU energy market has not only the legal and commercial elements, but also political elements, importers of natural gas within the EU were also seeking the certainty that long-term contracts with take-or-pay obligations provide. The rationale behind it was that these contracts were contributing to the EU's security of supply while providing a secure demand for the seller.[77]

Another reason why long-term contracts were preferred in the EU was the market setting. Conventionally, LNG is imported to the EU by national energy companies or large-scale utility companies.[78] As those companies were under strict obligations towards their customers in the downstream

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[74] ibid 263.
[75] Eurostat, 'EU imports of energy products - recent developments' (March 2019) https://ec.europa.eu/eurostat/statistics-explained/index.php/EU_imports_of_energy_products_-_recent_developments accessed on 27 July 2019.
[76] Talus (n 58) 268.
[77] ibid.
[78] ibid 278.

market, the long-term contracts were a requisite for them.[79] Additionally, diversifying their supply portfolio and being able to make low-risk and long-term investment plans pushed them towards the same structure of contracts.[80]

Likewise, the take-or-pay obligations were also part of long-established arrangements between parties.[81] According to the arrangement, sellers bore the price risk while buyers bore the volume risk.[82] Although this obligation seems like it amounts to an unfair disadvantage for the buyer at first sight, the take-or-pay clauses actually provided for buyers to have some flexibility, even though limited, on their purchase and storage portfolios. The quantity that is under a take-or-pay obligation is calculated at the end of the relevant contract year, but not for each cargo delivered.[83] Hence, the buyer has the flexibility over each delivery and can adjust the amount it requires with the only condition of honouring the accorded annual quantity.[84]

Oil price indexation was another issue targeted by the EU's agenda of making LNG markets more competitive. Traditionally, natural gas prices were based on crude oil prices.[85] Kim Talus stated that "*This linkage is based on the idea of switching capability of the customer where the price of natural gas would determine whether the customer burns oil or gas*."[86] However, one can argue that the oil price indexation requirement was a result of the way natural gas was traded as well as the restrictive and rigid contractual structures used in the market. These two factors only allowed a few competitors to enter into the trading scene and caused low liquidity in the market. As price indices

[79] Rowley, Bishop and Kaiser (n 57) 218.
[80] ibid.
[81] Talus (n 58) 287.
[82] Rowley, Bishop and Kaiser (n 57) 218.
[83] ibid.
[84] Talus (n 58) 287.
[85] Trimble (n 2) 30.
[86] Talus (n 58) 285.

reflect the market value of a product, without a liquid spot and short-term trade of that product, technically, price indices do not develop.[87] In the case of LNG trading, because the trade had been maintained through bilateral agreements and long-term and inflexible contracts, the liquidity of the market remained low and that hindered the development of price indices for LNG.[88]

The reason that other problematic provisions such as the destination clauses or resale restrictions were retained in contracts for so long, beside the fact that they were mostly dictated by the sellers, was the way the EU approached LNG and the natural gas markets in general. Until the start of the liberalization of the European energy markets in the early 2000s, natural gas markets were viewed as natural monopolies and controlled by the member states' regulatory bodies.[89]

From the seller's point of view, these clauses were necessary for several reasons. First of all, long term and inflexible contracts are an essential part of LNG projects and provide producers with the necessary commercial and legal security. As the requirement for a long-term contract, the take-or-pay obligations were necessary for the sellers to secure financing. LNG sellers needed a guarantee of revenue without being concerned about the taken amount by the buyer.[90] The oil price indexation clause was also something the veterans of LNG industry supported.[91]

Furthermore, supplier companies naturally sought to maintain their position in the market by restricting destination, use, or resale flexibility. Normally,

[87] J Baily and R Lidgate, 'LNG Price Reviews: A Sign of the Times' (2014) 7 The Journal of World Energy Law & Business 140, 148.
[88] Trimble (n 2) 430.
[89] Talus (n 58) 264.
[90] Rogers and Phua (n 64).
[91] Talus (n 58) 285.

flexible destination clauses provide buyers with the freedom to manage their volume risks from the take-or-pay obligation and participate in price arbitrage by enabling them to sell the excess LNG to other markets.[92] This means buyers could compete with the original seller in different markets. Hence, these restrictions were aimed at preventing buyers from reselling the LNG in different markets and competing with the seller as well as preserving distinct price areas around the world.[93] Also, the process of shipping, from loading and transport to unloading, took a significant amount of time and so was scheduled in advance.[94] But, it should be stated that the flexibility on the delivery point is limited by the seller when the shipping arrangement is chosen as DES by the parties. If the contract is FOB, transportation is handled by the buyer and there is no reason to use destination clauses.

It can be argued that these clauses originated from the fact that European energy markets were fragmented into vertical and horizontal segments.[95] This fragmentation, together with the way the gas markets operated--no direct transaction between gas producers and end customers--obstructed the development of competition and integration of the market.[96] As a result, , oil price indexed, long-term SPAs with take-or-pay obligations and limited destination and resale flexibilities constituted the majority of contracts with regards to the LNG trades in the EU market.

This traditional approach, however, started to change in the early 2000s for several reasons. While the EU's push for more liberalized and competitive markets was the main impetus, increasing supply options, especially from the

[92] Rowley, Bishop and Kaiser (n 57) 222.
[93] Talus (n 58) 281.
[94] Rowley, Bishop and Kaiser (n 57) 222.
[95] Harold Nyssens, Concetta Cultrera and Dominik Schnichels, 'The territorial restrictions case in the gas sector: a state of play' (2004) 48.
[96] ibid.

United States after the Shale Revolution, and a more developed international pipeline network with different suppliers contributed to the transformation as well.[97]

4.2. Case studies on the anti-competitive provisions

European investigations targeted several specific LNG SPA clauses which might have negative effects on market competition and the EU's new integrated energy policy. According to the investigations and the case law, destination clauses (territorial restrictions), profit-sharing mechanisms, take-or-pay obligations with resale restrictions, and strict oil price indexations were found to be anti-competitive by the EC. Because these clauses were mostly examined in groups by the European regulators, the analysis will present them in groups accordingly. Moreover, the cases are presented in chronological order.

i. Nigerian LNG Investigation

On 12 December 2002, the EC and Nigerian Gas Company ("**NLNG**") finally reached an agreement after the EC conducted a formal investigation on the LNG supply contracts between NLNG and its European customers.[98] Back then, NLNG was the second-biggest supplier of LNG to Europe with around 5 Bcm of LNG shipped each year, which was mainly sold into Italy, Spain, France, and Portugal.[99]

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[97] Talus (n 58) 262.
[98] EC Press Release, 'Commission settles investigation into territorial sales restrictions with Nigerian gas company NLNG', (IP/02/1869), (12 December 2002, Brussels) https://europa.eu/rapid/press-release_IP-02-1869_en.htm?locale=en accessed on 28 July 2019.
[99] ibid.

The investigation into NLNG's contracts with European buyers mainly concerned the imposition of territorial restrictions.[100] According to the EC, territorial sale restrictive clauses and others clauses with similar effects on the market violated the EU competition rules because they prevented cross-border commerce and adversely affected the ongoing restructuring of the European energy markets.[101] The announced agreement included an undertaking to remove profit-sharing mechanisms from current contracts and not to use profit-sharing mechanisms in future contracts either.[102] These mechanisms basically cause the same adverse effect on the market as territorial restrictions by obliging the buyer to share the profits made from reselling the gas outside of the contractually agreed territory.[103]

As a result of the settlement, NLNG agreed

- To remove the 'territorial restriction clause' which prevents European buyers from re-selling the LNG outside their national borders;
- Not to introduce the 'territorial restriction clause' in future contracts with European buyers; and
- Not to introduce 'use restriction clauses' which prevent buyers from using the LNG for other purposes than those contractually agreed upon.[104]

Furthermore, NLNG affirmed that none of its existing contracts with European buyers contained "profit-sharing mechanisms" and gave an assurance that it would not introduce those clauses in the future.[105]

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[100] ibid.
[101] ibid.
[102] Nyssens (n 96) 49.
[103] ibid.
[104] EC IP/02/1869 (n 88).
[105] ibid.

ii. Gazprom/ENI Investigations

On 6 October 2003, the EC reached an agreement with the Italian oil and gas company ENI and the Russian gas producer Gazprom regarding some of the provisions used in the gas supply contracts between them.[106] Similar to the NLNG case, the investigation started due to territorial restriction clauses, but resulted in the removal of more clauses that were considered restrictive.

The settlement resulting from this investigation was considered very important due to a significant amount of gas involved.[107] In 2001 and 2002, ENI imported around 20 Bcm each year from Gazprom, and that made ENI one of the largest customers of Gazprom in Europe.[108] After the settlement, ENI became the first European company to reach an agreement with Gazprom on the removal of restrictive clauses from LNG SPAs.[109]

As a result of the settlement, Gazprom agreed

- To remove all 'territorial restriction clauses' from the existing contracts with ENI and also not to introduce such clauses in future contracts with not only ENI but with any European buyer;
- To provide a second delivery point for the gas ENI bought and also to enable ENI to take the gas freely from any of the delivery points; and
- To remove the resale restriction clause which prevented ENI from selling the purchased gas outside Italy.[110]

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[106] EC Press Release, 'Commission reaches breakthrough with Gazprom and ENI on territorial restriction clauses' (IP/03/1345) (6 October 2003, Brussels) https://europa.eu/rapid/press-release_IP-03-1345_en.htm?locale=en accessed on 28 July 2019.
[107] ibid.
[108] Nyssens (n 96) 49.
[109] ibid.
[110] EC IP/03/1345 (n 121).

As a result of this settlement, ENI agreed on removing the "consent clause" which obliged Gazprom to get ENI's consent when Gazprom sought to sell natural gas to any other customer in Italy.[111] Moreover, both parties agreed on refraining from using similar provisions, including "use restrictions" and "profit-sharing mechanisms," in future contracts whether it be for pipeline gas or LNG.[112]

iii. GDF/ENI and GDF/ENEL Decisions

The first formal decisions made by the EC on competition restrictive provisions in gas supply contracts were the GDF/ENI and GDF/ENEL cases in 2004.[113] Unlike the other investigations, under which the EC conducted and closed investigations without a formal decision; in these cases, the EC declared informal decisions that the territorial restrictions in the LNG SPAs at issue were in violation of EU competition law.[114]

In the first case, GDF was responsible for transporting LNG, which was purchased by ENI, to northern Europe.[115] However, the agreement between GDF and ENI contained a clause that prevented ENI from selling the LNG in France.[116] The latter case was related to swapping of LNG purchased by ENEL from NLNG. The SPA included a clause which stipulated the use of LNG only in Italy.[117]

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[111] ibid.
[112] ibid.
[113] EC Press Release, 'Commission confirms that territorial restriction clauses in the gas sector restrict competition' (IP/04/1310) (26 October 2004, Brussels) https://europa.eu/rapid/press-release_IP-04-1310_en.htm accessed on 28 July 2019.
[114] Talus (n 58) 283.
[115] EC IP/04/1310 (n 128).
[116] ibid.
[117] ibid.

In both cases, the EC considered the restrictive clauses in the LNG SPAs as territorial restrictions and found that they violated Article 101 of the Treaty on the Functioning of European Union ("**TFEU**"),[118] even though they had not been applied by the parties a year prior to the rulings.[119] The decisions were notable because the EC declared the importance of removing those clauses not only to the parties but to market participants in general.[120] Also, they indicated the move towards more competitive and liberalized energy markets in Europe.[121]

iv. Sonatrach Investigation

On 11 July 2007, the EC announced that the EC and the Algerian national gas company (Sonatrach) agreed on the removal of restrictive clauses from LNG SPAs after the EC's investigation against the company's long-term gas supply contracts with European importers.[122] Unlike the NLNG and Gazprom/ENI investigations, which settled more quickly, the negotiations took seven years until both parties agreed on a settlement.[123] Even though Sonatrach insisted on replacing territorial restrictions with other alternative provisions, the same was not accepted by the EC because the effects of the proposed provisions on the market were quite similar to the territorial restrictions.[124]

As a result of the settlement, Sonatrach agreed

- To remove all territorial restrictions from ongoing contracts and not to include them in future contracts with European buyers;

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[118] Consolidated version of the Treaty on the Functioning of the European Union [2008] OJ C 326.
[119] EC IP/04/1310 (n 128).
[120] ibid.
[121] ibid.
[122] EC Press Release, 'Commission and Algeria reach agreement on territorial restrictions and alternative clauses in gas supply contracts' (IP/07/1074) (11 July 2007, Brussels) https://europa.eu/rapid/press-release_IP-07-1074_en.htm accessed on 28 July 2019.
[123] Talus (n 58) 284.
[124] ibid.

- Not to use profit-sharing mechanisms in existing or future pipeline gas supply contracts; and
- Not to use profit-sharing mechanisms in future LNG contracts in which the shipping is arranged under an FOB basis.[125]

However, Sonatrach was permitted to exercise profit-sharing mechanism in LNG contracts if the shipping arrangement was under a DES basis. Therefore, the company after this settlement began converting its existing FOB-based LNG contracts to DES-based contracts.[126]

v. Bundeskartellamt investigations on German gas supply contracts (take-or-pay clauses with resale bans)

On 7 July 2010, the Bundeskartellamt[127] announced that it had settled most of its investigations into the gas supply contracts of major German energy suppliers with their industrial customers.[128] According to the agreement, twelve German energy suppliers, including RWE, EWE and Entega, undertook to renounce the provisions which stipulated resale restrictions of the minimum take volumes.[129]

During the investigations, the Bundeskartellamt examined the validity of take-or-pay clauses with resale restrictions in LNG SPAs.[130] The authority upheld the traditional take-or-pay clauses in contracts in which the volume risk bore by the buyer and the price risk bore by the seller as legitimate.[131]

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[125] EC IP/07/1074 (n 137).
[126] ibid.
[127] The German Competition Authority (Federal Cartel Office).
[128] Bundeskartellamt, 'Gas and electricity suppliers agree to renounce resale bans Bundeskartellamt gets companies to abandon anti-competitive contract clauses, (7.07.2010) https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2010/07_07_2010_Weiterverkaufsverbot-Strom-Gas.html accessed on 30 July 2019.
[129] ibid.
[130] ibid.
[131] Talus (n 58) 276.

However, the authority found that when the take-or-pay obligation is combined with a resale restriction, the division of risks between parties becomes unjust.[132] The idea behind this was that the obligation to buy, or at least to pay, and the restriction to resell the gas resulted in the seller not weighing any of the risks while the buyer was purchasing the full volume risk.[133]

The Bundeskartellamt stated that these agreements were included in gas supply contracts for historical reasons and were admissible under Section 22 of AVBGasV.[134] However, considering the emergence of more liberalized energy markets in Europe, in the authorities' view, they were not acceptable anymore and they negatively affected competition in the market. Therefore, take-or-pay clauses with resale restrictions were found to be in violation of Article 101 of TFEU.[135] As a result of the investigations, the major energy suppliers to Germany agreed on removing the resale restriction from take-or-pay clauses in their contracts with buyers.[136]

vi. Bundesgerichtshof rulings on gas supply contracts (with strict oil price indexations)

In 2010, the Bundesgerichtshof[137] ruled in two cases that the clauses which strictly tie the price of gas to the fuel oil disadvantages the customers of the gas supplier. In both cases,[138] the claimants sought to establish the invalidity of the pricing formula used by the defendants, energy supply companies, as

[132] ibid.
[133] Konoplyanik (n 59) 285.
[134] General Terms and Conditions for the Supply of Gas.
[135] See (n 119).
[136] ibid.
[137] German Federal Court of Justice.
[138] Bundesgerichtshof VIII ZR 178/08 and Bundesgerichtshof VIII ZR 304/08.

they were disproportionately disadvantaging the customers of the supplier companies.[139]

The Bundesgerichtshof accepted the legality of fuel oil indexation clauses to the extent that the downstream gas supplier can compensate its losses caused by price fluctuations.[140] Though, the Court noted that contracts wherein the downstream gas supplier can make further profits via the pricing formula, which strictly tie the price of gas to the fuel oil, will amount to an undue advantage for the company and disadvantage to the customers. As a result, the court in both cases ruled the pricing formulas, which included strict linkage to fuel oil price, as ineffective.[141]

However, unlike in other cases examined above, these cases relate to downstream gas supply contracts rather than upstream gas supply contracts. The disadvantage that to which the court referred becomes relevant when the pricing formula is used as a basis for the gas price, and the formula in a gas supply contract is different from the formula used in a contract the same supplier is likely to use with its end customers in the downstream market.[142] In other words, price indexation formulas are found to be incompatible with EU competition law if they unduly disadvantage the customers in the downstream markets.

4.3. Current European LNG markets after the EU's implementations

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[139] The German Federal Court of Justice Press Office, 'Bundesgerichtshof erklärt "HEL" Preisanpassungsklauseln in Erdgas Sonderkundenverträgen für unwirksam' (Nr.61/2010)

http://juris.bundesgerichtshof.de/cgibin/rechtsprechung/document.py?Gericht=bgh&Art=en&Datum=Aktuell&nr=51371&linked=pm&Blank=1 accessed on 30 July 2019.

[140] Bundesgerichtshof VIII ZR 225/07.

[141] See (n 139).

[142] Talus (n 58) 286.

The EU's approach to the European energy markets changed considerably from the beginning of the 2000s with the push towards a more liberalised market structure. As can be inferred from the cases, the change stipulated the free flow of energy within the EU, and, for the LNG markets, it meant removing some provisions that had long been used in LNG SPAs. The provisions in question were deemed to be restrictive in that they were creating market barriers and adversely affecting competition and market liquidity.

Conversely, from the seller's point of view those provisions were necessary to profit from LNG trades as the business was capital intensive and high risk. Therefore, sellers often insisted on adding them into the contracts. The EC objected to this view and after the Nigerian LNG investigation, one of the first investigations into this issue emphasised that it would still be possible to profit from the LNG business even after removing the problematic clauses.[143] The EC also noted that while there was a reason behind these clauses in the early days of the industry, as there was no spot market and the projects required guarantees, today the current LNG industry does not have the same justification.[144]

The EC has asserted that the LNG sellers can make reasonable profits and maintain their business while abiding by the EU's competition rules through removal of the anti-competitive clauses. However, as the process of eliminating such clauses advanced through bilateral negotiations, the progress was slow and limited. Only the investigated companies on investigated issues compromised with their contracts. The EC investigation launched in 2018

[143] See (n 99).
[144] Davina Garrod and others, 'European Commission Takes Aim at Qatar's LNG Contracts' (Akin Gump, 2 July 2018) https://www.akingump.com/en/experience/industries/energy/speaking-energy/european-commission-takes-aim-at-qatar-s-lng-contracts.html accessed on 5 August 2019.

into Qatar Petroleum's contracts with European importers is a good example of the slow and limited scope of this process.

Even though the EC had been investigating these clauses for nearly two decades (it had been 16 years since the NLNG settlement), the Qatar Petroleum investigation showed that the destination clauses still existed in LNG supply contracts with European importers. Therefore, the method the European regulators followed in ensuring the free flow of LNG within the EU and allowing market competition for LNG had not been as fruitful as it should have been.

However, even though the EU's method of assuring LNG contracts' compatibility with the competition rules of the EU has not been perfectly effective, the process of defying the anti-competitive provisions in the LNG industry was an important part of expediting the market's development. Case studies on other similar fuel markets, such as pipeline gas and oil, demonstrate that after a significant change in the market, the second step necessary for market development is an apt regulatory intervention.[145] The LNG industry has already experienced this significant market change after the oversupply crisis due to the low-cost US LNG. Accordingly, the EC's interventions on the contractual structures used in the industry constituted the second step and aimed at encouraging market development.[146]

As a result of the bans on anti-competitive provisions in LNG SPAs imposed by the EC, the rigid nature of the contracts became more flexible for European buyers and thus, promoted the diversions of LNG to more profitable markets.

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[145] European Commission, 'Follow-up study to the LNG and storage strategy' (September 2017, Brussels) 128 https://ec.europa.eu/energy/sites/ener/files/documents/follow_up_study_lng_storage_final_01.pdf accessed on 5 August 2019.
[146] ibid.

The increasing number of flexible contracts carried short-term trade and spot market onwards. Following the increased flexibility and development of spot trades of LNG, the market became more liquid and integrated in Europe.

Historically, the price for LNG was determined by oil prices in Europe, mostly due to the lack of liquidity in the LNG markets. However, following the growth in market liquidity and competition, gas price indices started to develop, and currently, there are several major price indexes around Europe, which shows the progress of the market. Accordingly, together with the development of gas to gas competition, price linkages to gas prices are becoming more popular in the European LNG trades. For example, in 2005 less than 20% of the LNG SPAs used gas price indexation, while the ratio in 2015 was more than 60% of the LNG SPAs.[147]

As a result of the aforementioned developments, the investigations and decisions regarding the anti-competitive clauses led to a change in the industry-standard contractual structures. Now, LNG SPAs are more flexible and less restrictive for European buyers. To adjust to the new standards in contracts, LNG sellers to Europe had to concede on anti-competitive terms which they had seen previously as necessary and even compulsory. Although this seems like a negative outcome to sellers at first sight, it is actually a positive outcome in the long term. For example, as the market becomes more developed and more competitive, sellers will have the opportunity of increasing their sales volumes due to the new entrants to the market. Moreover, the increasing liquidity in the market will allow sellers to access and develop new markets. Finally, overall growth in the LNG markets will increase sellers' chance of utilizing their natural gas.[148]

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[147] See (n 24).
[148] Ashurst, 'What "new" LNG buyers want' (2016) https://www.ashurst.com/en/news-and-insights/legal-updates/what-new-lng-buyers-want/ accessed on 6 August 2019.

In summary, the deterrent implementations by the European regulators and courts on anti-competitive provisions guided by the developments in the EU's energy policy evolved the European LNG market. The removal of these provisions helped the development of short term and spot trade of LNG in Europe. This outcome boosted the liquidity and number of players in the market. Accordingly, the regional gas hubs and independent gas prices strengthened.

In conclusion, even though the EC's method of dismantling the anti-competitive clauses in LNG SPAs can be criticized as being slow and sectional, the European approach on the anti-competitive aspects of LNG contracts created an environment in which buyers and sellers both benefited. However, LNG is still a secondary gas supply option because Europe is supplying most of its natural gas needs through pipelines and potentially can supply more in the same way. As LNG is the subsidiary source, even though it is an important way to diversify energy portfolio, trade growth for LNG in Europe still mostly depends on the price of this commodity.

5. Analysis of the JFTC's Survey and Comparison with the EU's Investigations

In 2018, the Asia Pacific market constituted almost 50% of all global LNG trades.[149] Since China's LNG imports started in 2006, Asia's share in global LNG trades has been increasing gradually.[150] In addition, the LNG import growth in India and Pakistan has been substantial.[151] In the same year, despite a decrease in demand from the Japanese power sector, Japan represented 26%

[149] See (n 24) 16.
[150] ibid.
[151] ibid.

of all global LNG imports and remained as the world's largest LNG importer.[152] Japan's market share was followed by China (16.7 %), South Korea (13.6%) and India (7.1%).[153] In total, the global market share of LNG imported by these countries was around 70%. Therefore, it can be argued that the Asian market is the cornerstone of LNG trades.

Unlike European countries, Japan and some other Asian countries, including South Korea and Taiwan, do not have international gas pipeline connections and domestic gas productions.[154] Therefore, they secure their natural gas needs via LNG imports.[155] For these countries, LNG is the primary way of supplying their natural gas demands. For Japan particularly, the shortfall of energy after the Fukushima disaster, which resulted in the closure of nuclear plants, has been met mostly by LNG imports.[156]

Because the need for LNG is acute in Asia, utility companies in the region have entered into a variety of contractual arrangements including long-term, short-term and spot sales with suppliers around the world. Long-term contracts were considered to be requisite as they provided the necessary supply security for buyers, while short-term and spot trades were necessary to meet sudden demand increases.[157] However, because transportation distance directly affects the costs and duration of a delivery, Asian buyers

[152] ibid.
[153] ibid.
[154] The Japan Fair Trade Commission, 'Survey on LNG Trades: Chapter 4 of Fair Competition in LNG Trades' (2017) https://www.jftc.go.jp/en/pressreleases/yearly-2017/June/170628_files/170628-2.pdf accessed on 9 August 2019.
[155] Chantal Carriere, 'The Effects of Japan's Push for Greater LNG Market Flexibility on LNG Pricing and Destination Restrictions' (2018) 11 The Journal of World Energy Law & Business 136.
[156] ibid 138.
[157] See (n 24) 2.

often preferred entering into long-term contracts with relatively nearby suppliers such as Australian, Malaysian and Qatari companies.[158]

Even though supplies are increasingly provided by short-term contracts and spot sales, Asia still procures LNG mainly under long-term contracts. Almost all of these long-term contracts contain territorial restrictions, including the contracts under FOB arrangements and other types of restrictive provisions.[159] This being the case, the JFTC in 2017 published a survey which examined the negative effects of these restrictions on competition in the Japanese LNG market. Moreover, the JFTC has signalled that it will scrutinize contracts that contain such clauses.

In conclusion, there has been an increasing regulatory scrutiny of contractual structures in Japan as well as in some other Asian importer countries. Also, the possibility of regulatory intervention and oversight is becoming more real. Under these circumstances, one can argue that LNG supply contracts with Asian importers are on the margin of change. This change would have significant effects on the Asian LNG market presumably, as it happened in Europe. Before looking at the possible effects of the removal of anti-competitive clauses in the Asian market, it is important to analyse the JFTC's survey to understand Japan's position with regards to those anti-competitive clauses because the JFTC presumably will pave the way for other regulators in the region on this issue.

i. Analysis of the JFTC's survey on LNG trades

[158] ibid.
[159] ibid.

The JFTC examined the possible negative effects of the following anti-competitive clauses: destination and diversion restrictions, profit-sharing mechanisms, and take-or-pay obligations.

ii. Destination and diversion restrictions

According to the JFTC, destination and diversion restrictions result in the exclusion of new market entrants or at least minimize their trading opportunities by preventing buyers from reselling LNG. In the report, JFTC considered this as 'foreclosure effects' and stated that such effects, in principle, violate the Japan Antimonopoly Act.[160] The JFTC accepted that an imposition of a territorial restriction by one supplier will not have enough effect by itself to damage competition because no single supplier has high market shares in Japan, unlike Europe where a few numbers of companies supplied the whole market,. However, the JFTC stated that when two or more suppliers apply the same restrictions, it is possible to observe 'foreclosure effects' in the market.

On the other hand, the JFTC emphasized that even without destination restrictions, new market entrants have limited options to procure adequate amounts of LNG to stay in the market. The main reason behind this is that most of the supply contracts in the Japanese LNG market are long-term. Because almost all long-term contracts include a take-or-pay obligation, suppliers have promised the majority of their available source to the original buyers under those obligations. Hence, the possibility of procuring new or extra LNG for new entrants is very limited. Also, because the incidence of spot sales in the Asian LNG market is still relatively low, it is not possible for buyers to procure adequate amounts via spot trades. Therefore, even if no

[160] Act on Prohibition of Private Monopolization and Maintenance of Fair Trade (Act No. 54 of 14 April 1947).

single supplier has high shares in the market, the imposition of a destination restriction will limit the possibility of procuring LNG for new market entrants and hence will cause 'foreclosure effects' on the market regardless of the seller's market share.

Moreover, buyers can resell LNG using one of two methods; diversion sales and reload sales.[161] The diversion option allows buyers to divert the cargo while the LNG is still inside of the carrier and the ultimate buyer only takes the LNG at the diverted receiving terminal. The reloading method requires buyers to take the LNG at the receiving terminal and then reload it into another carrier to re-export for the ultimate buyer.[162] Because territorial restrictions prevent buyers from utilising the diversion option, the only way remaining option for a buyer to resell surplus LNG is through the reloading method.[163] However, the JFTC argues that the latter method cannot be an alternative to the first one because of the significant accompanying requirements, such as the extra costs triggered by the additional transportation and the need for an expansion at the receiving terminal. As such, the reloading method is not an economical option, not only for Japanese but for Asian buyers in general. This is because LNG price differences among Asian importers are too small for arbitrage options and Asia has higher prices for LNG than other parts of the world. Consequently, the territorial restrictions have more significant effects on Asian importers.

In analysing territorial restriction clauses, the JFTC made a distinction between contracts with FOB arrangements versus contracts with DES

[161] See (n 155) 6.
[162] Hiroshi Hashimoto, 'Recent Trends in European LNG Reloading Business' (July 2017) https://eneken.ieej.or.jp/data/7426.pdf accessed on 13 August 2019.
[163] See (n 155) 6.

arrangements while examining the destination clauses, unlike European regulators who mostly focused on the passing of the LNG title to buyers.[164]

FOB contracts

Under FOB contracts, buyers are responsible for the transportation of the LNG and the title and risk pass to them at the loading port. Therefore, FOB contracts do not contain a delivery port. Despite that, sellers argue that there are reasons to add territorial restrictions to FOB contracts anyway. Firstly, in the case of a diversion of the cargo by the buyer, increases in the distance and delivery duration to another receiving terminal, compared to the original distance and duration-,might negatively affect the sellers' commercial operations regardless of the shipping arrangement. In addition, in the case of a delay in a subsequent buyer's schedule, the possibility of other buyers' schedules being disturbed increases because the loading terminal (which are limited in number) and schedules would also be affected. Moreover, in such situations, reserve tanks in a loading terminal might become unserviceable due to overloading caused by the series of delays. As a result, this sequence of events might result in the suspension of production activities overall. Secondly, sellers argue that territorial restrictions are necessary even in FOB contracts because of the pricing issue. In order to set a reasonable price, sellers consider the price differences among different markets as well as the costs and risks associated with a specific receiving terminal.

As to the first argument from the buyers' perspective, the increasing fleet size of LNG carriers would likely prevent such delays. This is because the buyer now has the possibility to charter a different carrier to take subsequent cargoes even if the duration of transportation of cargo increases due to a diversion.

[164] Kim Talus, 'model diversion clause for LNG sale and purchase contracts' https://law.tulane.edu/sites/law.tulane.edu/files/Files/01_OGEL_Model_Diversion_Clause_for_LNG_SPA_2018%20%28003%29.pdf accessed on 13 August 2019.

Even if such damages occur, buyers are obligated to compensate the seller for the damages. So, in practice, buyers often avoid taking such risks.

Therefore, the JFTC considered the first argument for supporting territorial restriction clauses as unreasonable. On the other hand, the JFTC accepted the reasonableness of such restrictions in FOB contracts since they help to provide a base trading price at specific destinations. However, the JFTC emphasized that this argument is only reasonable for ongoing contracts. For new contracts, the JFTC indicated it will not accept this rationale.

In conclusion, territorial restriction clauses prevent buyers from reselling LNG without any necessary and reasonable cause because under FOB contracts the title of LNG and risks related to transportation passes to the buyer at the loading terminal. As a result, the JFTC found that territorial restrictions under FOB contracts are likely to violate the Japan Antimonopoly Act.[165]

iii. DES contracts

Under DES terms, sellers are responsible for the transportation of LNG to the destination point. The title and risk passes to buyers at the unloading terminal. In that sense, destination clauses are necessary under DES contracts. As it did in regard to destination clauses, the JFTC accepted the reasonableness of diversion restriction clauses under DES contracts to some extent. In addition, a framework on the extent to which diversion restrictions are accepted was also made available by the JFTC in the survey. Also, the JFTC encouraged parties to include terms in territorial restrictions that clarify the procedure and circumstances under which a buyer can request a diversion and exercise its right.

[165] See (n 24) 9.

The framework set out by the JFTC analysed the matter of diversion restrictions under several different scenarios. In practice, DES contracts that allow diversion of cargoes for buyers often require different conditions. The JFTC While some of the conditions were found reasonable by the JFTC, some others were found likely to violate the relevant competition rules.

The most used condition for diversion requests in LNG SPAs is the 'seller's consent.'[166] Even though some SPAs provide a "reasonableness" requirement for sellers' declining of such requests, as it is pointed out by the survey, consent conditions in some other SPAs do not provide enough information on how to obtain that consent by buyers or under which circumstances the consent can be withheld by sellers. The JFTC emphasized, in the case of DES contracts, the requirement is also considered as the reasonableness of sellers' decline. In connection with that, another commonly used condition for diversion requests is the 'necessity and reasonableness' of a request.[167] This condition includes the requirement of the compatibility terminals receiving diverted cargo as well as the requirement of the buyer compensating the seller the additional costs attributable to the diversion and not disturbing the sellers' original delivery program. Despite the fact that these conditions cause some problems between parties, in general, the JFTC accepts that they do not violate Japan Antimonopoly Act.

However, there are some other conditions imposed by sellers in DES LNG SPAs with regards to diversion rights that the JFTC found to be highly likely to violate Japan Antimonopoly Act. According to the survey, the majority of DES contracts with Japanese buyers contain such anti-competitive conditions for diversion rights.[168] These conditions include (i) limiting the diversion

[166] ibid 10.
[167] ibid.
[168] ibid.

option to specific circumstances of operational requirements, such as the buyers' storage capacity problems; (ii) preventing buyers from using their diversion rights for commercial reasons, such as arbitrage options; and (iii) limiting buyer's customers in case of a resale, for instance preventing a buyer from reselling LNG to the original sellers' customers.[169] The JFTC stated that these conditions are anti-competitive by their objectives.

In conclusion, the JFTC accepted that destination clauses are not necessarily in violation of the Japan Antimonopoly Act. Also, the 'seller's consent' and 'necessity and reasonableness' conditions for cargo diversions are not in violation of the same act. However, the JFTC found that it is likely to violate the act when a buyer complies with such conditions, but the seller refuses a diversion anyway. Moreover, the JFTC also found that such-anti competitive conditions attached to destination clauses are highly likely to violate Japan Antimonopoly Act.

iv. Profit-sharing mechanisms

Profit-sharing mechanisms oblige buyers to allocate a part of the profit generated through resale for sellers. However, these mechanisms only apply to the diversion sales, not to sales conducted under reloading method. It is stated in the survey that only a small number of long-term LNG SPAs include these mechanisms as typically those SPAs contain terms related to diversion.

Similar to the destination clauses, these mechanisms under FOB contracts are considered as unreasonable by the JFTC. Under DES contracts, on the other hand, they are reasonable to the extent that they function as a compensation for the original sellers' increased risks caused by the diversion.

[169] ibid 11.

In practice, however, these mechanisms have several possible negative effects that can be considered as problematic with regards to competition. Firstly, most of the profit-sharing mechanisms used in SPAs allocate at least 50% of the generated profit for the original seller, and in some contracts, this amount goes up.[170] The allocation of such high percentage without actually considering the seller's contribution to the resale is resulting in the resale being less attractive for the buyers. Furthermore, depending on the calculation method of the profit, these mechanisms might even result in the resale being profitless, and this can cause inconvenience for the buyer's commercial operations. Secondly, if the calculation method or procedure for resale in the contract is ambiguous and requires parties to negotiate, this might result in resale opportunities being forfeited. Finally, because the original seller requires some confidential information with regards to the resale – information related to costs, customers or price, the buyer might prefer not to continue with the resale in order to keep the information confidential.

The JFTC found that in any of the abovementioned situations, buyers are hindered from reselling the LNG and deprived of the opportunities. As a result, profit-sharing mechanisms might cause foreclosure effects in the market regardless of the shipping arrangement, and therefore they are, in principle, in violation of the Japan Antimonopoly Act.

v. Take-or-pay obligations

Take-or-pay obligations require the buyer to pay for the all annually contracted quantity even if they do not take the full amount. As in European regulators, JFTC also recognized its reasonableness since a guarantee of regular payment is important for sellers' investment decisions. Therefore, it is remarked by the JFTC that including take-or-pay obligations in LNG SPAs

[170] ibid 14.

is not by itself violates competition rules. However, even though they are necessary for the sellers because a take-or-pay obligation is agreed while concluding the contract, it causes problems for buyers in case of demand fluctuations in the future. Also, some of the SPAs provide these obligations even after the seller gets full return on the investment.[171]

As a result, the JFTC stated that if this obligation is imposed by the seller from a superior bargaining position and also included strict minimum purchase requirement, it is likely to violate the Japan Antimonopoly Act.[172] However, the JFTC found that the destination clauses and profit-sharing mechanisms violated the act as they constituted trading on restrictive terms, take-or-pay obligations, on the other hand, found violating the act because the JFTC considered them as abuse of superior bargaining position.

vi. Comparison of the JFTC and EU approaches

The EC's case by case investigations of the anticompetitive terms in LNG SPAs from the early 2000s and the JFTC's more recent industry-wide report with regards to the same issue, even though the significant differences between them, had somewhat similar findings on the effects of such clauses. They both confirmed that the restrictive nature of such clauses was adversely affecting the competition and market liquidity. However, it should be noted that while the EC's focus was on the EU's internal energy markets and free flow of energy within those markets, the JFTC highlighted the free trade and liquidity of international LNG markets.[173]

The EU's competition rules ban agreements which might obstruct the internal market competition of the EU by their actual effect or the object. In that

[171] ibid 19.
[172] ibid.
[173] See (n 155) 7.

regard, the EC considered FOB LNG SPAs with territorial restrictions deter European buyers from diverting cargoes within the EU and therefore, violating the competition rules. DES LNG SPAs, on the contrary, allowed to have destination clauses since the seller bears the transportation costs and risks and holds the title of the LNG until the unloading terminal. Although, it should be pointed out that the EC considers resale restrictions with strict minimum purchase obligations as a violation of the EU competition law regardless of the shipping arrangement.

The JFTC, on the other hand, used the notions of reasonableness and fair necessity when evaluated the anticompetitive clauses. Even though the JFTC accepted the destination clauses and diversion restrictions to the extent that they only provide reasonable and necessary practices for buyers, it is clearly stated that FOB LNG SPAs do not provide such reasonableness or necessity due to the nature of the arrangement. Therefore, it is considered that such clauses under FOB contracts are highly likely to violate competition laws.[174] DES LNG SPAs, like in Europe, considered to have the reasonableness and necessity by the JFTC as the seller arranges the shipping of LNG. However, it should be noted that the JFTC stipulated some requirements for DES contracts to ensure these provisions were not imposed unreasonably and do not obstruct competition.

Under both jurisdictions, the profit-sharing mechanisms are partially allowed. In that sense, under FOB contracts, both jurisdictions reached the same conclusion that these mechanisms are in violation of the relevant competition laws. The EC's investigations on FOB LNG supply contracts all concluded with the supplier company guaranteeing to remove such mechanisms from ongoing contracts and not to introduce them in future contracts with any

[174] See (n 155) 9.

European buyers. The JFTC, in the survey, clearly stated that under no circumstances, the profit-sharing mechanisms are reasonable if the contract is agreed on FOB terms. On the other hand, for the DES contracts, the JFTC accepted the profit-sharing to the extent that it only compensates the extra costs and risks on the original seller caused by the diversion of the cargo. Therefore, it can be argued that the suggested use of profit-sharing mechanisms by the JFTC is very limiting compared to the actual use in practice.

Both jurisdictions had similar views on the anticompetitive aspects of such mechanisms. They both emphasized that profit-sharing allocations designed without considering the seller's actual contribution to the profit from resale are disincentivizing buyers from reselling cargoes. This outcome is a potential obstructing of competition and therefore considered as a violation of the competition rules in both of the jurisdictions. Moreover, and maybe the most anticompetitive aspect of these mechanisms is the requirement of sharing commercially confidential information which typically buyers do not disclose. After the diversion and resale, in order to calculate the profit, the original seller may ask sensitive information with regards to the resale of LNG such as the customer and the price.

On the take-or-pay obligations, the EC and the JFTC both emphasized its necessity under traditional financing methods as the seller requires a guarantee of revenue without considering the actual amount taken by the buyer. Also, take-or-pay clauses are considered useful for the supply security concerns by the importer countries. Accordingly, regulators in both jurisdictions accepted its validity and stated that by itself, these obligations do not create problems with regards to the competition in the market.

However, when they are combined with other restrictions, problems start to appear. For example, the Bundeskartellamt investigated the take-or-pay obligations and found that if they are combined with resale restrictions under the same contract, it is in violation of the EU competition laws, Article 101 of the TFEU in particular. The authority's reasoning was that if such an obligation is combined with a resale restriction, the allocation of the risk-sharing between parties becomes unjust for the buyer.[175] The JFTC, on the other hand, followed a different reasoning. It is stated in the survey that in order take-or-pay clauses to violate competition rules they should contain strict minimum purchase requirements as well as a unilateral imposition by the seller by using its superior bargaining position.

Even though these partially similar findings on the problematic clauses, there is a fundamental difference between the two approaches. While the EC made formal investigations, the JFTC's survey developed through in-depth market analysis. In this sense, the EC's case by case and legally binding approach is very different than the JFTC's industry-wide but non-binding approach.

However, it is pertinent to note that even though the survey by the JFTC is not a legally binding document, it can be considered as a declaration by the JFTC. The survey warns the market participants of Japanese LNG industry not to introduce such restrictions for the future contracts, and also signals a revision for the current contracts with anticompetitive restrictions.

Additionally, one of the most important aspect to remember with regards to the application of competition laws is that they are under continuous alterations. For example, the approach towards long-term capacity reservation contracts in the EU is quite interesting. As it is remarked by Kim

[175] See (n 149).

Talus, these contracts, "*moved from being supported, to being tolerated and further to being prohibited in a matter of years*".[176] Several factors can affect the market and weaken or strengthen companies' positions. Therefore, competition rules require regulators to watch the changes and act accordingly.[177] Also, as the rules cannot adapt to the transformation of the market realities right away, it is significantly important for regulators to take extra care when applying the outdated rules.[178]

Following the increase in regulatory oversight on LNG SPAs in Europe, the Japanese LNG market is also on the verge of an intervention by the regulatory authorities. This argument is supported by the conclusion of the JFTC's survey as it ends by declaring that the commission will take strict actions against the violation of Japan Antimonopoly Act by means of anticompetitive clauses. However, it should be added that the approach of the EC has never been tested in the European courts.[179] That is why, the success of the JFTC's measures on removing the anticompetitive clauses, if it is challenged under the courts, remains to be seen.

The possible methods that the JFTC might use intervening LNG SPAs are also an important issue to consider. It might follow a similar approach as of the EC, launching investigations case by case, or go on a different direction by declaring such clauses void altogether. In any case, though, because the market realities for LNG trading has changed substantially in the last couple of decades, the legal reasoning of the JFTC's interventions will probably be somewhat different than the European regulators. Especially in the second

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[176] Talus (n 58) 314.
[177] ibid.
[178] ibid.
[179] 'Japanese Antitrust Scrutiny of LNG Supply Agreements' (Baker Botts, 6 March 2017) http://www.bakerbotts.com/insights/publications/2017/03/japanese-antitrust-scrutiny accessed on 13 August 2019.

scenario, where the JFTC decides to declare such clauses as void, it will raise complicated issues and require a solid legal defence from the JFTC.[180]

In conclusion, after the JFTC's survey, it is highly likely that at least in FOB contracts parties will avoid including such clauses in their future contracts. For the contract renewals, the terms considered as anti-competitive by the JFTC might need to be modified in accordance with the JFTC's findings. Under the ongoing contracts, it is important for parties to conduct business practices considering the JFTC's survey. In addition to that, in case the JFTC decides to investigate such contracts, a renegotiation for the anticompetitive clauses might be required as well.

6. Conclusion

According to the EC's follow-up LNG study, there are several essential requirements that need to be met in order to reach a certain level of development in LNG markets.[181] As the case studies of similar fuel markets display, these requirements are: a significant transformation of the market, apt regulatory intervention that supports the progress and finally, relying on market forces to further the development.[182] In this context, the EC's and the JFTC's interventions can be considered good examples of how to fulfil the requirement for regulatory intervention to support the development of competitive LNG markets.

This regulatory intervention by Japan will presumably pave the way for other Asian states to put pressure on market players to remove anticompetitive clauses in LNG SPAs. As in Europe, the removal of such clauses is expected

[180] ibid.
[181] See (n 146) 128.
[182] ibid.

to prompt several changes in the Asian LNG markets. The following part of this chapter will analyse the effects of those changes.

6.1. Emerging cooperative trends in Asia after the JFTC's push

Prior to the JFTC's survey on LNG trades, Japan's Ministry of Economy, Trade and Industry ("**METI**") published a report on creating a flexible market and developing an LNG trading hub in Japan.[183] The report emphasizes that LNG is a strategically significant energy source for Japan, and it will stay that way for the foreseeable future.[184] However the report also notes that, following the excess supply available from the U.S. and liberalization of the Japanese gas and electricity markets, the focus of importers on LNG trades is moving away from securing long-term and sufficient supply and toward having more resiliency and flexibility when trading.[185]

Considering the anticompetitive aspects of traditional LNG supply contracts, which have the effects of hindering flexibility and free trade in LNG trades, the JFTC's aim of eliminating or at least mitigating such negative effects by removing anticompetitive clauses is in line with the METI's LNG policy. Moreover, the increasing regulatory oversight on LNG SPAs in Asia will not only stay in Japan, but other Asian countries will follow such regulatory actions to benefit from more flexible contracts. In connection with that, there have been multiple reports that the Korean Fair Trade Commission ("**KFTC**") is also expected to launch similar investigations with regards to

[183] Government of Japan, Ministry of Economy, Trade and Industry Strategy for LNG Market Development, 'Creating flexible LNG Market and Developing an LNG Trading Hub in Japan' (2 May 2016).
[184] ibid 2.
[185] ibid.

the anticompetitive provisions in LNG SPAs.[186] According to these reports, the KFTC will examine the legality of territorial restrictions in LNG supply contracts. Although, it should be noted that currently there have been no formal investigations or press releases from KFTC on this matter.

In addition to the expected increase of regulatory oversight in Asia, it is stated in the METI's report that because the removal of anticompetitive clauses is essential for providing the required flexibility and resiliency, the ministry will increase its cooperation with other major LNG importer states. In this sense, the report emphasizes the importance of collaboration in the Asian market to eliminate anticompetitive restrictions from LNG SPAs.

As mentioned earlier, Japan, China, Korea and India's imports constituted 70% of the global LNG trades in 2018. Despite this substantial share, the lack of cooperation between those countries has been weakening importers' negotiation power in relation to sellers and the governments' power to implement regulatory decisions.[187] However, following the METI's report, cooperation has begun to increase. Since 2016, JFTC has concluded a series of memorandum of understandings ("**MoU**") with other Asian states including India, Singapore and Korea with regards to LNG trading.[188] In

[186] Reuters, 'South Korea's regulator weighing whether to start probe into LNG destination clauses' (Seoul, 19 October 2017) https://www.reuters.com/article/us-southkorea-lng/south-koreas-regulator-weighing-whether-to-start-probe-into-lng-destination-clauses-idUSKBN1CO070 accessed on 15 August 2019; Business Korea, 'Korea's FTC to Tackle Destination Clauses of LNG Trade Contracts' (3 August 2017) http://www.businesskorea.co.kr/news/articleView.html?idxno=18870 accessed on 15 August 2019.

[187] Babak Kiani, 'LNG Trade in the Asia-Pacific Region' (1991) 19 Energy Policy 63.

[188] METI, 'Japan and India Signed a Memorandum of Cooperation on Establishing a Liquid, Flexible and Global Liquefied Natural Gas Market' (18 October 2017) https://www.meti.go.jp/english/press/2017/1018_002.html accessed on 15 August 2019; the JFTC, 'The Japan Fair Trade Commission Concluded Memorandum of Cooperation with the Competition Commission of Singapore' (22 June 2017) https://www.jftc.go.jp/en/pressreleases/yearly-2017/June/170622.html accessed on 15 August 2019.

addition to the increasing cooperation of competition authorities in Asia, major LNG buyers from Japan, China and Korea are also entering into similar partnerships. For example, in 2017, the biggest LNG buyer in Japan, JERA, signed an MoU with Korea's KOGAS and China's CNOOC with regards to their LNG businesses.[189] The MoU covered subjects such as joint procurement and storage as well as joint investments on upstream projects.[190] Also, the memorandum provided a platform for parties to discuss issues relating to traditional LNG trading such as the restrictive contracts.[191]

As a result of the increasing cooperation between regulators in Asia, the competition authorities will have a better chance of monitoring the market activities and fighting against the anticompetitive practices. The increasing cooperation in the private sector, on the other hand, will provide stronger negotiation positions for Asian buyers when contracting LNG supply agreements. Arguably, this stronger position will help them get more flexible terms than before. As the flexibility in contracts is something that the importers seek in the current market conditions, the push for more cooperation between market participants is an important aspect of the development of the flexible Asian LNG markets.

6.2. Increasing number of short-term and spot trades

Currently, LNG trading is still mostly conducted through long-term contracts.[192] However, when the growth rates of short-term and spot trades

[189] JERA, 'Conclusion of Tripartite MOU between JERA, KOGAS and CNOOC Concerning Cooperation in LNG Business' (23 march 2017) https://www.jera.co.jp/english/information/20170323_325 accessed on 15 August 2019.
[190] ibid.
[191] World Maritime News, 'JERA, KOGAS and CNOOC Team Up on LNG Business' (24 march 2017) https://worldmaritimenews.com/archives/216020/jera-kogas-and-cnooc-team-up-on-lng-business/ accessed on 15 August 2019.
[192] Maalouf (n 7) 411.

are considered, it can be argued that it will not stay that way for long. Non long-term trade of LNG moved from approximately 10% to more than 30% of all LNG contracts, between 2002 and 2018.[193] Although several factors contributed to this development, the main driver was the increase in contractual flexibility.

The interventions by the regulators on restrictive and anti-competitive LNG SPA provisions, or at least the declaration of the intention to fight such provisions, drew the attention of market players towards such clauses. Together with the increase in cooperation between Asian market participants, regulatory pushes strengthened the buyers' hands and let them negotiate for less restrictive contractual terms.

Following the easing of such restrictive terms, especially the territorial restrictions, the resale option for buyers became more feasible, and the number of diverted cargoes increased. This freedom of resale allowed more players to enter the LNG trading scene and resulted in more competitive markets.[194] New participants in LNG trading included portfolio traders as well as new exporters and importers. These new traders of LNG have been one of the most important features of short term and spot contract development.[195]

Additionally, after the shale development in the U.S, a significant amount of LNG became available for export.[196] However, most of the LNG facilities built prior to the shale revolution were designed as receiving terminals, and

[193] See (n 24) 22.
[194] ibid.
[195] ibid.
[196] Kostas Smith, 'The Future of LNG Exports: How the Federal Government Can Promote U.S. LNG Exports' (2018) 27 S CAL INTERDISC LJ 405 406.

that is why LNG exports from the U.S. have not started until recently.[197] Now, as the receiving terminals are being transformed into liquefaction plants, the supply options from the U.S. increase.[198] Furthermore, because most of the American LNG projects have been developed by private businesses rather than state owned companies, they trade LNG in a more market-oriented way, which conforms with the buyers' expectation of more flexible contractual terms.[199]

As the excess supply from the U.S and Australia reinforces the Asian buyers' expectation of less restrictive contracts, their long-term LNG suppliers, such as Qatar and Malaysia are being compelled to provide such flexibility in their contracts. For instance, Petronas, a Malaysian state-owned oil company and a major LNG supplier to Japan, announced its intentions to comply with the JFTC's findings and move away from such restrictive provisions in their supply contracts with Japanese buyers.[200]

In conclusion, as the competition and flexibility in contracts increased, more parties became involved in LNG trading and the number of transactions increased. This trend led to the development of short-term and spot trades. In fact, the non-long-term LNG supplies to the Asian market almost quadrupled between 2010 and 2018, increasing approximately from 7 MTPA to 27 MTPA.[201]

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[197] ibid 407.
[198] ibid.
[199] METI LNG report (n 197) 3.
[200] Reuters, 'Petronas to observe Japan ruling on LNG destination clause: Nikkei' (1 November 2017) https://www.reuters.com/article/us-lng-japan-contracts/petronas-to-observe-japan-ruling-on-lng-destination-clause-nikkei-idUSKBN1D13DJ accessed on 16 August 2019.
[201] GIIGNL (The International Group of Liquefied Natural Gas Importers), 'the LNG Industry Annual Report 2019' https://giignl.org/sites/default/files/PUBLIC_AREA/Publications/giignl_annual_report_2019-compressed.pdf accessed on 16 August 2019.

The LNG industry's main argument in support of long-term contracts is that buyers need them for supply security and sellers need them for mitigating volume risks. In today's market environment, however, it is possible to procure sufficient LNG supplies via non long-term contracts. Therefore, as the parties are increasingly able to secure supplies from non-long-term contracts this will presumably result in the decline in the dominance of long-term contracts.

6.3. Liquidity, competition and the development of gas price indices

As mentioned earlier, the development of an LNG price hub is mostly dependent on liquid markets. Liquidity of a market is measured by how easy it is to purchase or sell an asset without having significant changes in the price. In this sense, there is a direct correlation between liquidity and the increasing number of flexible contracts, as such contracts increase the number of non-long-term contracts and participants in a market.

Furthermore, a competitive regional LNG market is essential for the development of an index price for LNG in Asia.[202] This is important for market players to be able to rely on when basing their contracts to a hub price. In the Medium-term gas report of 2013 by IEA, it is emphasized that the regulatory action from a competition authority is a necessary part of establishing the required competitive market.[203] In this context, the JFTC's report is an important development.

[202] Howard V Rogers, Jonathan P Stern and Oxford Institute for Energy Studies, Challenges to JCC Pricing in Asian LNG (2014) 38.
[203] OECD Publishing; International Energy Agency and others, 'Medium-Term Gas Market Report; Market Trends and Projections to 2018 ' (2013) 177.

Unlike Europe and North America, where the LNG prices are determined by gas to gas competition, the price of LNG is still indexed to the oil prices under contracts with Asian buyers. For the last couple of decades, LNG trades in Asia based on Japanese Customs-Cleared Crude Oil ("**JCC**") pricing system.[204] JCC price is determined by the average price of imported crude oil to Japan. However, even though this mechanism is useful when the price of crude oil is close to gas prices because it is indexed to commodities other than natural gas, it does not reflect the actual supply-demand for LNG.[205] Accordingly, because it does not reflect the actual numbers of LNG trading, it is usually considered that this pricing mechanism is preventing Asian LNG traders from utilizing market flexibility.[206]

Therefore, it can be argued that the positive effects of flexibility provided in contracts, by the market cooperation and regulatory pushes, is diluted by the oil-indexed pricing mechanism. Considering the recent price disparities between crude oil and spot LNG in Asia, which causes issues for Asian users, it is presumable that the buyers in the region will be compelled to move away from oil-indexed pricing mechanisms in supply contracts, as happened in Europe late 2000s.[207] However, the JCC pricing is a highly complex issue and there are differing views on the subject in the industry. Therefore, it should be noted that it warrants further discussion beyond the scope of this paper.

However, taking into account the fact that most of the Asian LNG buyers are wholesalers and aiming to resell it into the domestic markets, even though the energy markets in Asia are becoming more competitive and several major

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[204] Rogers, Stern and Oxford Institute for Energy Studies (n 203) 1.
[205] Carriere (n 156) 141.
[206] ibid.
[207] Thierry Bros and The Oxford Institute for Energy Studies, 'Quarterly Gas Review – Issue 6' (16 March 2019) https://www.oxfordenergy.org/wpcms/wp-content/uploads/2019/06/Quarterly-Gas-Review-6.pdf?v=79cba1185463 accessed on 16 August 2019.

companies dominance' in LNG markets is coming to an end, it is vital to have accurate price indicators. Also, it is equally important to have a price indicator which is determined by the actual supply-demand of LNG, as Asian importers' supply options are diversifying.

In conclusion, as the price differing between oil and gas continues, it will be vital for Asian LNG trades to have a price index based on actual LNG supply and demand. Increasing liquidity and competition, by the effects of increasing oversight on restrictive LNG supply contracts, is an essential part of the development of an LNG trading price in Asia.

6.4. Final thoughts

The traditional existence of anticompetitive practices in the LNG industry is coming to an end as the market balances are changing. Excess supply options from different areas of the world are lowering gas prices and transforming LNG trading into a buyers' market. At this point, the preconditions for further market development is competition and liquidity. In this sense, the regulatory interventions on the anticompetitive contractual terms are necessary actions to ensure the required competition and liquidity in markets. This is because those historically overlooked terms, as analysed above, were a major obstacle to the development of both, as they restricted LNG trades and created market barriers for new participants. However, considering that today's market conditions are quite different than the conditions prior to the EC investigations, it might be arbitrary for Asian regulators to launch investigations, as they can easily supply sufficient unrestricted LNG from other exporters. In conclusion, given that the market conditions are

reinforcing the regulators, today, the level of regulatory intervention required to remove such clauses is much lower in Asia. Developing a regional consensus to fight against anticompetitive clauses and improving the regional cooperation on this issue rather than launching investigations will add up to the same conclusion, ensuring the competition and liquidity, without actually intervening with the market.

THE INTERSECTION BETWEEN INTELLECTUAL PROPERTY RIGHTS AND COMPETITION LAW IN LIGHT OF STANDARD ESSENTIAL PATENTS

Giulia Sonderegger*

The overlapping nature of intellectual property rights ("IPRs") and competition law has posed challenges ever since their existence. Nowadays, EU competition law generally recognises IPR's innovation-promoting nature. Yet, the intersection between IPRs and competition law still creates conflicts. This was not last shown in recent fair, reasonable and non-discriminatory ("FRAND") encumbered standard essential patent ("SEP") cases in which SEP-holders have sued a potential licensee for a patent infringement although the potential licensee was actually willing to enter into a licensing agreement on FRAND terms. This raised the question of whether SEP-holders are allowed to lawfully apply for an injunction in such cases or whether such patent claims constitute an abusive behaviour according to Article 102 Treaty on the Functioning of the European Union ("TFEU").This article seeks to scrutinise the congruency and incongruency, respectively, of IPRs and competition law in light of FRAND obligations concerning injunctive requests. A closer analysis of this issue leads to the conclusion that although these two areas of law are not yet fully harmonised, as otherwise patent infringement actions would under no circumstances lead to an antitrust violation, the recent Huawei judgement has contributed to the clarification of injunction applications by dominant undertakings, shifting this area of law more towards competition law.

Keywords*: FRAND, Standard essential patents, IPR.*

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1. Introduction

Modern understanding of competition law and intellectual property rights ("IPRs") is that both are necessary to ensure that new and better technologies, products and services can be developed in order to benefit consumers.[1] Although their overlapping nature has posed challenges ever since their existence, nowadays the EU competition law generally recognises IPRs' innovation-promoting nature.[2] Hence, it mainly focuses on drawing IPRs' outer limits while only applying in "*exceptional circumstances*", where IPRs' exercise coincides with restrictions of competition.[3] Therefore, whereas in the past the tensions between IPR protection and competition law were primarily emphasised, today their complementary relationship is at the centre of the debates.[4]

That their relationship still creates conflicts has, however, been shown in recent FRAND-encumbered standard essential patent ("SEP") cases.[5] SEPs are IPRs that have been declared essential to a collaborative technology

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[1] U.S. Department of Justice and the Federal Trade Commission, 'Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition', April 2007, 1, <https://www.ftc.gov/sites/default/files/documents/reports/antitrust-enforcement-and-intellectual-property-rights-promoting-innovation-and-competition-report.s.department-justice-and-federal-trade-commission/p040101promotinginnovationandcompetitionrpt0704.pdf> accessed 27th September 2019.

[2] Commission Regulation on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of technology transfer, OJ [2014] L 93/17.

[3] *RTE und ITP v. Commission* ("Magill") [1995] Case C-241/91 P and C-242/91 P, ECLI:EU:C:1995:98, para. 50; Steven Anderman and Hedvig Schmidt, EU Competition Law and Intellectual Property Rights: The Regulation of Innovation, (2nd edition, Oxford 2011), 4 et seq.

[4] See Alden F. Abbott, 'The evolving IP–antitrust interface in the USA – the recent gradual weakening of patent rights' [2014] 2(1) JAE, 363-388.

[5] See for instance *Samsung- Enforcement of UMTS standard essential patents* (CASE AT.39939), Commission Decision, C [2014] 2891 final; *Motorola- Enforcement of GPRS standard essential patents* (Case AT.39985), Commission Decision, 2014/C 344/06 [2014] OJ C 344/6; *Huawei Technologies Co. Ltd v ZTE Corp. and ZTE Deutschland GmbH* [2015] Case C-170/13, ECLI:EU:C:2015:477 ("Huawei").

standard[6] and whose patentees are usually subject to a so-called FRAND-obligation, i.e. are required to commit *ex-ante* to license their patents on fair, reasonable and non-discriminatory terms. This should prevent SEP-holders from charging excessive royalties, thus protecting potential licensees.[7] Nonetheless, it has occurred that SEP-holders have sued a potential licensee for a patent infringement although the potential licensee was actually willing to enter into a licensing agreement on FRAND terms.[8] This raised the question of whether SEP-holders are allowed to lawfully apply for an injunction in such cases or whether such patent claims constitute an abusive behaviour according to Article 102 TFEU.

This article seeks to show the intersection between IPRs and competition law in light of FRAND obligations concerning injunctive requests. It asserts that, although these two areas of law are not yet fully harmonised, as otherwise patent infringement actions would under no circumstances lead to an antitrust violation, the recent *Huawei* judgement[9] has contributed to the clarification of injunction applications by dominant undertakings. In fact, the case increasingly shifts this area of law more towards competition law. However, it criticises the *Huawei* ruling in so far, as it still leaves a lot of room for interpretation, which will need to be addressed by national courts. Based on these observations, this article scrutinises the relevant case-laws regarding injunction requests, with a special focus on the *Huawei* decision. Thereafter, it discusses the role of SEPs in the context of innovation, showing that the increased application of competition law to FRAND-encumbered SEP cases can stimulate innovation instead of impeding it.

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[6] Anderman and Schmidt, n. 3, 295 et seq.
[7] ibid.
[8] See for instance *Huawei Technologies Co. Ltd v ZTE Corp. and ZTE Deutschland GmbH,* n. 5.
[9] ibid.

2. Relevant Case-Law

It has generally been established that the specific subject-matter of patent law includes the right to safeguard oneself against any infringement.[10] The recent case-laws show, however, that the line between seeking an injunction being lawful and breaching Article 102 is very thin.

2.1. Right to apply for an Injunction

Originally, following the strict approach of the U.S. theory of inherency, the right to apply for injunctions was covered by the specific subject-matter of IPR protection, thus falling outside the scope of competition law. However, the change as one towards a 'more economic approach' has also affected SEP-holders' right to take civil action against any patent infringement. In the decision involving *Motorola*, the EC took the position that where a dominant patent-holder has agreed to licence on FRAND terms, and the licensee is willing to negotiate a licence on these terms, the seeking of an injunction by the dominant firm in question constitutes an infringement of Article 102, thus legitimising competition law to be opposed to IPR protection.[11] In fact, the EC found such conduct to miss the objective of standardisation, primarily aiming at achieving compatibility and interoperability while saving costs.[12]

In the *Samsung* decision, which was issued on the same day as the case involving Motorola, the EC addressed, *inter alia*, the question of what shall be understood by 'willing licensee'. To this end, the EC created a 'safe harbour', providing the parties with more certainty by finding that a licensee is deemed to be qualified as "willing" if (i) an unsuccessful licence

[10] See for instance *Commission v. Italy* [1992] Case C-235/89, ECLI:EU:C:1992:73, para. 17; *Motorola- Enforcement of GPRS standard essential patents*, n. 5, para 29 and 502.
[11] ibid, para. 281 et seq.
[12] ibid.

negotiation goes on for a period of maximum twelve months and (ii) the parties subsequently agree to have the FRAND terms determined by a court or an arbitration.[13]

The *Motorola* as well as the *Samsung* decisions stand in stark contrast to the *Orange Book Standard* judgement issued by the German Federal Court of Justice ("GFCJ").[14] In this patent case, the GFCJ found that the claim for an injunction by a dominant licensor is generally to be awarded unless the opposing party can raise a substantive antitrust defence, showing that the award of the injunction would infringe Article 102. The potential licensee must demonstrate that it has tried to obtain a licence on FRAND terms by making the patent-holder a binding and unconditional offer, which was subsequently rejected by the licensor without any substantive reasons. It follows from the term "unconditionally" that the existence of the IPR in question must not be challenged and the infringement must not be contested.[15] Although this case does not address a FRAND-commitment but an obligation to license under competition law, it raised the question of whether the developed criteria should also apply to injunction requests concerning SEP-related cases. This question was recently addressed by the Court of Justice of the European Union ("CJEU") in the preliminary question in *Huawei v. ZTE*.[16]

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[13] *Samsung- Enforcement of UMTS standard essential patents*, n.5, para. 83.
[14] *Orange-Book-Standard* [2009] German Federal Court of Justice, Case KZR 39/06.
[15] Mark Simpson, Evans and Seiko Hidaka, The EU Court of Justice Judgement in *Huawei v ZTE* – important confirmation of practical steps to be taken by Standard Essential Patent holders before seeking injunctions, (Norton Rose Fulbright, August 2015) <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 27th September 2019.
[16] *Huawei Technologies Co. Ltd v ZTE Corp. and ZTE Deutschland GmbH*, n. 5.

This case concerned the Chinese mobile network technology company Huawei, seeking an injunction before the GFCJ whereby accusing ZTE of having incorporated software essential to the 4G LTE standard before having reached an agreement on FRAND terms. ZTE defended itself by pointing out that Huawei's injunction request constituted an infringement of Article 102 since ZTE was willing to negotiate with Huawei on FRAND terms. Recognising the great importance of the question on whether Huawei's application for an injunction constituted a breach of competition law, the GFCJ referred the question to the CJEU.

Following this, the Advocate General Wathelet suggested 'middle path',[17] according to which excessive protection for neither the SEP-holder nor the potential licensee should be granted. The CJEU found that as long as the potential licensor is willing to negotiate on FRAND terms, seeking an injunction constitutes an abuse of dominance. At the same time, it identified some guidelines regarding the precautions SEP-holders have to take in order to legitimately apply for an injunction, thus creating a safe harbour for SEP-holders from the application of Article 102 to dominant licensors who follow the guidelines. The guidelines encompass the SEP-holder's obligation to alert the implementer of the infringement. Subsequently, the potential licensee must be willing to enter negotiations on FRAND terms. If this is the case, the SEP-holder must provide the potential licensee with a written offer for a licence on FRAND terms, including a specification on the amount of royalty. The licensee must then (i) diligently, (ii) in accordance with the recognised commercial practices, (iii) in good faith and (iv) without signs of any delaying tactics respond to the offer. If the licensee does not agree to the offer issued by the SEP-holder, it must make a written counter-offer to the SEP-holder. In case that a consensus can still not be reached, the parties may, by agreement,

[17] ibid, Opinion of Advocate General Wathelet, para 52.

consult an independent third party in order to determine the amount of royalty.

Moreover, the CJEU established that if the potential licensee has already implemented the teachings of the SEP before the SEP-holder agreed to it, the former must additionally provide the licensor with an appropriate security regarding the past and future use of the SEP by, for instance, making a bank guarantee for the payment of royalty. Unlike the GFCJ's ruling in *Orange Standard Book*, the CJEU held that potential licensees can, in parallel to the negotiations on the FRAND terms, challenge the SEP with non-infringement and invalidity arguments.[18]

2.2. Critical Analysis of the *Huawei* Decision

The *Huawei* case indicates that the intersection in SEP-related injunction requests between IPRs and competition law is slowly shifting towards the latter. It appears that by largely following the Commission's path in *Motorola* and *Samsung*, the CJEU has chosen an implementer-friendly approach as opposed to the licensor-friendly approach taken in *Orange Standard Book*. By issuing the guidelines, the CJEU could establish more legal certainty as to the practical steps SEP-holders must take before seeking a lawful injunction. Although the developed criteria undoubtedly bring more clarity into the negotiation process of FRAND terms, they do nevertheless not provide the hoped-for clarity, still leaving a lot of room for interpretation. For instance, the CJEU did not further substantiate what is meant by 'recognised commercial practices', 'delaying tactics', 'reasonable FRAND royalties' or

[18] Damien Geradin, 'Ten Years of DG Competition Effort to Provide Guidance on the Application of Competition Rules to the Licensing of Standard-Essential Patents: Where Do We Stand?' [2013], <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2204359> accessed 27th September 2019.

'non-FRAND counter-offer', thus leaving the specification of these crucial terms in the hands of national courts. Moreover, the Court did not satisfactorily specify what happens if the parties involved cannot find a consensus regarding the FRAND-terms and do not agree to have the terms determined by an independent third party. Finally, the ruling does also not include the crucial question of portfolio licensing and cross-licensing, both commonly occurring situations in practice.[19] Although the CJEU has created more legal certainty as to the negotiation process of FRAND terms, it still leaves many questions open, which will have to be addressed by national courts.

In regard to the meaning of 'reasonable royalties', it would have been desirable for the CJEU to specify the threshold for exploitive conduct, in particular in light of the fact that there is very limited judicial guidance on IP-related exploitive behaviour.[20] Instead, the CJEU completely ignored exploitive licensing theories and did not even refer to the landmark case *United Brands*, where the CJEU held that a price may be excessive if "*it has no reasonable relationship to the economic value of the product supplied*."[21] The only competitive harm the CJEU actually touched upon in *Huawei* was the potential to exclude rivals from a downstream product market, which, however, does not contribute to the determination of 'fair' royalties and therefore does not provide more certainty in this regard.

It seems that the national courts will have to continue to rely on the Horizontal Co-operation Guidelines, which very succinctly state that "*...royalty fees can only be qualified as excessive if the conditions for an abuse of a dominant*

[19] Ioannis Lianos, Competition Law and Intellectual Property Rights: Promoting Innovation, (Hart Publishing, 2017), 145.
[20] ibid.
[21] *United Brands v. Commission* [1978] Case 27/76, ECLI:EU:C:1978:22, para 250.

position as set out in Article 102 of the Treaty and the case-law of the Court of Justice of the European Union are fulfilled.''[22] Whether this rather vague guidance is actually helpful is, however, doubtful, considering that in order to impose antitrust liability on the patentee, courts would probably first have to establish that the licensor in question has a duty to license at any price in the first place. Given that such a duty significantly interferes with the freedom of contract and the basic property rights, which represent fundamental rights of the free market economy,[23] it may be challenging for courts to prove that the required high thresholds are met. Even if the court would affirm such a duty, it would still have to analyse whether the price in question is actually excessive by relying on the vague and complex concept developed in *United Brands*. Thereby, courts may find it hard to define a 'fair' price for an IPR which allows the IP-owner to recoup the money invested into developing the product and at the same time is still not excessive. Thus, overall it seems that the current practice regarding excessive royalties is unsatisfactory, hazy, time-consuming and requires a sophisticated analysis of price and costs. In this sense, it would have been desirable if the CJEU had seized the opportunity in *Huawei* to address exploitive behaviour in IP-related cases.

However, the CJEU seems to provide some clarity as to the imposition of antitrust liability. In fact, it appears that liability can only arise if the SEP in question is valid, essential, infringed and ultimately indispensable to all competitors. In contrast to previous refusal to license cases, where a breach of Article 102 required exceptional circumstances,[24] in *Huawei* the CJEU distinguished this case, noting that (i) SEPs have an indispensable nature, which creates a situation of dependency to all manufacturers of standard-

[22] European Commission 'Communication from the Commission – Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements' (Communication) COM (2011) OJ C 11/1, para 269.
[23] See *RTE und ITP v. Commission*, n. 3, para 54.
[24] ibid, para. 50.

compliant products and (ii) in contrast to "ordinary" licensors, SEP-holders create legitimate expectations for implementers by taking a commitment to the Standard Setting Organisation (SSO) to grant licences on FRAND terms.[25] Following these observations, some commentators have raised the question of whether the unique role of SEPs in relation to injunctions may lead to the conclusion that SEP-holders' contractual commitment to license on FRAND terms could be seen as an equivalent to a general waiver of the right to obtain an injunction.[26]

Considering the General Court's previous position in *ITT Promedia*[27] and *Protégé International*,[28] where it held that "*it is only in wholly exceptional circumstances that the fact that legal proceedings are brought is capable of constituting an abuse of a dominant position within the meaning of Article 86 of the Treaty"*[29], it seems rather doubtful that the CJEU would go as far as viewing a FRAND commitment as a general waiver. However, given that the CJEU is not bound by the rulings of the General Court, this largely depends on whether the CJEU considers SEP-related cases as a new type of abuse, to which the 'ordinary' refusal to license practice does not apply. This is an open question which cannot be answered conclusively as the CJEU did not reconcile the General Court's previous position in *Huawei*. In this sense, it would have been desirable from a legal certainty perspective if the CJEU had determined whether the widely-recognised standard for abusive litigation is still valid or not and whether SEP-related cases should be treated as an own form of abuse when it comes to injunction applications.

[25] Lianos, n. 19, 139-140.
[26] ibid, 140.
[27] *ITT Promedia NV v. Commission* [1998] Case T-111/96, ECLI:EU:T:1998:183.
[28] *Protégé International Ltd v. Commission* [2012] Case T-119/09, ECLI:EU:T:2012:421.
[29] *ITT Promedia NV v. Commission*, n. 27, para. 60.

It seems that the *Huawei* ruling has reduced the scope of possible lawful applications for injunctions in SEP-related cases. SEP-holders may still legitimately apply for an injunction in case the potential licensee refuses to negotiate on FRAND terms or does not provide enough financial security for the payment of royalties in a timely manner as was the case in the German judgement *Sisvel v. Haier*,[30] however, the chances that potential licensees will actually refuse to negotiate on FRAND terms, especially after the *Huawei* ruling, are rather small. To what extent *Huawei* will actually narrow the scope largely depends on how wide national court will interpret the vague terms 'recognised commercial practices', 'delaying tactics' or 'reasonable FRAND royalties.' Especially in regard to the latter, it is, however, likely that courts will choose a reluctant approach as, unlike sectoral regulators, they often do not have the necessary resources and expertise to conduct an in-depth analysis of price and costs.

It is worth mentioning that instead of issuing guidelines on how SEP-holders and potential licensees must proceed when negotiating on FRAND terms, the CJEU could have adopted a completely new, less formalistic but more effects-based approach by applying another test of liability, suggested by some commentators in literature.[31] Accordingly, courts would have had to assess whether the application of an injunction by the dominant SEP-holder would alter the balance of bargaining market power through injunctive relief after having tried to charge a price which is "*above what it would have been able*

[30] *Sisvel v. Haier*, Düsseldorf Regional Court, Joint cases 4a O 93/14 and 4a O 144/14, summary available at: <https://caselaw.4ipcouncil.com/german-court-decisions/olg-dusseldorf/sisvel-v-haier-olg-dusseldorf-1>, accessed 27th September 2019.

[31] Mario Marinniello, 'European Antitrust Control and Standard Setting', [2013] Bruegel Working Paper, 2013/01, 16, <http://aei.pitt.edu/40190/1/European_antitrust_control_and_standard_setting_(English)[1].pdf>, accessed 27th September 2019.

to charge if the adoption of the standard would not have altered the balance of bargaining powers"[32].

This would have been a welcomed approach as it would have forced courts to assess the increase in market power as a result from a potential injunctive relief, thus encouraging them to establish "*the correct competitive counterfactual*" while making the examination of FRAND-commitments in this context obsolete.[33] Given that the determination of 'fair royalties' entails an extremely complex assessment, for which competition authorities generally lack appropriate tools, the introduction of this more effects-based approach would have taken the burden off national authorities to determine what is to be understood by reasonable royalties.[34]

Moreover, considering that competition authorities have instruments which are well in place to identify an increase in market power and the associated assessment of competitive aspects, an effects-based approach would have made national courts' assessment in SEP-related injunction cases considerably easier, providing them with more certainty as opposed to leaving them with vague terms. Thus, it appears that the CJEU has not seized the opportunity to introduce a completely new approach to assess the right to lawfully seeking injunction in FRAND-encumbered SEPs cases, but rather issued helpful but incomplete guidelines by relying on previous case-law.

3. SEPs in the Context of Innovation

By issuing the guidelines and, thus tendentially increasing the threshold for dominant licensors to successfully seek an injunction, it is observable that the

[32] ibid.
[33] ibid.
[34] ibid, 4.

CJEU gradually shifted the intersection between FRAND-encumbered SEPs and competition law towards the latter. One might think that the extended application of competition law to such cases may generally harm innovation as, by narrowing the scope for dominant SEP-holders to legitimately request an injunction, it minimises the SEP-holders' advantages resulting from their IPR, thus making it more difficult to maintain effective patent protection. However, this is not necessarily true. In fact, it could be objected that especially in the high-tech sector, where the creation of compatibility and interoperability is of major importance, (fair) competition between different market players is an indispensable requirement to promote innovation.[35]

After all, users of a standard often make high investments in subsequent innovation, trusting the validity of the standards and relying on the willingness of the SEP-holders to license on FRAND terms. In turn, this results in considerable dependency of potential licensees on licensors, which can be easily exploited by SEP-holders by abusing their position at the expense of users of the standard. In this regard, competition law plays indeed a significant role as it sets necessary boundaries to exploitive behaviour. It ensures that market participants do not estimate the risks of being exploited higher than the benefits of investing, thus contributing to innovation by preventing opportunistic behaviour on the part of SEP-holders.[36]

Competition law is therefore indispensable for a well-functioning licensing regime. However, the *Huawei* ruling has shown how important it is to strike the right balance between IPR protection and competition law, which both aim to promote innovation but whose objective can only be achieved if either

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[35] Andreas Heinemann, 'Immaterialgüterrecht und Wettbewerbsrecht: Divergenz oder Kongruenz?', [2014] 3 Medien und Recht, 4, <https://www.zora.uzh.ch/id/eprint/103474/1/Heinemann_MR-Int_3_2014.pdf> accessed 27th September 2019, 8.
[36] ibid.

of them is neither over-enforced nor under-enforced. After all, if SEP-holders had no chances at all to successfully apply for an injunction without abusing Article 102, they may lose the incentive to invest into developing products as they could not protect themselves from being exploited on the part of licensees. On the other hand, if potential licensees could not claim that an injunction is abusive, they would be exploited and consequently would stop to invest into subsequent innovations. By issuing the guidelines in *Huawei,* it is observable that the CJEU has tried to find the middle of these two extremes, still enabling licensors to apply for an injunction without violating Article 102 contingent upon strict conditions in order to protect potential licensees from exploitation.

5. Conclusion

To conclude, it should be highlighted that overall *Huawei v. ZTE* has brought some legal certainty as to how SEP-holders should proceed when negotiating on FRAND terms in order to seek an injunction without abusing their dominant position according to Article 102. Nevertheless, the judgement is less comprehensive than hoped for, still leaving a lot of room for interpretation, thus giving rise to legal uncertainty. Therefore, it remains to be seen how the GFCJ will apply the developed criteria.

LUNDBECK AND SERVIER: THE ANTI-COMPETITIVE FINDINGS ARE HARMFUL TO CONSUMER WELFARE

Jason Cheung*

Pay-for-delay agreements were identified as being anti-competitive by object in the cases of Lundbeck and Servier. While these agreements might bring anti-competitive effects, the question is whether it is right to consider them as anti-competitive by object. This essay will challenge the decisions of the Commission and the General Court in those two cases and argue that finding these agreements anti-competitive by object may lead to even more anti-competitive effects as the Commission and the Court failed to consider the proper counter factual, and that these agreements in themselves should not be considered as anti-competitive by object but should be examined under the by effect methodology.

***Keywords**: pay for delay, Lundbeck, Servier.*

1. Introduction

Pay-for-delay agreements in the pharmaceutical sector are those agreements which "*lead to a delay of generic entry in return for a value transfer (e.g. a payment) by the originator company to the generic company*"[1]. The cases of

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[1] Competition DG, '8th Report on the Monitoring of Patent Settlements' (*European Commission*, 9th March 2018) <http://ec.europa.eu/competition/sectors/pharmaceuticals/inquiry/patent_settlements_report8_en.pdf> accessed 19th February 2019, 2.

Lundbeck[2] and *Servier*[3] were the first two opportunities for the General Court ('GC') to consider the impact of such agreements on competition. In both cases, the GC agreed with, at least in most parts, the Commission Decisions[4] that such agreements should be considered as anti-competitive by object and, therefore, rejected the appeals from the pharmaceuticals. There have been significant criticisms directed towards the Commission Decisions and the GC judgements, especially on the points of whether the Commission was right to consider such agreements as anti-competitive 'by object', whether the generics were correctly considered as potential competition and whether the Court should have placed such heavy reliance onto the 'disproportionate' payments to demonstrate that the payments were made for the exclusion of the generics from the market.[5]

This essay seeks to focus on the point made by the Commission, and agreed with the GC, that pay-for-delay agreements have no real benefits for consumer welfare and are not essential to provide incentives for originators to innovate. This essay seeks to argue that the Commission and the GC have failed to consider the proper counter-factual situation in arriving at this conclusion and have, therefore, arrived at a questionable conclusion. The counter-factual situation in *Lundbeck* and *Servier* would be if the originators and the generics did not have the option of settling through a pay-for-delay

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[2] Case T-472/13 *H. Lundbeck A/S and Lundbeck Ltd v European Commission* [2016] ECLI:EU:T:2016:449.
[3] Case T–691/14 *Servier SAS and Others v European Commission* ECLI:EU:T:2018:922.
[4] *Lundbeck* (Case AT.39226) [2013] OJ C 80/13, and; *Perindopril (Servier)* (Case AT.39612) [2014] C 393.
[5] Norton Rose Fulbright, 'Will the GC's *Lundbeck* decision be overturned on appeal?' (*Norton Rose Fulbright*, November 2016) <https://www.nortonrosefulbright.com/en/knowledge/publications/19bd2358/will-the-gcs-emlundbeckem-decision-be-overturned-on-appeal> accessed 21st February 2019; Pablo Ibanez Colomo, 'GC Judgment in Case T-472/13, Lundbeck v Commission: on patents and Schrödinger's cat' (*Chillin' Competition*, 13th September 2016) <https://chillingcompetition.com/2016/09/13/gc-judgment-in-case-t-47213-lundbeck-v-commission-on-patents-and-schrodingers-cat/> accessed 19th February 2019.

agreement but through either a lawsuit to the bitter end or a settlement through other means. If these two other options would provide fewer benefits or more harm to consumer welfare and would provide fewer incentives for originators to innovate, then one could logically conclude that pay-for-delay agreements do generate more benefits to consumer welfare and provide more incentives for originators to innovate, contrary to the beliefs of the GC and the Commission.

This essay will commence with a discussion on the *FAPL v Murphy*[6] case and its aftermath to demonstrate that, in failing to consider the proper counter-factual situation, findings of breach of competition law may not always lead to prevention of anti-competitive conduct and promotion of competition. The essay will seek to argue that, in the *FAPL* case, a finding of anti-competitive effects was not only unable to stop anti-competitive conducts from arising in the market, it actually led to more consumer harm. The essay will then move to the *Lundbeck* and *Servier* cases and consider whether the Commission Decisions and the GC judgements would have the same effect of creating more consumer harm.

2. Football Association Premier League Ltd and Others v Murphy and its aftermath

In the case of *FAPL v Murphy*, the Court of Justice of the European Union ('CJEU') found that the agreements concerned constituted a breach of Article 101, Treaty on the Functioning of the European Union ('TFEU'). That was so because the agreements included clauses involving (a) segregating the internal market into exclusive territories for different broadcasters, and, (b)

[6] Cases C-403/08 and C-429/08 *Football Association Premier League Ltd and others v Karen Murphy and others* [2011] ECR I-09083.

imposing active and passive sales bans to maintain those exclusive territories for the broadcasters. This finding forced the FAPL and the broadcasters to renegotiate the terms of licensing broadcasting rights and abandon the clauses imposing the active and passive sales bans on the broadcasters prohibiting them from providing their goods outside the assigned territories. Therefore, the finding of breach of Article 101, TFEU had successfully stopped the conduct in question and will likely have a strong impact on the prevention of active and passive sales bans.

The issue with the Commission decision and the judgement was that they did not consider the proper counter-factual situation. The Commission and the CJEU simply considered the counter-factual situation as one where the FAPL would act with the main purpose of complying with competition policy instead of seeking to profit from its business. The proper counter-factual situation should simply have been 'if FAPL was not allowed to conclude its agreements with broadcasters with the above-mentioned clauses included'. As mentioned above, one of the results of the case was that the clauses had been deemed as illegal under competition law and, therefore, had to be removed. Therefore, the outcome of the case was effectively the realisation of the proper counter-factual situation.

The decision and the judgement in *FAPL* led the FAPL and the broadcasters having to re-negotiate for new broadcasting agreements. The outcomes of the re-negotiations were that the broadcasters from outside the UK and Ireland can only broadcast in the local language and can only broadcast one game per Saturday afternoon.[7] These new agreements demonstrate that the finding of

[7] Ben Van Rompuy, 'Premier League fans in Europe worse off after Murphy judgment' (*Kluwer Competition Law Blog*, 6th May 2014) <http://competitionlawblog.kluwercompetitionlaw.com/2014/05/06/premier-league-fans-in-europe-worse-off-after-murphy-judgment/> accessed 21st February 2019.

breach of Article 101, TFEU has failed in ensuring that parties in the market act in a competitive manner. The agreements may actually have led to further restriction of competition and harm to consumer welfare. Firstly, the end consumers in any Member States ('MSs') outside of the UK and Ireland would no longer have the option to watch the games in languages other than the official language of such a Member State. Moreover, they could only watch one game per Saturday, which significantly harms consumer welfare considering that the absolute majority of the Premier League games are played on Saturdays suggesting that it is quite likely that the end consumers will not be able to watch their preferred games.

Secondly, there is the imposition of the UK 3 pm blackout rule across the whole of the EU. It was previously held that blackout agreements did not breach Article 101(1), TFEU as the Commission deemed that a 2.5-hour blackout has no appreciable effect on competition.[8] However, the blackout rule can no longer be considered as not having any appreciable effect on competition or being proportionate in regard to the objective of getting the local public to attend the stadium as the blackout rule is, *de-facto*, applicable EU wide and not just in the UK.[9] Therefore, the *FAPL* judgement has indirectly given rise to more anti-competitive results as the anti-competitive effects of the now *de-facto* EU wide blackout outweigh its pro-competitive effects.

Thirdly, the judgement and the decision failed to resolve the issue of price discrimination. Prior to the re-negotiations, the fact that different prices were charged for the provision of the same broadcasts in different MSs meant that the ultimate consumers would be paying different prices depending on where

[8] *UEFA's broadcasting regulations* (Case COMP/37.576) Commission Decision 2001/478/EC (2001) OJ L 171/12.
[9] Van Rompuy (n 7).

they were accessing the feed from. Hence, although this may constitute a breach of contract both on the part of the broadcasters in regard to their contract with FAPL as well as on the part of the consumers in their contract with the broadcasters, pubs like Murphy's sought to purchase their feed from outside the UK to take advantage of the lower price offered in those MSs. After the re-negotiations, the consumers in the UK (and those MSs where the broadcasters have to pay a higher price for the right to broadcast the games) are now forced to pay a higher price in order to watch the games in their preferred language. Therefore, it could be said that, although the ban of passive sales and even active sales have been prohibited, the finding of restriction of competition in the case resulted in harming consumer welfare in the long run.

The issue of territory exclusion has not been resolved either. Although FAPL no longer requires broadcasters to sell their feeds within assigned territories, the language requirement would create very similar results in reality. This is likely to create more harm to consumer welfare as consumers may prefer to watch in another language. However, this option is no longer possible through means other than obtaining the games from another MSs which potentially requires a higher price to be paid and, in any case, would require the consumers having to go through more procedures. Hence, it must be acknowledged that the finding of breach of Article 101, TFEU may result in the promotion of anti-competitive practices and harm to consumer welfare in certain scenarios.

3. Lundbeck and Servier

The judgments from *Lundbeck* and *Servier* may have similar effects in terms of further restricting competition in the relevant markets. *Lundbeck*

demonstrated that settlement agreements in intellectual property rights (IP) disputes will be deemed as anti-competitive by object if the settlement involves the IP holder making a transfer of value to the other party(ies) to the agreement in exchange for the other party delaying its entry into the market. *Servier*, the latter case, proceeded to clarify that the GC did not seek to outlaw settlement agreements and only those settlement agreements that restrict competition are prohibited. It was also stated in *Servier* that agreements will be deemed as restricting competition by object if the transfer of value is to act as an inducement for the other party to not enter the market. In essence, *Lundbeck* and *Servier* have outlawed pay-for-delay agreements. It should be noted that, in both cases, the GC failed to consider the counter-factual situation because such was not required as pay-for-delay agreements have been branded as being restrictive of competition by object.

4. Pro-competitive Effects from Lundbeck and Servier

The essay will now seek to examine how the decisions in *Lundbeck* and *Servier* may affect the competitiveness of the pharmaceutical markets. Since *Lundbeck* and *Servier* outlawed pay-for-delay agreements, the only remaining type of settlement agreements in IP disputes is the type involving the IP holder granting a license to the other party in exchange for a transfer of value. The question, however, is whether the promotion of settling cases through the granting of licenses, or litigation to the very end, would actually promote competitiveness in the pharmaceutical markets.

The argument that settlement agreements involving the granting of licences could lead to the promotion of competition is based on the assumption that generic companies would enter the market and compete against the originators, which in turn leads to lower prices, therefore, benefitting

consumers and promoting competition. However, such an assumption may be erroneous if one considers the proper counter-factual scenario. The IP holder may not be willing to grant that license and is likely to be entitled to do so as case law demonstrates that refusal to supply will only be considered as an abuse if it prevents the emergence of a new or better product.[10] This is unlikely to be the case here given that generics are, by definition, seeking to avoid investing in innovation and to profit from exploiting existing technology.

Outlawing pay-for-delay agreements in IP disputes would necessarily lead to "litigation to the death"[11] being the only realistic outcome in IP disputes when the IP holder is not willing to grant a license. This necessarily means one party will lose all the investments that it has made, as well as having to cover the legal costs for both parties. It would disincentivise both the originators and the generics to invest. The originators would be disincentivised to invest in innovation since losing the case would lead to originators having to suffer all the costs as non-recoverable losses; the generics would also be disincentivised because they would lose out on their investments in attempting to enter the market if they lose the case. The lack of incentives to innovate will ultimately lead to more consumer harm. Therefore, it may be the situation that there is no pro-competitive effect in the *Lundbeck* and *Servier* decisions aside from outlawing two agreements which have been decided to be anti-competitive. Had the proper counterfactual situation been considered, the courts must be able to appreciate that pay-for-delay agreements could potentially produce pro-competitive effects and, hence, should take the 'by-effects' approach.

[10] Case C-7/97 *Oscar Bronner v Mediaprint and others* [1998] ECR I-07791 and Case T-201/04 *Microsoft v Commission* [2004] ECR II-03601.
[11] Sir Robin Jacob, 'Competition Authorities Support Grasshoppers: Competition Law as a Threat to Innovation' [2013] 9 Competition Policy International Journal 15, 19.

5. Anti-competitive effects from Lundbeck and Servier

The starting point for finding if there are any anti-competitive effects flowing from the two decisions must be to acknowledge the commercial realities of the pharmaceutical markets. There are two main types of firms in the markets, the originator firms, which actively seek to invent and develop new drugs for the market, and the generic firms, which specialise in manufacturing existing generic drugs that are no longer protected by patents. Originator firms have to incur significant sunk costs from research and development ('R&D'), testing and trails.

Moreover, they will incur fuller costs in relation to marketing at the initial stages when the drugs have just been made available on the market if the technical stages were successful in order to invent and develop new drugs. Furthermore, roughly only about 0.1% of the drugs invented will be approved by the relevant authorities (US statistics)[12]. This process of innovation, from invention to approval by relevant authorities, takes about 10-15 years on average in the UK and the US[13], which means that originator pharmaceuticals will have to incur huge costs and only recover and profit from the investments made years later. Hence, there exist huge disincentives for these originator

[12] MedicineNet, 'Drug Approvals – From Invention to Market… A 12-Year Trip' (*MedicineNet*, 14th July 1999) <https://www.medicinenet.com/script/main/art.asp?articlekey=9877> accessed 21st February 2019.

[13] Cancer Research UK, 'How long a new drug takes to go through clinical trials' (*Cancer Research UK*, 22th February 2019) <https://www.cancerresearchuk.org/find-a-clinical-trial/how-clinical-trials-are-planned-and-organised/how-long-it-takes-for-a-new-drug-to-go-through-clinical-trials> accessed 21st February 2019; U.S. Department of Veteran Affairs, 'How long does the FDA take to approve a drug?' (*U.S. Department of Veteran Affairs*) <https://www.hiv.va.gov/patient/clinical-trials/drug-approval-process.asp> accessed 21st February 2019; Drugs.com, 'New Drug Approval Process' (Drugs.com) <https://www.drugs.com/fda-approval-process.html> accessed 21st February 2019, and; MedicineNet (n 13).

firms to not innovate, or at least reduce the amount of resources they spend on innovation.

Patents are designed to counter-act these disincentives for innovation through granting a monopolistic position to their holder.[14] Granting the monopolistic position would give some assurance to the patent holder of having a chance to recover the costs incurred during R&D as well as obtaining profits if the drugs invested in are successful, thus incentivising originator firms to innovate drugs.[15] However, patents remain in force for only 20 years.[16] Taking into account that originators spend 10-15 years on average to get the drugs into the market and the fact that only 0.1% of the drugs do make it to the market, the originator pharmaceuticals would have only 5-10 years in their monopolist position, unless they are able to extend their monopolist position through extension of the patent, to recover the investments made in the drugs in question. This would suggest that originator pharmaceuticals have only two alternative approaches they can take: they can either (a) charge excessively for the drug in the 5-10 years that they do enjoy a monopoly in that drug market, or (b) refrain from investing for innovation purposes in the first place.

The originators may excessively charge during the period they enjoy a monopoly in the drug market to ensure they can recoup all the investments made for the drug in question and other failed investments. Excessive pricing has been recognised as a form of anti-competitive conduct in cases such as *United Brands*[17] and *Pfizer and Flynn*[18]. In the *Pfizer and Flynn* case, the Competition and Markets Authority ('CMA') found that excessive pricing

[14] Tanya Aplin and Jennifer Davis, *Intellectual Property Law Text, Cases, and Materials* (3rd edn, OUP 2017) 1.
[15] William E. Landes and Richard A. Posner, *The Economic Structure of Intellectual Property Law* (Harvard University Press 2003) 13-14.
[16] Patents Act 1977, s 25(1).
[17] Case 27/76 *United Brands v European Commission* [1978] ECR 207.
[18] *Flynn Pharma Ltd and Pfizer Ltd v Competition and Markets Authority* [2018] CAT 11.

constituted a breach of Article 102, TFEU but this finding was quashed by the Competition Appeal Tribunal as it was held that the CMA failed to demonstrate that the pricing was excessive. This shows how heavy the burden is on the part of the Commission and the competition authorities considering that it was held that a price increase by 780-2,600% may potentially not be excessive. Following this decision, it can be said that it is improbable that the Commission or national competition authorities will be able to demonstrate that the pricing of a good that did not previously exist is excessive. Hence, excessive pricing is a viable approach for the originators if they wish to remain in the market for manufacturing innovative products. However, this would result in consumer harm as well as anti-competitive effects due to the high levels of prices imposed.

This approach is, however, only viable where the market allows for the pharmaceuticals to impose high prices. In markets where there are numerous potential substitutes, originators may not be able to impose these high prices even if the new drugs are more efficient and better than existing ones due to the existence of the substitutes. Hence, pharmaceuticals will refrain from investing in areas where the markets are already filled with existing options.

This leads to the other alternative of the originators, simply limiting investments in innovation. Jacob argues that the fact that competition authorities are pursuing a case against *Lundbeck* is anti-innovation to begin with.[19] Indeed, one potential result of finding pay-for-delay agreements to be anti-competitive would be that originators may not deem the investments and risks incurred from the innovation process to be worth it. These originators would be driven into the competitive market of manufacturing generic drugs to avoid the high costs of the innovative process. However, this would also

[19] Jacob (n 11) 15.

mean medicinal and technological progress will be heavily reliant on investments through public funding. The lack of private investments is likely to lead to stagnation in medicinal and technological progress which suggests the lack of dynamic competition, meaning the judgement may indirectly lead to anti-competitive conduct.

6. Conclusion

This essay has sought to argue that the Commission and the GC might have arrived at the conclusion that pay-for-delay agreements should be considered as having no real benefits for consumer welfare and are not essential to provide incentives for originators to innovate. The counter-factual scenario demonstrates that the prohibition of pay-for-delay agreements would mean the only alternatives in IP disputes are 'litigation to the death' or settlement through the holder of the IP granting a licence to the challenger of the IP. It has been demonstrated that, in either scenario, it is possible, if not likely, that there would be more harm to consumer welfare and disincentives to innovate. Therefore, logic dictates that pay-for-delay agreements may, in certain scenarios, have real benefits for consumer welfare and may be essential to provide incentives for innovation.

Hence, the Commission and the GC were wrong to have taken the 'restrictive of competition by object' shortcut as it has been established that the pro-competitive effects of pay-for-delay agreements may outweigh the anti-competitive effects of the same. The proper approach should have been to take into consideration the counter-factual situation in assessing whether pay-for-delay agreements are indeed predominantly anti-competitive. The GC judgements in *Lundbeck* and *Servier* may, therefore, have led to more anti-

competitive effects in the market and brought in more disincentive for generics and originators to innovate and more harm to consumer welfare.

REFUSAL TO LICENSE:
A FINE BALANCE BETWEEN ANTITRUST AND IPR LAWS

Shweta Murarka & Shaurya Aron*

Modern understanding of the interaction between the two disciplines of antitrust and intellectual property rights (**IPRs**) *is that intellectual property and antitrust laws should together aim and work to bring new and better technologies, products, and services to consumers at lower prices. IPRs could however attract antitrust scrutiny where such rights do create market power and the possibility of exploitation of such market power through exclusionary behaviour by the innovator, facilitated by the acquisition of such rights. This article specifically analyses and carries out the economic assessment of the conduct of unilateral refusal to license cases in the United States of America. The article further puts forth principles which the authorities can use to regulate overlapping conducts within the antitrust and IPR regimes.*

Keywords*: refusal to license, IPR, competition law.*

1. Introduction

One can observe simultaneous involvement of IPRs and antitrust principles at different levels of applicability of both the regimes. The foremost is the abuse of dominance based on the acquisition of intellectual property rights (IPRs) and licensing issues related to it. As recognized by antitrust enforcement agencies elsewhere, the abuse of dominance, which includes unilateral refusal to license, based on IPRs should be treated using the same antitrust principles as used to treat abuse of dominance based on any other non-intellectual property rights. For example, under the US antitrust enforcement, cases involving unilateral abuse of intellectual property law

often arise under Section 2 of the Sherman Act, 1890 the same legal rules governing abuse based on any other tangible property or otherwise.[1] Similarly, under EU competition law, Article 102 of the Treaty on the Functioning of the European Union (**TFEU**) is used to deal with the abuse of dominance cases based on IPRs. The primary focus of this analysis is pertaining to unilateral refusal to license intellectual property, aimed at monopolization or sustenance of market power by constriction of competition.

Modern understanding of the interaction between the two disciplines of antitrust and IPRs is that intellectual property and antitrust laws should together aim and work to bring new and better technologies, products, and services to consumers at lower prices.[2] Intellectual property laws create exclusive rights to promote innovation by allowing intellectual property owners to prevent others from appropriating much of the value derived from their inventions or original expressions.[3] These rights also can facilitate the commercialization of these inventions or expressions and encourage public disclosure, thereby enabling others to learn from the protected property.[4]

Antitrust laws foster competition by prohibiting anti-competitive mergers, collusion, and exclusionary practices aimed at extension of market/monopoly

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[1] Debra A. Valentine, 'Abuse of Dominance in relation to intellectual property: U.S. perspectives and the Intel cases FTC, 1999' <https://www.ftc.gov/public-statements/1999/11/abuse-dominance-relation-intellectual-property-us-perspectives-and-intel> accessed 07 October 2019.

[2] OECD, 'Licensing of IP rights and competition law – Note by the United States' DAF/COMP/WD (2019)58, <http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WD(2019)58&docLanguage=En> accessed 29 September 2019.

[3] U.S. Dep't of Justice & Fed. Trade Commission, 'Antitrust Enforcement and IPRs: Promoting Innovation and Competition' (2007), <http://www.usdoj.gov/atr/public/hearings/ip/222655.pdf.> accessed 01 October 2019.

[4] ibid.

power. In a dynamic market, it ensures that innovative technologies, products and processes are traded and licensed in a competitive environment. Moreover, antitrust laws do not constitute a violation if the monopoly/market power is lawfully gained on grounds of innovative activities aimed at bringing new and better products and processes into the market.[5] The presence of other substitutable technologies or products for the protected technologies, or products, in a dynamically evolving market place, ensures that mere presence of intellectual property should not be taken to presume existence or exploitation of market power under modern antitrust rules.[6] Antitrust and intellectual property laws should thus be perceived as complementary bodies of law that should work together to bring improved products and processes to consumers at best prices.

IPRs could however attract antitrust scrutiny where such rights do create market power and the possibility of exploitation of such market power through exclusionary behaviour by the innovator, facilitated by the acquisition of such rights. Examples include cases where a patented technology constitutes a basis of standard of manufacture for the entire industry or constitutes the only available cure for a particular disease, or refusal to license a patented technology in the absence of good substitutes for the same. Striking a balance between maintaining competition aimed at promoting efficiency by restricting illegal collusive behaviour and exclusionary conduct involving IPRs, and sustaining the incentives to innovate, lies at the heart of antitrust regime concerning IPRs. Failure to address any of these could lead to deterioration of consumer welfare and dynamic efficiency in the economies where innovation is the main propeller of growth.

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[5] Richard A. Posner, 'Antitrust in the New Economy' (2001) 68 ANTITRUST L.J. 925, 930-31.
[6] *Ill. Tool Works Inc. v. Indep. Ink, Inc.* (ITW), 547 U.S. 28 (2006).

2. Refusal to License

Licensing constitutes vertical agreements between the owner of intellectual property, licensor, and the licensee, where the licensor sells the right to use the intellectual property or the innovation protected by the IPR to the licensee. Such licensing contracts are limited to the use of intellectual property by the licensee and do not allow its resale to another party by the licensee.[7] Through licensing, there is a transfer of knowledge that affects the licensor's as well as licensee's ability and incentives to invest in innovation. Also, licensing promotes productive efficiency by granting rights to firms who could produce and sell the product at the lowest costs and with the highest selling expertise using the innovation.[8] It also enables diffusion of knowledge by enabling innovators to gain huge profits in the form of royalties obtained from licensing, without having to undertake production themselves. Thus, both the European Union (**EU**)[9] and US[10] antitrust regimes consider licensing to have pro-competitive effects, 'compulsory licensing' being an important remedy in case of mergers and other exclusionary conducts involving IP rights.

The starting point for making sense of the unilateral refusal to license cases is the fundamental principle that an intellectual property owner is not obliged to license the use of its hard earned property to anyone.[11] There is no general

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[7] Andrea Tosato, 'Intellectual Property License Contracts: Reflections on a Prospective UNCITRAL Project (September 15, 2017)' (2018) University of Cincinnati Law Review, Vol. 4, No. 86.

[8] Mark Blaug, 'Is Competition Such a Good Thing? Static Efficiency versus Dynamic Efficiency' (2001) Review of Industrial Organization, Vol. 19, No. 1, pp. 37-48.

[9] Pedro Caro de Sousa, *Directorate for Financial and Enterprise Affairs Competition Committee* (DAF/COMP (2019) 3) (29 April 2019).

[10] Max Planck Institute for Intellectual Property and Competition Law, 'Copyright, Competition and Development' (WIPO, December 2013), <https://www.wipo.int/export/sites/www/ip-competition/en/studies/copyright_competition_development.pdf> accessed 29 September 2019.

[11] Geetanjali Mehlwal, 'Intellectual Property Licensing: Discovering its Facets' (2005) 10 Journal of IPRs 214, 220.

duty to deal issue in case of IPRs.[12] The dispute that arise within the ambit of unilateral refusal to license therefore concern specific exceptional circumstances to this general rule. These circumstances mainly relate to the cases where intellectual property owner has sought to expand the scope of its right beyond what the IP laws grant it such as where it helps a party to acquire or maintain monopoly power.[13] Similarly, there could be cases where IPRs are themselves considered *essential facility* that must be licensed on reasonable or non-discriminatory terms. In some cases, compulsory licensing is adopted as a remedy for a refusal to deal based on *essential facility doctrine* (EFD*)*.[14]

Most of the recent case laws on intellectual property under antitrust scrutiny relate to copyright protection in case of computer software. Examples include cases where the application developers seek access to proprietary interface codes to develop complementary applications for the proprietary software. Thus, the EFD has an important role to play in mandating access, requiring compulsory licensing and permitting copying of codes without infringement, in cases that lie at the intersection of intellectual property and antitrust laws.

The issue of whether IPRs should constitute an essential facility remains unsettled insofar as it is in direct conflict with the essence of an intellectual property right that grants exclusivity to the owner and puts no obligation to

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[12] Herbert Hovenkamp, et.al., 'Unilateral Refusals to License in the U.S.' (2005). Stanford Law and Economics Olin Working Paper No. 303. <https://ssrn.com/abstract=703161 or http://dx.doi.org/10.2139/ssrn.703161.> accessed 01 October 2019.

[13] Rahul Goel, 'Crossroads of Regimes-competition Law and IPRs' (*Manupatra*) <http://www.manupatrafast.com/articles/PopOpenArticle.aspx?ID=1aaf8a76-9fa7-4954-abb4-874671fd8c78&txtsearch=Subject:%20Competition%20/%20Antitrust> accessed 3 October 2019.

[14] Sergio Baches Opi, 'The Application of the Essential Facilities Doctrine to Intellectual Property Licensing in the European Union and the United States: Are IPRs till Sacrosanct' (2001) 11 Fordham Intell. Prop. Media & Ent. L.J. 409.

deal for the whole course of the IP right. Moreover, it could also adversely impact the incentives for innovation. Dealing with such cases would involve courts and enforcement agencies to determine a reasonable price for the license and fair conditions for access by others, and to supervise this access on an ongoing basis which is a formidable task. Thus, it is better to avoid such a claim except for unusual circumstances.

In *Integraph Corp. v. Intel Corp*[15], Integraph Corp. ("**Integraph**"), which makes computer workstations for computer aided designs which are based and thus rely heavily on Intel microprocessors sued Intel after Intel refused to supply its microprocessors and proprietary information to Integraph. Among Integraph's other claims including infringement of its patents by Intel and its customers, was an essential facility argument. Integraph argued that access to Intel's chips and technical know-how was vital for its business, and that Intel should be compelled to license its proprietary technology and information to Integraph on reasonable and non-discriminatory terms.

While the district court acknowledged the fact that Intel's IPRs related to its chip architecture was an essential facility, Federal Trade Commission ("**FTC**")) reversed this position and concluded an essential facilities claim could not be made out unless the owner of the intellectual property (essential facility) and the antitrust plaintiff competed in a market that required access to the facility. The court held that Integraph and Intel did not compete in the same market and thus Intel cannot be alleged to engage in restricting the use of its property to foreclose competition from Integraph and thus there cannot be a case made out against Intel with respect to essential facility doctrine.

[15] *Intergraph Corp. v. Intel Corp.* [1999], 195 F.3d 1346.

3. Economic Assessment of a Refusal to License and Antitrust Considerations

The courts and antitrust agencies usually weigh the pro-competitive effects of the refusal with the anti-competitive ones to arrive at the final outcome. For example, a case where a refusal prevents imitation and lower quality products to flood the markets, may actually be good for the consumers who attach a positive high utility to quality, even if they have to shell out more for it. Another case could be the dynamic efficiency rationale attached to a refusal to deal where it may preclude free riding by rivals that could impede the economic incentives for innovation and R&D investments.[16]

In *CSU v. Xerox*[17], Xerox is in the business of designing, manufacturing, selling and servicing photocopiers and laser printers, whereas Copier Services Unlimited (CSU) is one of the independent service organizations (ISOs) competing with Xerox to service these copiers and printers after the initial warranty period. In 1984, Xerox decided to refuse to sell its patented high-speed copier repair parts as well as diagnostic software (protected by both patent and copyright) to ISOs. The ISOs (particularly CSU) complained that they were unable to effectively compete in the provision of repair service without access to Xerox parts. They alleged that end consumers were harmed because service prices were higher, and the variety of service contracts available was diminished. Xerox responded to CSU's claim by arguing that its refusal to license parts and software protected by IPRs was a lawful unilateral exercise of its IPRs.

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[16] Christophe Humpe & Cyril Ritter, 'Refusal to Deal' (*SSRN*, July 6, 2005), <https://ssrn.com/abstract=771907> or <http://dx.doi.org/10.2139/ssrn.771907> accessed 4 October 2019.

[17] *CSU, L.L.C. v. Xerox* [2000] No. 99-1323 (Fed. Cir. Feb. 17, 2000).

Moreover, Xerox countered that its strategy was procompetitive because it could ensure higher quality service as both the manufacturer and the service provider by providing the repair services using authentic parts and software. The case is a precedent in itself because of the district court's adoption of the *per se legality* rule for unilateral refusals to license IPRs, later refuted and criticized by many, who argued that antitrust should accord the same treatment to refusals in case of tangible as well as intellectual property.[18]

The economic effects of a refusal to license has been distinguished into two, *direct* effect on current consumers, or static effect and *indirect* effect on future consumers, or dynamic effect. The interplay between the two determines the net economic welfare impact. Under a *direct* effect, a consumer may experience one of the following: pay higher prices for the protected product, might face a restricted choice in terms of product variety, or a lower product quality. Each of these adversely affects consumer welfare and makes a case for antitrust scrutiny under static antitrust regime.[19]

There are situations where a refusal is done to foreclose competition in the market, rather than for appropriating the returns on innovation, in which case it is liable to create a net anticompetitive harm. For example, a case, where a dominant firm forecloses enough of a distribution channel that a competitor cannot achieve necessary economies of scale. Thus, refusal, whether it involves IPRs or not, can constitute a harm to static allocative efficiency[20] and consumer welfare through higher prices, lack of product variety and lower

[18] ibid, at 1327.
[19] *Supra*, at 10.
[20] Broadly, there is a conflict between antitrust laws' objective of promoting competition to maximize current output from society's existing resources (static efficiency) and maximizing output over time (dynamic efficiency). *See* Mark Blaug, '*Is Competition Such a Good Thing? Static Efficiency versus Dynamic Efficiency*', Review of Industrial Organization, Vol. 19, No. 1 (August 2001), pp. 37-48.

quality. It has also been argued against the dynamic efficiency[21] rationale for legality of refusal to license, purported by many in case of IPRs which suggests that the perspective of *ex post* duty to deal will harm the *ex-ante* incentives to undertake innovation. According to theorists the incentives to the competitive innovator may be more than the monopolist. The marginal limitations on patentees' market power may actually increase social welfare which may be more than the necessity for antitrust immunity for intellectual property owners who have unilaterally refused to deal. Therefore, there is a need to review intellectual property-related refusals according to their particular market conditions by the courts.[22]

Under *indirect* effects, there is an impact on the welfare of future consumers by sustenance or prohibition of incentives to invest in risky innovation projects. A refusal to licence aimed at appropriating the returns on innovation, if prohibited under antitrust law, might hinder the future incentive of such innovators to undertake risky R&D investments and develop better products and processes to the benefit of consumers. The innovation incentives can be segregated into two, *local effects* on the firms operating in a particular market of interest, and *global effects*, on the innovation incentives of the firms in general. The importance of global effects can be felt for most new-economy high-tech industries, for whom innovation and refusal to license are important strategies to gain huge returns from such innovation, and the anticipation of these returns drives them to innovate. The local effects hold more importance for antitrust authorities. A refusal to license by a firm, if successful, might reduce competition in one or more markets in which the firm operates. A consequence of such reduction in competition might be to reduce the number

[21] ibid.
[22] Simon Genevaz, 'Against Immunity for Unilateral Refusal to Deal in Intellectual Property: Why Antitrust Law Should Not Distinguish between IP and Other Property Rights' (2004) 19 Berkeley Technology Law Journal, Article 4.

of innovative efforts in the industry. Most antitrust agencies today, view harm to innovation as constituting an antitrust injury. The effect that dominates static antitrust analysis when considering local effects is that of an increase in the level of concentration and exploitation of market power by the innovator. But that might be a weaker argument as far as rapidly innovating and most high-tech industries based on innovation are concerned.[23]

The answer to what should be the economically relevant and optimal policy with regard to refusal to license when IPRs are involved would include the answer to another important aspect, particularly relevant for enforcement agencies- whether refusal to license intellectual property should be accorded the status of being *per se lawful* or should it be treated under the *rule of the reason* approach.

An antitrust regime that is permissive of refusals to license may generally lead potential innovators to expect higher average returns from their investment in risky innovations and it may spur the level of innovation, in both markets directly involved and the markets in general in that economy.[24] On the other hand, such a regime may allow for certain anticompetitive motives furthered through such refusal, for example, persistence of monopoly, which may cause harm to consumer welfare in both short and long run. Thus, an optimal policy has to be based on a *rule of reason* approach and depends on a balance between the costs and benefits associated with permitting or revoking such refusals, a daunting task. The answer, therefore, is largely empirical and

[23] MacKie-Mason & Jeffrey K., 'What to Do About Unilateral Refusals to License?' Competition and Intellectual Property Law and Policy in the Knowledge-Based Economy, Forthcoming, <https://ssrn.com/abstract=974922> accessed 29 September 2019.
[24] Richard A. Posner, *The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality*, 48 U. CHI. L. REV. 6, 24 (1981)

depends on the particular market structure in which the firms operate and innovate[25].

The appropriate analysis of refusals to license should try to address the following questions before a general rule could be formulated: How much static allocative inefficiency results from such refusal over time, through its impact on rivals, related industries and consumers? What is the implication for the expected returns on investment for a given tightening or loosening of constraints on refusal to license and the impact of such returns on innovation efforts in the industry? How does the impact on innovation incentives influence the consumer welfare and dynamic efficiency in the industry and the economy?

The indirect benefits from permitting refusal to license can span across industries by inducing innovation efforts across them from increased expectations of future reward[26]. Therefore, one cannot rely on specific instances of cases pertaining to a single industry where refusal to license had an anticompetitive or procompetitive effect. One can try to identify situations where anticompetitive costs of a refusal to license unambiguously exceeds or not exceed the procompetitive benefits from greater returns to intellectual property.

In *Integraph Corp. v. Intel Corp,*[27] although there was no case based on the essential facility doctrine, the FTC alleged that Intel, being a dominant player in the market for general purpose microprocessors, had engaged in exclusionary conduct to maintain its dominance. It was contended to be done

[25] Thibault Schrepel, *A New Structured Rule of Reason Approach for High-Tech Markets* (February 2, 2017). Suffolk University Law Review, Vol. 50, No. 1, 2017.
[26] ibid.
[27] *Intergraph Corp. v. Intel Corp.* [1999] 195 F.3d 1346.

by forcing computer manufacturers, who were also actual or potential competitors for Intel, to license their patented innovations to Intel to resolve intellectual property disputes and denying them the access to technical information and microprocessor product samples if they refused to agree to its terms (refusal to license).

The anticompetitive harm caused by Intel's conduct was based on three rationales: First, Intel would get preferential access to a wide range of technologies being developed by other firms in the industry. Second, Intel's coercive tactics would force customers to license away patent rights, which would tend to diminish the customers' (including Integraph) incentives to develop new and improved microprocessors or related technologies. This behaviour had the ability to harm competition and consumers by reducing innovation. Third, a computer maker's inability to enforce its patent rights would make it more difficult to develop and maintain a brand name based on superior technology. Finally, Intel's exclusionary conduct was not reasonably necessary to serve a legitimate, procompetitive purpose.

However, FTC ruling did not impose any kind of broad compulsory licensing regime upon Intel (Intel is free to license to whomever it wishes or to choose not to license it at all) but prohibited certain conduct on its part aimed at maintaining its dominance in the market. For example, once Intel grants a license, and a computer manufacturer relies on the license to design computer systems based on Intel microprocessors, Intel cannot leverage its dominant position in microprocessors to extract intellectual property grants from its customers (including Integraph).

Some of the rationales behind the refusal to deal might actually have favourable outcomes for economic efficiency. A refusal to deal may preclude

free riding by rivals that could impede the economic incentives for innovation and R&D investments[28]. Moreover, the refusal could be a part of an initiative to restore the quality of services[29]. For example, if a hardware manufacturer believes that an ISO cannot ensure a desired quality of services, it may unilaterally refuse to provide access to the parts or softwares required by the ISOs to compete with it in the services market.

Effective price discrimination by the manufacturer could be another motivation behind the refusal[30]. For example, the hardware manufacturer may want to use its services data to gauge the intensity of use by its customers a hence price discriminate. In this case, one has to weigh the efficiency benefits in terms of expanded sales and availability of the product to price-sensitive customers against the potential loss in welfare due to price discrimination. The above arguments should not however conceal the anticompetitive motives driving such refusals. For example, a refusal to deal could serve an important entry barrier for a potential entrant in not just the market in which the essential input is traded but also in the product market and thus, may be used by the owner to enhance the exploitation of market power or to preserve it. The refusal may also be motivated by the absence of contractual arrangements between the owner and the rivals that effectively compensates the owner for its efforts and investments in the creation of an essential input or intellectual property.

Thus, refusals to license should be treated under a *rule of reason* approach that involves weighing procompetitive benefits of such refusals with the

[28] Glen O. Robinson, On Refusing to Deal with Rivals, 87 Cornell L. Rev. 1177 (2002).
[29] ibid.
[30] Damien Geradin, Abusive Pricing in an IP Licensing Context: An EC Competition Law Analysis (June 2007). http://dx.doi.org/10.2139/ssrn.996491.

anticompetitive ones and should not be accorded the status of being per se unlawful as suggested by Intel's case.

4. Conclusion

The *Antitrust Guidelines for the licensing of intellectual property* (the US Department of Justice and Federal Trade Commission) explicitly states that agreements involving IPRs can be analysed using the same antitrust rules applied to agreements involving any other property.[31] This does not mean to say that intellectual property is not different from other forms of property. The issues pertaining to intellectual property can certainly be distinct than those concerning other forms of property, however, the same antitrust principles can be used to analyse them. Moreover, the Guidelines state that intellectual property right does not necessarily create market power. The guidelines also consider intellectual property to have procompetitive effects so long as firms can combine them with other complementary factors of production such as manufacturing and production facilities and workforce.

However, typical differences between other forms of property and intellectual property make it difficult to apply antitrust rules to cases involving IPRs. Intellectual property faces more threat of infringement than other forms of property due to the relative ease with which they can be copied or used without interfering with the ability of others to do the same. Successful acquisition of IPRs requires huge fixed costs in R&D and development of innovative products and processes. On the other hand, marginal cost of using such intellectual property is very low, and at times even zero.[32] It is difficult

[31] U.S. Dep't of Justice & Fed. Trade Commission, *Antitrust Guidelines for The Licensing of Intellectual Property* (2017), 7, <https://www.justice.gov/atr/IPguidelines/download> accessed 7 October 2019.
[32] Richard A. Posner, 'Intellectual Property: The Law and Economics Approach' (2005) 19 Journal of Economic Perspectives 2, 57–73, 58.

to define boundaries for the protection afforded by IPRs. The value of intellectual property typically depends more on its combination with other factors of production, such as manufacturing and distribution facilities, workforces, or complementary intellectual property, than does tangible property. Finally, the duration of some, but not all, IPRs is limited.

At the outset, the two legal regimes appear to have an inherent tension due to the objectives pursued by them. On one hand, IPRs grant exclusive rights to the owners of the intellectual property to promote investments in development of new products, processes and technology in the future by allowing the innovator to reap gains from the innovation. On the other hand, antitrust rules are framed to prevent abuse of market power in the economy, even though such market power comes from the innovation and acquisition of IPRs. However, if one considers the long run goals of antitrust principles of promoting consumer welfare by not just lowering of prices but by also providing improved quality goods, then the objectives of both the regimes can be reconciled. This is because IPRs are necessary for the promotion of innovation due to the 'appropriability effect'[33], which ultimately brings new and improved goods to the consumers. The fear of misappropriation due to immediate imitation by rivals precludes optimal innovation incentives which are then protected by property rights on such innovations. Thus, some market power is a prerequisite for innovations. Thus, market power acquired through IPRs itself should not be considered a violation of antitrust rules but only its abuse should be.

[33] Sairah Hussain & Mile Terziovski, 'Intellectual Property Appropriation Strategy and Its Impact On Innovation Performance' International Journal of Innovation Management. 20. 1650016. 10.1142/S136391961650016X. (2015).

COMPETITION LITIGATION UK PRACTICE AND PROCEDURE:

BY MARK BREALEY QC AND KYLE GEORGE

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1. Introduction

Since 2010, the first edition of *Competition Litigation UK Practice and Procedure* (also called "The Blue Book")" was a leading title in "the procedural aspects of the discipline in the UK competition library".[1] Nevertheless, competition law experienced significant developments in the following years and therefore, the need arose for an updated version of this vital text for the practitioners. However, even at the point of publication, the first edition lacked the impact analysis of Lisbon Treaty ("**Lisbon Treaty/TFEU**")[2] on the competition law rules.[3] It is one of the essential changes considered in the second edition of "Competition Litigation UK Practice and Procedure". In terms of the UK procedures, this edition elaborates on the Competition Appeal Tribunal ("**CAT**") cases as it now has jurisdiction over determination of damages claims and class actions (opt-in and opt-out). In addition, the Competition Act 1998 ("**Competition Act**") was heavily amended which has been examined below.

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[1] Blanke, "Competition Litigation UK Practice and Procedure" G.C.L.R. 2011, 4(4), p. 167-168.

[2] 2012 OJ C 326/47.

[3] ibid.

2. The authors and the structure of the Book

The authors are Mark Brealey QC and Kyla George who bring their practical experience to this new edition, hence the insightful analysis of the amendments of procedures that may meet the high standards set by the previous one, as explained by Blanke in his review of the previous edition.

The chapters had to be essentially rewritten by the authors in order to reflect the amendments in the law. It is still divided in 24 chapters, like the first edition, yet a few changes have been introduced in order to present the amendments and new elements in a comprehensive manner. The authors decided to have one chapter on damages, therefore there is no separate chapter where the quantification of damage is considered. Instead, there are two additional chapters on the competition litigation in Scotland and Northern Ireland (Chapter 23 and 24). There is also no chapter on privilege, however some of the implications are considered in Chapter 9D. Apart from these changes, there are slight amendments introduced in the scope of some chapters, e.g. Strike-Out and Summary Judgment, which in the first edition included Rejection as well.

The book deals specifically with parties and group litigation in Chapter 3, identically as in the previous edition, however the reform of The Competition Act 1998 brings in new considerations such as widened jurisdiction of the CAT over class actions. The updated chapter on disclosure (Chapter 9) acknowledges the move to electronic disclosure. The chapter on criminal proceedings has also been rewritten in order to reflect the amended cartel offence (Chapter 20). The authors also added two separate chapters considering litigation in Scotland and Northern Island that have not been covered extensively in the first edition. The new edition however continues the legacy of the first one by elaborating extensively on Alternative Dispute

Resolution (ADV) and arbitration, considered in separate chapters, that reflects their growth in popularity not only in the UK, but in the EU as such.

The book is practical in use due to paragraph numbering therefore despite its length. It can provide quick answers to practitioners specialising in competition law but also to professionals that do not deal with this branch of law on a daily basis. It provides checklists for various sorts of claims. The practicality of this edition also lies in the use of headings and clear representation of procedures in the forms of bullet points as well as in short abstracts at the beginning of each chapter.

This review is aimed at elaborating on the limited issues considered by the second edition, namely: commencing proceedings, group litigation, jurisdiction, applicable law, disclosure and criminal proceedings. This is due to the amount of the essential insights and the number of landmark modifications made in competition law in the course of the 10 years when the first edition was published. These chapters cover the landmark amendments and therefore are critically evaluated below.

3. Specific considerations

Chapter 1 covers procedures in different kinds of competition law claims: private actions in the High Court, in the CAT, the appeals in CAT and judicial review. It is an essential part of the book as it serves as a primer for the various procedures involved in the practical application of competition law. It specifies the basis of the jurisdiction of both of the institution over claims: e.g. CAT's jurisdiction is excluded in cases that are not based on the breach of competition law, as explained in *Unwired Planet International Ltd* v *Huawei Technologies Co. Ltd.*[4], while the High Court has the authority to consider claims other than the ones before CAT. However, as per *Deutche*

[4] *Planet International Ltd* v *Huawei Technologies Co. Ltd.* [2016] EWHC 958 (Pat).

Bahn AG and Others v MasterCard Incorporated and Others[5] (abuse of process) both of the institutions may have jurisdiction over one claim, especially if e.g. proceedings in one may solve an ambiguity that may prove to make the other proceedings difficult. This chapter comments on the impact of landmark cases such as *Sainsbury's v MasterCard*[6], but also new cases e.g. *Gascoigne Halman Ltd v Agents' Mutual Ltd*[7] on the right of the parties to transfer a claim from the CAT to the High Court. If the reader's interest lies in the competition law procedures in Scotland or Northern Ireland, Chapters 23 and 24 provide a point of reference.

Chapter 2 (parties and group litigation) encompasses the detailed analysis of Articles 101 and 102 the TFEU. Section B of said chapter 2 takes into account the amended Competition Act, such as Section 47B and 47C introduced by the Consumer Rights Act 2015. These modifications established more efficient rules on class actions before the CAT including: (i) CAT being now able to award damages without analysing each claimant's loss[8]; or (ii) the transitional limitations in Section 47B of the Competition Act applicable to both follow-on and stand-alone claims. Chapter 2 discusses the application process for a Collective Proceeding Order (CPO) in a detailed examination of CAT Rules[9] and the Competition Act. On the account of this very recent amendment in 2015, there are verylimited case laws available. Nevertheless, the authors include in the analysis the leading cases of *Walter Hugh Merricks CBE v Mastercard Incorporated and Others*[10] and *Dorothy Gibson v Pride Mobility Products Ltd*[11].

Chapter 5 focuses on both the UK procedures of determining jurisdiction applicable to the claims brought before the High Court and the CAT. As for

[5] *Deutche Bahn AG and Others v MasterCard Incorporated and Others* [2018] EWHC 412 (Ch).
[6] *Sainsbury's v MasterCard* [2015] EWHC 3472.
[7] *Gascoigne Halman Ltd v Agents' Mutual Ltd* [2019] EWCA Civ 24.
[8] Section 47C(2) of the Competition Act.
[9] The Competition Appeal Tribunal Rules, 2015 (2015 No. 1648) ("**CAT Rules**").
[10] *Walter Hugh Merricks CBE v Mastercard Incorporated and Others* [2017] CAT 16.
[11] *Dorothy Gibson v Pride Mobility Products Ltd* [2017] CAT 9.

the EU law, however, it extensively analyses the Judgments Regulations[12] that applies since2015. The important changes in contrast to the previous judgments regulations[13] are e.g. now certain provisions can be applied to defendants domiciled in other than a member state. Also, Article 25 (previously Article 23) of the Judgment Regulations is to ensure preventing multiple proceedings in various member states by stipulating that the court considering given case shall look at the jurisdiction specified in the agreement and move the proceedings to the court in the determined jurisdiction, unless the agreement itself is proven invalid under the laws of that member state. The book draws upon recent case laws such as *Cartel Damage Claims (CDC) Hydrogen Peroxide SA v Akzo Nobel NV and Ors*[14], establishing *inter alia* that in jurisdiction disputes, the jurisdiction agreement should prevail over Judgment Regulations.

In terms of the applicable law, **Chapter 6** elaborates on the current law applicable to competition law claims, but also explains the rules in other periods such as between 1 May 1996 and 10 January 2009 and before 1996. Therefore, its scope is wider than in the previous edition where the focus was set mostly on Rome II[15], presumably because of its rather recent introduction given the date of the publication of the first edition. Notably, in the UK the competition law claims can be considered under rules applying to non-contractual obligations or breach of contract and this chapter explains them in separate subsections.

Chapter 9 covers disclosure and outlines the procedures in relation to claims before the High Court and the CAT, taking into account the technological advancement such as the increased use of electronic disclosure and its

[12] Regulation (EU) 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. ("**Judgment Regulations**")
[13] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.
[14] Case C-352/13 *Cartel Damage Claims (CDC) Hydrogen Peroxide SA v Akzo Nobel NV and Ors* [2015] ECR 0.
[15] Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations.

recognition by the High Court. The definition of the Electronic Documents in para 5(3) of Practice Direction 31b – Disclosure Of Electronic Documentsstates a rather wide definition that allows the high status of various data as evidence e.g. metadata or embedded data. As far as CAT has a jurisdiction on damages claims, the 2015 CAT Rules resemble CPR Part 31 recalled above. Importantly, this chapter also covers the impact of Schedule 8A of Competition Act 1998 that deals with leniency documents. Before the date it came into force, the European Court of Justice judgment in *Pfleiderer*[16] was applied.

Lastly, the criminal proceedings chapter had to be fully updated in order to reflect the updated cartel offence introduced by the Enterprise and Regulatory Act 2013 ("**ERA 2013**"). Further, the chapter compares the original offence in Enterprise Act 2002 with the amended one. It provides an overview of the procedure of initiating criminal proceedings. The main issue with the original cartel offence was that it required *mens rea*. The ERA 2013 changed this standard of proof and instead introduced exceptions and defenses to the offence such as exclusion of liability in case of notification exclusion[17] or publication exclusion[18]. However, these provisions only applyto agreements concluded after 1 April 2014 (the date the ERA 2013 came into force). The chapter makes clear which of the defenses and exceptions apply to agreements concluded before and after the date allowing the reader to quickly identify the applicable provisions, which value addition to the practicality of the book.

The authors also elaborate on the relationship between different amended provisions such as the defenses and exceptions. The former ones are directed at the nature of the arrangements while the latter are designed to target the intention with which the undertakings entered into the agreement. There is also a subsection on prosecution procedure and the features of the agreement

[16] Case C-360/09 *Pfleiderer AG v Bundeskartellamt* [2011] ECR 0.
[17] Section 188A(1)(a).
[18] Section 188A(1)(c).

taken into account while assessing whether the criminal investigation shall be started. The later stages follow, such as the trial and sentences, analysed based on case law.

4. Conclusion

Overall, the "Blue Book"[19] maintains the practicality of its previous edition. Similarly, it does not contribute to the academic debate as apart from primary sources, it only rarely mentions textbook materials rather than any academic comment. This shall in no way be considered a flaw of this title – on the contrary, due to its extensive reliance on case laws and experience of the editors, it is a comprehensive guide to the UK's competition claims' procedures. Its reader-friendly format through a step-by-step approach with exquisite attention to detail and in-depth case law analysis.

[19] Blanke, "Competition Litigation UK Practice and Procedure" G.C.L.R. 2011, 4(4), p. 167-168.

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Aim

The *ICC Global Antitrust Review* aims at encouraging and promoting outstanding scholarship among young competition law scholars by providing a unique platform for students to engage in research within the field of competition law and policy with a view to publishing the output in the form of scholarly articles, case commentary and book reviews. The Review is dedicated to achieving excellence in research and writing among the competition law students' community around the world.

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The *ICC Global Antitrust Review* is intended to become a leading international electronic forum within which students engage in debate and analysis of the most important issues and phenomena in the global competition law scene. The *Review* welcomes contributions dealing with competition law and policy in all jurisdictions as well as those addressing competition policy issues at regional and international levels. In particular, it welcomes works of interdisciplinary nature discussing and evaluating topics at the interface between competition law and related areas such as economics, arbitration, information technology, intellectual property, political science and social geography. Only scholarship produced by students – whether at undergraduate or postgraduate level (taught and research) – will be considered for publication in the *Review*.

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The *Review* will be published annually in electronic format. Each yearly volume will consist of a maximum of five long articles, two short essays, a case note section and a book review section. Further information on submission guidelines can be found in the *Review's Guidelines for authors*.

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