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CONTENT

DIGITALIZATION AND ANTITRUST

SUSTAINABILITY OF "TRADITIONAL ANTITRUST" UNDER THE CHALLENGE OF "SUSTAINABILITY" AND DIGITALIZATION

JOSEF BEJČEK

Abstract: Antitrust law arose from political pressures and has been subject to political pressures all the time. Recently, the slogan of the digital and economic transformation of society has been spread and there have been discussions about the impact of this social trend on the nature and goals of competition law. The digitalization of antitrust itself does not affect the already rather controversial debate on the goals of competition law. While digitalization does not change the goals of competition law, and competition law "only" has to deal with the challenge of adapting to technological developments within its tool-box, the so-called sustainability is associated with pressures to change and expand the goals of antitrust themselves. However, the protection of competition and consumer welfare must remain a priority, and competition authorities should not be forced to pursue a political agenda outside their remit under the pretext of a significant social change. Considerations of the so-called sustainability, however defined, must be addressed in the context of a classical competitive analysis, which provides enough flexibility to do so even today.

Keywords: conflict of goals; digitalization of antitrust; sustainability; digital and ecological transformation

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1. INTRODUCTION

1.1 CONUNDRUM OF THE GOALS

We can thank the current topical challenges for the new outbreak of endless disputes about antitrust goals and their conflicts. Like the almost unlimited number of goals attributed to antitrust (AT), the range of current influences[1] that modify, alter, and sometimes negate these goals is very wide, too. Digitalization, the focus of this issue of AUCI, is just one in a number of these. The digitalization of AT must be considered in context with other comparably significant current changes and in the context of the more general issue of conflict of goals.[2]

[1] I am freely building on part of a paper BEJČEK, J. Antitrust's response to the conflict of goals in the disarray of some current trends. In: ŠMEJKAL, V. (ed.). *EU ANTITRUST: HOT TOPICS & NEXT STEPS*. Prague: Charles University, Faculty of Law, 2022, pp. 347–371.

[2] As described and discussed in many sources, e.g., very clearly ORBACH, B. Foreword: Antitrust Pursuit of Purpose. *Fordham Law Review*. 2013, Vol. 81. No. 5, pp. 2151–2156.

AT protects the competitive environment as a public good and thus consumer welfare, and it also provides protection against some market failures, since the market obviously does not possess a mystical and reliable autocorrective capacity.[3] It is clear that no branch of law or legal regulation has any "natural" tasks or goals; they are all set (assigned) by the legislature and we can talk about rather traditional goals and those set by the majority.

AT is thus traditionally assigned the task of protecting competition and consumer welfare. The dispute is whether this is the only objective or only the main objective, accompanied by a number of collateral objectives, or even whether it is a differently composed interplay or contest between a number of parallel goals imposed on the AT according to the political order of the day. "Consumer welfare" is not a panacea for all ills but it may have broader sense than a simple consumption. It may also encompass broader values than those that are measurable in terms of price, including the broad quality of goods and services, taking into account, for example, environmental and socio-political values, too.[4]

The question is whether AT law intervention should be limited to protection of competition (when competition fails) and possibly in cases of other market failures (existence of public goods, externalities, incomplete markets, lack and asymmetry of information, unemployment etc.[5]) or whether it can also pursue specific sectoral or broader societal goals. The answer to this question cannot be "right or wrong", but only consistent or inconsistent with this or that value premise and stance. The value base correlates with the political direction that is currently in power.[6] AT is not the only area of law that is instrumentalized to achieve extraneous goals. It also sometimes happens even in private law, which might be required to be a vehicle for pioneering "progressive" values that may not be in tune with its main protective purpose (cf. private corporate law "enriched" by corporate social responsibility considerations, mandatory participation of employees' representatives or mandatory female quotas for statutory boards, etc.).

AT deals with protection of competition mainly in the course of cooperation of private companies. They naturally act in their own interest. The performance of society-wide tasks is difficult to delegate to them. Nor can the decisions of a cartel authority or a court substitute for an authoritative and legitimate countervailing decision by the legislature on how the conflict between the interests of protection of competition on the one hand and the objectives of the public good on the other hand should actually

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3 GALBRAITH, J. K. *Společnost hojnosti* [Society of Abundance]. Praha: Svoboda, 1967, p. 76.

4 Similarly, BURNSIDE, A. *Bob Dylan and consumer welfare* [online]. Dechert LLP, 2017, p. 4 [cit. 2023-02-21]. Available at: https://info.dechert.com/12/9073/landing-pages/bob-dylan-and-consumer-welfare-white-paper.pdf.

5 STIGLITZ, J. E. *Ekonomie veřejného sektoru* [Economics of the public sector]. Praha: Grada Publishing, 1997, p. 22.

6 In searching for an answer, I would like to avoid a possible pitfall of legal argumentation, namely that *"there appears to be something in the nature of lawyers that suggests that winning an argument is more important than reaching the right result in the broader good"*. See WHISH, R. Do Competition Lawyers Harm Welfare? In: *Network Law Review* [online]. 11.5.2020 [cit. 2023-02-21]. Available at: https://www.networklawreview.org/richard-whish-welfare/.

be resolved.[7] AT was not created - and thus should not be used – as an all-purpose tool for dealing with and treating all the ills of modern society. To widen its inherent goals may be tempting but endangering its enforcement, while it may not even benefit those added (expanded) goals.

The ideology of competition as a governing principle of a market-based economy is, in general, no worse or better than the ideology of targeted regulation of central assurance of general welfare. The superiority of the former is, of course, backed up by convincing empirical evidence, and the latter too, but with the opposite sign. Therefore, I confess at the outset that I am a proponent of the ideology of competition as an indispensable self-regulatory tool and that I am value-biased. This is not cynicism – rather, I see cynicism in the opposite approach – in obscuring value bias.

AT, which is supposed to protect competition, has the misfortune of being highly political in nature.[8] But despite that – AT is equipped to deal with one type of specialised market failures only – distortion of competition. However, this does not qualify it to step in to solve completely different market failures or to solve policy assignments.

1.2 DIGITALIZATION

Since it is impossible to deal with all the goals of AT that are promoted today, in this paper I will focus first on the more general question of the criteria for choosing AT goals and their nature. I will then discuss and comment on two of the most controversial aspects of contemporary AT, namely the digitalization and the so-called sustainability.

Often, these factors are considered decisive for the so-called "ecological-digital social transformation",[9] which is also a challenge for the competition order. AT must not only react to this trend and passively adapt to it, but it is increasingly being encouraged and required[10] to assist this transformation by revising its traditional objectives and, where appropriate, prioritising new ones. I think it is essential to clarify whether this current technological and ideological trend should have any implications for the treatment of the goals of competition law.

Adding "sustainability" aspects to the AT is an example of purely political decision which should, if at all, only be made on the basis of a thorough discussion and

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[7] Bundeskartellamt. *Offene Märkte und nachhaltiges Wirtschaften – Gemeinwohlziele als Herausforderung für die Kartellrechtspraxis* [online]. 2020, p. 14 [cit. 2023-02-21]. Available at: https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Diskussions_Hintergrundpapier/AK_Kartellrecht_2020_Hintergrundpapier.pdf;jsessionid=366990DF0CA10B8C8B5424C4290F25D3.1_cid378?__blob=publicationFile&v=2.

[8] Former chairman of the Federal Trade Commission of the United States once declared (PITOFSKY, R. The political content of antitrust. *University of Pennsylvania Law Review*. 1979, Vol. 127, p. 1051), that it is bad history, bad policy and bad law to exclude certain political values in interpreting the antitrust laws…

[9] See KÜHLING, J. Die sieben Herausforderungen für eine wettbewerbliche Ordnung. *Wirtschaft und Wettbewerb*. 2022, Jhrg. 72, Nr. 10, p. 522; Monopolkommission. Die ökologisch-digitale Transformation gelingt nur mit einer starken Wettbewerbsordnung. In: *Monopolkommission* [online]. 5.6.2022 [cit. 2023-02-21]. Available at: https://www.monopolkommission.de/de/gutachten/hauptgutachten/385-xxiv-gesamt.html.

[10] HOLMES, S. – MIDDELSCHULTE, D. – SNOEP, M. (eds.). *Competition Law, Climate Change & Environmental Sustainability*. New York: Concurrences, 2021.

evaluation.[11] Despite being enshrined in legislation, fluctuations in value orientation manifest themselves in the interpretation of legislation, which is sometimes functionally comparable to amending legislation. Even independent civil servants and independent judges carry value ideas, professional opinions and biases, and can shift the de facto meaning of legal norms. This is particularly striking in the case of competition law rules, which are characterised by vague and undefined (and usually also undefinable by law) concepts, allowing for considerable restriction and expansion in administrative and judicial discretion.

Recently AT has already been facing unprecedented challenges related to the digitalization of the economy and the rapid developments in information technologies. These in themselves pose major question marks over the rationale, content, and methods of application of AT, which has emerged and evolved in fundamentally different conditions; it is even argued that we are facing the end of competition as we know it. The big question is whether the objectives of AT should be changed or supplemented in the context of digitalization (for example, adding privacy and data protection), or whether the objectives remain the same but only the analytical tools used by AT will change.[12]

This "information-digitalization" challenge is being tackled in theory and responded to by legislation – most recently by the European Commission's Digital Markets Act (DMA)[13] and Digital Services Act (DSA)[14] or the regulation in § 19a of the German Gesetz gegen Wettbewerbsbeschränkungen (GWB), according to which a conduct is prohibited without having to prove that the platform concerned is dominant on a given market and without having to resort to proven abusive conduct.[15] In the case of DMA, the European legislature deliberately departed from competition law stricto sensu in favour of special regulation, albeit close to competition law.[16]

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[11] Studienvereinigung Kartellrecht. *Stellungnahme der Studienvereinigung Kartellrecht e.V. im Rahmen der Öffentlichen Konsultation der Europäischen Kommission über "Wettbewerbspolitik des Grünen Deals"* [online]. 2020, p. 25 [cit. 2023-02-21]. Available at: https://docplayer.org/204728082-Per-european-commission-directorate-general-for-competition-1049-brussels-belgium-20.html.

[12] KÖHLER, A. Online Advertising and the Competition for Data: What Abuse are We Looking For? *World Competition Law and Economics Review*. 2021, Vol. 44, No. 2, p. 200.

[13] Regulation 2022/1925, OJ, L 265, 12 October 2022, pp. 1–66.

[14] Regulation 2022/2065 OJ, L 277, 19 October 2022, pp. 1–102. Earlier comments e.g., EZRACHI, A. – STUCKE, M. E. *Virtual Competition*. Cambridge. Massachusetts: Harvard University Press, 2016, p. 203; BEJČEK, J. "Digitalizace antitrustu" – móda, nebo revoluce? ["Digitization of antitrust" – fashion or revolution?]. *Antitrust*. 2018, Vol. 10, No. 3, p. VIII; BEJČEK, J. Chytře protiprávní "chytré" smlouvy [Cleverly unlawful "smart" contracts]. *Právník*. 2020, Vol. 159, No. 5, p. 399; PODSZUN, R. *Empfiehlt sich eine stärkere Regulierung von Online-Platformen und anderen Digitalunternehmen?* München: C. H. Beck, 2020, p. 104 ff; EIFERT, M. – METZGER, A. – SCHWEITZER, H. – WAGNER, G. Taming the giants: the DMA/DAS Package. *Common Market Law Review*. 2021, Vol. 58, No. 4, p. 988.

[15] HAUCAP, J. – SCHWEITZER, H. Revolutionen im deutschen und europäischen Wettbewerbsrecht. *WRP*. 2021, Jhrg. 67, Nr. 7, p. I.

[16] DMA tries to ensure that *"markets where gatekeepers are present are and remain contestable and fair, independently from the actual, potential or presumed effect of a given gatekeeper* […] *on competition on a given market"*. § 19a GWB in contrast, remains consistent with the competition law toolbox. See WOLF, G. – BRÜGGEMANN, N. Agenda 2025: der Digital Markets Act und § 19a GWB. In: *D'Kart* [online]. 19.7.2022 [cit. 2023-02-21]. Available at: https://www-d--kart-de.translate.goog/en/blog/2022/07/19/agenda-2025-der-digital-markets-act-und-%C2%A719a-gwb/?_x_tr_sl=en&_x_tr_tl=cs&_x_tr_hl=cs&_x_tr_pto=sc.

1.3 BROADER SOCIETAL GOALS

In addition to this unprecedented challenge, we can observe increasingly strong pressures to expand the catalogue of broader societal goals that – as some activists believe – AT should pursue and support. Since the times are changing and antitrust needs to change with them,[17] we are witnessing a fundamental rethinking of AT that will include an assessment of the relationships between AT and media, sustainability, human rights, gender, privacy.[18]

However, there is a danger of forgetting that the original purpose of AT is to serve as a tool to remove the structural causes of market power and to provide a defence against behavioural distortions of competition. AT should protect not only consumer welfare – however this may be defined – but the process of rivalry – however difficult it may be to operationalise or even measure it. Even in the USA, as the cradle of economic and consumer approach to AT, we can observe attempts to include growth of wages and employment and reduction of income inequality, raising the Corporate Social Responsibility (CSR) etc. in the catalogue of goals.

Open markets and dispersion of economic power (as preconditions to self-regulatory workable competition) may be particularly undermined by the massive digitalization of the economy and the emergence of digital giants in various interconnected markets. Thus, AT is in danger of eroding under the "crossfire" from several directions, of losing its coherence and, above all, its proven functionality. Traditional conflicts of goals[19] have been joined in recent years by new and perhaps even more controversial conflicts than before.[20]

2. THE WIDER AND NARROWER CONCERNS OF COMPETITION LAW (CONFLICTS OF GOALS IN ANTITRUST)

According to a classical statement of Robert Bork, antitrust policy cannot be made rational until we are able to give a firm answer to one question: what is the

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17 BURNSIDE, *c. d.*, p. 4.

18 CAPOBIANCO, A. The Ghost of Competition past, present, future. *Wirtschaft und Wettbewerb*. 2021, Jhrg. 71, Nr. 7–8, p. 387.

19 BEJČEK, J. Cílové konflikty v soutěžním právu [Target conflicts in competition law]. *Právník*. 2007, Vol. 146, No. 6, p. 66; ZIMMER, D. (ed.). *The Goals of Competition Law*. Cheltenham: Edward Elgar, 2012.

20 "Binary choice" between intervention and non-intervention based on experience, ideology, and/or opportunism should be allegedly replaced by the so called "complexity antitrust". It is promised to introduce new positive feedback loops to create new competitive dynamics in order to understand when and why markets develop in terms of a provisional form of market control. Understanding of uncertainty should be improved. See PETIT, N. – SCHREPEL, T. Complexity-Minded Antitrust. In: *SSRN* [online]. 29.7.2022, pp. 20, 24–25 [cit. 2023-02-21]. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4050536. This would be nice if it did not lead to even more dispersion and vagueness, coupled with arbitrariness of judgement. Especially since the "market economy" is now more a theoretical model for abstract study than a reality. It has been deformed by a rampant system of various subsidies, ideologically motivated large-scale regulations and huge social transfers. "Complexity-minded AT" does not resolve the conflict of goals – it just hides it under an impenetrable cover of "complexity".

point of the law – what are its goals?[21] If we were to follow this rule, we would have to conclude that antitrust policy could never be successfully implemented because there was never a consensus on a clear definition of antitrust objectives.[22] There are so many and differing goals that it can cause confusion and despair. Moreover, their "collection" will probably never be completed and it is constantly being supplemented with new surprising ideas. In general, the various goals are set depending on the bias as to whether competition is merely an instrument for achieving other social goals or whether, as an expression of freedom, it is an end in itself. The former (utilitarian) approach prevails over the latter (deontological).[23]

In addition, the "list" of objectives does not have a clear and explicit structure and hierarchy. Even the EU case law is ambiguous as to the existence of a hierarchy of objectives in EU competition law. Some objectives partially overlap, some are fully included in others, and some are contradictory and incompatible. Some pursue hard-to-define non-economic welfare, others promote European market integration, or consumer protection, freedom of competition or diverse social values.[24] The call for more "order" in this area has led to a desire for a "more holistic competition law".[25]

Some doctrinal concepts of competition law[26] tend to be very ambitious in their conception, while certainly well-intentioned and morally anchored, and question the existing functioning competition law instruments and overestimate its potential and coverage. Such approaches conceptualise competition law as an almost "catch-all-instrument" of social regulation. AT, which was founded and developed as a type of applied microeconomics and was primarily concerned with efficiency, is thus shifting into a role of a tool that should promote public policy objectives and to contribute to a kind of hard-to-measure general well-being.[27] Competition law should even include among its goals e.g., environmental sustainability and the reduction of teenage alcohol or tobacco consumption, because the law is allegedly incapable of achieving these non-economic

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21 BORK, R. *The Antitrust Paradox: a Policy at War with Itself*. Oxford: MacMillan, 1993.

22 See e.g., a short survey ORBACH, *c. d.*, pp. 2151 ff.

23 See ANDRIYCHUCK, O. Rediscovering the Spirit of Competition: on the Normative Value of the Competition Process. *European Competition Journal*. 2010, Vol. 6, No. 3, pp. 578 ff.

24 Cf. LIANOS, I. *Some Reflections on the Question of the Goals of EU Competition Law*. CLES Research Papers Series 3/2013. London: Centre for Law, Economics and Society, 2013, pp. 2–64.

25 Ibid., p. 64. Holistic approach stands for a belief that the parts of something are interconnected and can be explained only by reference to the whole. This is highly desirable in regulating economics and society in general, but it faces the problem of recognizability of all relevant influences and their operationalisation and balancing. For this reason, and in order to increase legal certainty and predictability, competition law has also introduced narrower and more identifiable and measurable goals.

26 E.g., TOWNLEY, CH. *Article 81 EC and Public Policy*. Oxford: Hart Publishing, 2009; LIANOS, I. *Polycentric Competition Law*. London: UCL, Centre for Law, Economics and Society, 2018; FOER, A. A. – DURST, A. The Multiple Goals of Antitrust. *The Antitrust Bulletin*. 2018, Vol. 63, No. 4, pp. 494–508; CENGIZ, F. The conflict between market competition and worker solidarity: moving from consumer to a citizen welfare standard in competition law. *Legal studies*. 2021, Vol. 41, pp. 73–90; obviously confusing or merging economically based "consumer welfare" and socially broader "citizen welfare" (p. 90); MIAZAD, A. Prosocial Antitrust. *Hastings Law Journal*. 2022, Vol. 73, No. 6, pp. 1640–1696.

27 TOWNLEY, *c. d.*, p. 11.

objectives by other means. Competition law is in this very broad concept "hijacked" to achieve wider objectives until the appropriate legislation is enacted.[28]

In fact, no one objects to the legitimacy of non-economic values that achieve social acceptance, but which should be formally anchored and enforced by legislation. To place these values among the goals of competition law is to sacrifice and to compromise the actual goal of competition law and to put in question or even spoil the competitive process. Such a "trade-off" and setting efficiency aside in order to promote socially valuable virtues is very controversial. A legally unsafe "sloping surface" of exceptions and of arbitrary decision making of competition authorities and of hardly predictable judicial shaping of law might be consequence thereof. Values and political priorities are a sovereignly political problem, and should be dealt with in a regulatory manner, and not by an expansive interpretation of competition law. AT has more modest but achievable goals that should not be compromised in favour of those political values and, in addition, only interpretatively.

Even a noncontentious, more economic, approach to competition law emphasises the economic context of the conduct under review. This is still within the framework of AT as applied microeconomics. It is stated that context is (almost) everything when it comes to antitrust assessment.[29] This would be all the more true if the context of antitrust regulation were to be measured in non-economic terms with no measurable impact on efficiency. Conflict of specific (industry related) regulation and antitrust regulation may occur. Full compliance with one regulatory barrier *"may not only leave one too exposed to liability under the other; but may indeed be conceptualised as part of a pattern of strategic behaviour that, coupled with evidence of anticompetitive intent, comes to constitute the very substance of a competition violation"*.[30]

It is therefore a question of whether we are confusing the conflict between the objectives of general competition regulation and the objectives of sector-specific regulation (which should be decided politically) with the conflict between an unlimited and unbounded number of goals of competition law. Thus, this value-conflict is only seemingly put under the guise of competition law, which cannot deal with the conflict in a sophisticated (transparent, methodological, predictable, credible, reviewable…) way.

It is arrogant to assume that a competition authority understands a specialised area better than a sectoral regulator when the competition authority is supposed to deal with other than competition matters and vice versa. Competition enforcement may serve as an antidote to sectoral regulatory intervention and can correct regulatory interventions

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28 See criticism of this Townley's opinion in ODUDU, O. The Wider Concerns of Competition Law. *Oxford Journal of Legal Studies*. 2010, Vol. 30, No. 3, pp. 607 ff. He also criticises the confusion about the breadth of this concept – that on the one hand it is argued that the absence of environmental sustainability cannot be used as an excuse for pursuing environmental policy through competition law, but that on the other hand environmental policy objectives should be included in the competition assessment. Unquestionable virtues are to be converted into legal duties by means of competition law and competition authorities (ibid., p. 609).

29 See DUNNE, N. The Role of Regulation in EU Competition Law Assessment. *LSE Legal Studies Working Papers* [online]. 2021, No. 9, p. 6 [cit. 2023-02-21]. Available at: https://ssrn.com/abstract=3871315.

30 Ibid., p. 12.

that are deliberately at odds with competition policy. It is argued,[31] that the use of competition law is problematic if it is used as a means to reverse legitimate political decisions to prioritise socially important values other than effective competition. *"To the extent that the regulatory outcome is suboptimal from a competition policy perspective, advocacy efforts may be the more effective and appropriate solution."*[32]

Competition and regulation of different social activities and goals are complementary tools, so that the main goals of competition law should not be left behind or compromised by their confusing with specific regulatory goals. Rather, they should be applied properly even with regard to the other specific regulatory social goals. Strong voices are heard saying that today's antitrust based on modern economic thinking must be strengthened and more strict in order to face the challenges of raising market power and it should not be endangered and weakened by vague political considerations.[33]

Efforts to exclude those "non-market goals"[34] from decision-making with conflicting goals can take many forms. I have argued above for the separation of such issues for sector-specific regulation that would not contaminate and distort competition regulation by introducing incompatible and incommensurable considerations in relation to the competition economic analysis.

The existence of important and legitimate public interests other than competition is undoubtful. Implementing these "alternative" goals by the competition authorities[35] presupposes to include these "alternative goals" into a broader concept of whatever welfare, or to suspend the goals of competition law and to prioritize. This would mean an expansive interpretation of that provision beyond its purely linguistic framework, slipping into a teleological interpretation in favour of a vague and arbitrarily determinable "public interest".

When assessing restrictive agreements distorting competition[36] that simultaneously meets one of the "out-of-market" goals, in addition to the use of the statutory exemptions from the ban, another possibility has been offered in terms of expansive understanding of so-called prioritisation.[37] It might functionally serve as a means to avoid conflict of goals by putting the "out-of-market" goals aside the competition assessment.

This is possible, according to Czech law, however only because there is no public interest in the conduct of the proceedings due to the low degree of detrimental effect on competition. A problem can arise (and prioritisation[38] cannot be applied) if an "out-

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31 Ibid., p. 16.

32 Ibid., p. 17.

33 BAKER, J. B. Competitive Edge. In: *Washington Center for Equitable Growth* [online]. 31.1.2019, p. 4 [cit. 2023-02-21]. Available at: https://equitablegrowth.org/revitalizing-u-s-antitrust-enforcement-is-not-simply-a-contest-between-brandeis-and-bork-look-first-to-thurman-arnold/.

34 KUPČÍK, J. Alternativní cíle soutěžního práva a prioritizace [Alternative competition law objectives and prioritisation]. *Antitrust*. 2018, Vol. 10, No. 3, p. 73.

35 Ibid., p. 79.

36 Art. 101/1 TFEU, § 3/4 of the Czech Act on Protection of Competition.

37 Sec. 21/2 of the Czech Act on Protection of Competition. See KUPČÍK, *c. d.*, p. 77.

38 The term is, by the way, used – in terms of semantic – rather incorrectly. Whereas genuine "prioritisation" means *preferring* something to anything else, "prioritisation" in terms of Sec. § 21/2 of the Czech Act on Protection of Competition is even not an opposite to posteriorisation of the not "prioritised" case (dealing

of-market" goal (e.g. in the area of environmental sustainability) can have a significant impact on the competition.

2.1 TREATMENT DIFFERENT GOALS OF COMPETITION LAW

The alleged or asserted goals of competition law are manifold and it is difficult to find any system or order in them. These include, for example, consumer welfare, general welfare, dispersion of economic and political power, economic growth, and "workable and politically acceptable mixture of competition and cooperation".[39] This conception is very fuzzy and attributes to antitrust the role of a universally applicable political tool, whose actual non-use or use (and its intensity) depends on arbitrary political-value judgments. Attempts to express this quasi-knowledge in terms such as "coopetition" or "prosocial cooperation" and the claim that prosocial collaboration between competitors is the economic imperative today illustrate this trend of so-called "progressive antitrust". Antitrust policy is supposed to support collaboration between competitors with the collective goal (!) of addressing systematic risks[40] for AT allegedly, it actually prevents companies from addressing systematic risks.

More sophisticated approaches emphasise the enumerative method (naturally open-ended) of the main and secondary goals of AT. However, the hierarchy of goals should not be rigid, but the goals of the "polycentric competition law" are dispersed among the main ones that form the core of AT (such as ensuring low prices, high output, promoting innovation, consumer choice and variety competition) and the rest. "Grey area" includes fairness (lack of exploitative conduct), freedom to compete, ensuring market access for small and medium undertakings, privacy[41] and self-determination. The last group of the "goals" normally falling outside the competition law core, but mirroring public policy interests, contains e.g., protection of environment, biodiversity

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it later, postponing it); it is rather about *not dealing* the case at all, that is suspension, putting it aside, which is an outright opposite of prioritisation. Whether something is "prioritised", then an indefinite and open set of cases that have been left out of the decision according to § 21/2. Some of them, including those of which the antitrust authority does not yet know, may later also be subject to this "prioritisation".

39 See FOER – DURST, *c. d.*, p. 22.

40 So MIAZAD, *c. d.*, pp. 1643, 1646, 1673. Reading some of the statements, with our historical experience, one cannot help but be reminded of the era of slogans from Eastern European "real state socialism": such as "put an end to the era of shareholder capitalism", or "the prosocial corporation reigns triumphant", or about corporations as "guasi-public" institutions that "serve not alone the owners to the control group but all society". Relying on market-based solutions is labelled as an "expedient diversion from the more difficult and intractable questions concerning economic inequality". Ibid., pp. 1649–1670, 1988. It seems that "progressive AT" and the CSR (Corporate Social Responsibility) movement have common ideological roots. Therefore, it can be generalized that social problems should not be solved through AT, but through special regulation, which is appropriately complemented with CSR (and sustainability, note JB). They both motivate companies to behave in a desirable way and represent a profitable business model in which there is a struggle for customers. After all, it is the consumer who appreciates more socially responsible behaviour in a market (which is also regulated by various specific protectionist regulations). See in detail SCHINKEL, M. P. – TREUREN, L. *Corporate Social Responsibility by Joint Agreement*. Tinbergen Institute Discussion Paper TI 2021–063/VII. University of Amsterdam, Tinbergen Institute, 2021, p. 26.

41 So privacy is protected by specific regulations, the violation of which only co-creates the context of the competition law analysis.

and sustainability (including even "animal welfare"[42]), media pluralism, promotion of employment and social security[43] and social welfare, and even "human happiness or capabilities".[44]

Unlike the "gray area", in which AT may overlap with other regulations and may dominate, this third group is typically the domain of specific sectoral regulations, or remains completely beyond the regulatory ambitions of the state. Intuitive (non-quantitative) balancing among competition law approaches and "appropriate weight" of framing "out-of-competition values" may distort workable and consistent antitrust tool-box and to reshape it to a largely unpredictable policy instrument and a kind of "law of everything".[45] It is as if it were forgotten that all these non-competitive values also enter the broad minds of consumers and are part of their decision-making in the marketplace, and therefore also of the competition between undertakings that more or less implicitly offer them to consumers of their products and services.

The "trade-off" between a narrow competitive perspective and "higher societal values" may therefore be unnecessarily sharpened. Consumers (including corporate ones) are not, after all, narrow price decision-making machines, but include non-price considerations in their decisions about the content of their present and future "well-being", which – in accordance with the findings of behavioural economics – bypass even their rational price calculations. A wide variety of conduct can admittedly push output and welfare in opposite directions and therefore a more "coherent, practical, and efficient antitrust"[46] is demanded, but the problem is "only" what it should look like.

The mixture of multiple goals of competition law has also been investigated empirically.[47]

It is correctly stated that numerous attempts to identify the role and objectives of competition law ranging from interpretations of legislative history to normative principle-based analyses have been made, while the final word rests with courts and enforcers.[48] According to a review of the literature and European case law, there are dozens of differently formulated competition law objectives that can be divided into several groups, namely efficiency, welfare (both total and a consumer's one), freedom (freedom of competition, equality of opportunities, economic freedom, protection of competitors etc.), market structure, fairness, European integration, competition process. It is

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42 However, this value is rather intuitive and cannot be compared to economically measurable "consumer welfare". On the first glance, this is a case suitable for special veterinary-hygiene regulations and not for contamination of competition law criteria by moral compassion.

43 See ŠMEJKAL, V. Competition law and the social market economy goal of the EU. *International Comparative Jurisprudence*. 2015, Vol. 1, No. 1, pp. 33–43.

44 See LIANOS, *Polycentric Competition Law*, pp. 17 ff.

45 It is enough to imagine how the content of the so far quite precisely economically detectable "consumer welfare" (or human welfare) would change if it were to be judged as arbitrarily and intuitively as the so-called "animal welfare".

46 NEWMANN, J. M. The Output-Welfare Fallacy: a Modern Antitrust Paradox. *Iowa Law Review*. 2022, Vol. 107, No. 2, p. 563.

47 See STYLIANOU, K. – IACOVIDES, M. C. The Goals of Competition Law: a comprehensive empirical investigation. *Konkurrensverket* [online]. 28.1.2021, Dnr. 407/2019 [cit. 2023-02-21]. Available at: https://www.konkurrensverket.se/globalassets/dokument/kunskap-och-forskning/forskningsprojekt/19-0407_the-goals-of-eu-competition-law.pdf.

48 Ibid., p. 4.

concluded that EU competition law pursues a multitude of goals concurrently and it can therefore not be said that it is monothematic.

EU competition law prioritizes the process of competition rather than directly the achievement of a desirable outcome (e.g. efficiency, welfare maximization etc.). Fairness does not fare highly in the decisional practice of any EU institution. The Commission assigns more value to welfare and to the protection of competitors and commercial freedom, but less value to efficiency than the Court and Advocates General. Different Commissioners seem to emphasize different goals during their terms. Ordoliberal objectives (like open and free markets and undistorted free competition) are still being pursued and may recently be on the rise again.[49]

These empirical findings argue against preferring "outputism" in the real competition "law in action."[50] On the contrary, it is hereby verified that competition law focuses, even in practice, on the structure of markets and the competitive process rather than on a partial output.[51] In fact, the various contemporary "expansive concepts" of competition law are also a kind of "outputism" because they promote, instead of (or in addition to) consumer welfare, various sets of social goals – e.g. more jobs or less inequality, whereas AT is expected and supposed to refocus on structures and on competitive process.[52] Some "overriding" or desirable goals (such as coping with pandemics, climate change, income inequality and racial injustice) are presented as "social issues" and, in more modern and psychologically appealing jargon, as "systematic risks".[53]

Sometimes different goals of competition law are labelled as being "alternative".[54] This leads to the impression that these goals are other, substitute or surrogate ones (which is the true meaning of the word "alternative"), whereas at most these goals are further, additional, complementary, or associated ones. It is clear from theoretical considerations, from the history of AT development, and from decision-making practice that the goals of AT are multiple and that there is no clear hierarchy among them. They are therefore subject to value-based assessment and evaluation on a case-by-case basis, depending on current socio-political priorities. Thus, rather than hierarchization, proportioning and balancing comes into consideration. In this process, any didactic division of objectives into different groups[55] will not help much, because it is irrelevant from the point of view of the values and interests involved in the decision making.

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49 Ibid., pp. 14 ff, 26 ff.

50 Proponents of "outputism" insist that AT is properly focused on competition and that achieving its specific goals (welfare standards) should be measurable. Difficulties in implementation of the goals and *outputs* (such as productivity, economic growth, innovation, consumer choice and broad opportunities for labour) should not be an excuse for replacing them with something much worse: protection of the competitive *process* is denied as a slogan, not as a goal. See HOVENKAMP, H. The Slogan and Goals of Antitrust Law. In: *Faculty Scholarship at Penn Carey Law* [online]. 2022, pp. 92–93 [cit. 2023-02-21]. Available at: https://scholarship.law.upenn.edu/faculty_scholarship/2853.

51 The proponents of the Chicago School, by the way, advocate a particular outcome – namely consumer welfare instead of the process of competition.

52 See KHAN, L. The New Brandeis Movement: America's Antimonopoly Debate. *Journal of Competition Law & Practice*. 2018, Vol. 9, No. 3, p. 132.

53 See MIAZAD, *c. d.*, p. 1641.

54 See KUPČÍK, *c. d.*, p. 73.

55 Such as *"market goals"* including both ordoliberal values in terms of free competition, but also "output": maximisation of differently distributed welfare, and *"out-of-market goals"* that are not "strictly speaking"

Practical solution to the conflicting or collateral goals of competition law can be demonstrated by an example of strong position of BigTech firms, which, however, do not reach the threshold of dominance in the relevant market. Traditional AT is therefore unable to operate and intervene effectively in these circumstances. However, due to the power and information asymmetry in favour of the big digital players, the value of fairness obviously suffers. Nevertheless, this cannot be "made up" for by an expansion of competition law, but will be helped by specific regulation based on political consensus in society: both in favour of fairness protection and of both customers (Digital Market Act) and consumers (Digital Services Act).

2.2 THE DISPUTE IS CONCERNING THE VERY NATURE OF ANTITRUST

AT used to be focused on competition issues, on protection of competition, thus basically against cooperation of rivals, against misuse of market power and potentially anticompetitive market structures. The goal of antitrust law is, by preserving free competition to preserve a tool to achieve the goal of economic welfare, which includes consumer welfare.

AT can only contain norms that allow competition to operate socially as a "process of disclosure and discovery". They must therefore be very general and abstract rules, universally applicable to all subjects equally (exceptions cannot be completely avoided for obvious reasons).

These rules cannot have any specific objectives in relation to specific conduct and must be specific and their application must be subject to objectively ascertainable circumstances.

Competition law is primarily aimed at protecting this social value and should not be used instrumentally to enforce arbitrary current economic policy objectives of a lower order compared with the preservation and development of competitive environment. The goal (purpose) of competition law is therefore to create barriers against restricting competition.

Conflicts between effective competition and other goals should be a fairly exceptional matter. Competition policy and competition law both have tools enabling them to grant such exemptions in case that a particular competition value is found to carry a greater importance than the value of workable competition. Competition policy is the best "industrial policy". Healthy growth of companies in an environment protected against competition and deformed by different subsidies or exemptions from the application of antitrust laws is an unlikely option.

Nowadays some tendencies occur that speak in favour of current "antirust empowering more collaboration." The reason should be facing systematic risks arising from climate change, income inequality, and the COVID-19 pandemic.[56] Competition is not,

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related to the functioning of the market and include a potentially infinite set of sub-political decision objectives (artificial support of "national champions", protection of the labour market in a broad social context, broadly defined sustainability of economic development and environmental protection, etc.). See ibid., pp. 75–76.

[56] See MIAZAD, *c. d.*, p. 1637.

of course, an untouchable fetish and idol that denies the legitimacy of cooperation and disregards broader societal goals. But competition is a kind of public good, not an end in itself, rather a tool whose self-regulatory ability makes broader societal goals easier, faster and more effective to achieve.[57]

Contemporary AT as a set of rules cultivated over decades and specified by extensive case law and decision-making, largely on the basis of the rule of reason, has created and continues to create a transparent and predictable environment for the economic activity of undertakings.

As is well known, the difference between the principle and the exception to the principle is relative and depends on their proportional relationship. The saying that the exception proves the rule is old and somewhat cynical, because it obscures the fact that it applies only if the exception is truly "exceptional" and that the number of exceptions does not exceed a certain critical mass.

A principle "perforated" by many exceptions ceases to be a principle and may itself become an exception to the "principle". Indeed, such a weakened "declaratory principle" is valid only if there is enough room for it after many extremely numerous exceptions are preferably applied.

Above, I have tried to show that the current trends towards large-scale expansion of the goals of competition law or their "trade-off" for other actual socially valued and promoted goals are dangerous and short-sighted in their frequency, scope and intensity. Some externally imposed "exogenous" challenges for competition policy are more dangerous, as they may strike at the very "heart" of the AT and threaten its core function for which it was created and which gives it its purpose: to protect competition and consumer welfare.

So AT can be distorted not only by competitors and lobbyists motivated by them, but also by the (perhaps well-intentioned and noble) efforts of socially responsible and ethical people for the "social good for all". However, we must be very cautious about them from the AT viewpoint without necessarily calling into question the broader societal goals themselves or the values that underpin them. The road to hell is often paved with good intentions.

Also, behind the lofty-sounding values, to which competition considerations should be aligned, there may be a vested interest that is better promoted than an undistorted competition environment would allow. AT is unable to deal with societal tasks aimed at "citizen welfare" instead of "consumer welfare", such as "low incomes and marginalised communities", "structural racism", "press freedom" etc., the fulfilment of which

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[57] In addition to the generally declaratory considerations that competition law will have to take environmental factors into account (e.g., KINGSTON, S. Integrating Environmental Protection and EU Competition Law: Why Competition Isn't Special. *European Law Journal*. 2021, Vol. 16, No. 6, pp. 780–805), there are very sophisticated and detailed procedures in various areas of competition law that allow for environmental considerations to be taken into account even in the existing legal framework (see HOLMES, S. Climate change, sustainability and competition law. *Journal of Antitrust Enforcement*. 2020, No. 8, pp. 354–405; VAN DIJK, T. A New Approach to Assess Certain Sustainability Agreements under Competition Law. In: HOLMES, S. et al. *Competition Law, Climate Change & Environmental Sustainability*. New York: Institute of Competition Law, 2021, pp. 55–68.

should condition mergers and could even break up longstanding merged companies for similar reasons.[58]

The latest attempts to outline in rough contours another "consumer standard" in a form of a "universal consumer standard"[59] accounting for "systematic risks" are just another conceptual variation on an old topic. This new "goal" of AT should probably consider even the welfare of future (not yet living) consumers and it should be able to alleviate market failures and serve as a procompetitive justification of an otherwise anticompetitive behaviour. This term seems to me to be rather vague and fuzzy and can be filled with basically any politically supported content. Its relationship to the established concept of "total welfare" is also vague. I do not think it has any advantages over a reasonable interpretation of the established and judicially tested exceptions to the prohibition on anticompetitive conduct and over an appropriate application of the "rule of reason".

3. TWO OF THE MOST SIGNIFICANT CURRENT CHALLENGES TO THE INTEGRITY AND COHERENCE OF COMPETITION LAW

I found the previous more general discussion on the purpose, goals and functionality of AT useful before commenting on the two most frequently mentioned threats and challenges to traditional AT, namely digitalization and the so-called sustainability. AT is recently already facing unprecedented challenges related to the digitalization of the economy and the rapid developments in information technologies. These in themselves pose major question marks over the rationale, content, and methods of application of AT, which has emerged and evolved in fundamentally different conditions; it is even argued, that we are facing the end of competition as we know it. The big question is whether the objectives of AT should be changed or supplemented in the context of digitalization (for example, adding privacy and data protection) and similarly of sustainability, or whether the objectives remain the same but only the analytical tools used by AT will change.[60]

Each of these two selected areas constitutes its own professional "universe". I can and will shortly mention them here, primarily because this issue of the AUCI takes a closer look at one of these areas, which nevertheless might be seen in their context as part of the declared "ecological-digital transformation"[61]of recent society.

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[58] OHLHAUSEN, M. K. Liberty, Equality, and Fraternity: Evolution or Revolution in Antitrust? In: *Concurrences* [online]. 2021 [cit. 2023-02-21]. Available at: https://awards.concurrences.com/en/awards/2021/business-articles/liberty-equality-and-fraternity-evolution-or-revolution-in-antitrust.

[59] See MIAZAD, *c. d.*, pp. 1690 ff.

[60] See KÖHLER, *c. d.*, p. 200; HOLMES, *c. d.*

[61] So KÜHLING, *c. d.*, pp. 522, 529. Number of other challenges for contemporary AT (e.g., privacy protection, dealing with social inequality, gender-related issues, etc.) cannot be addressed here, simply because of the allowed scope of the contribution. I refer to BEJČEK, *Antitrust's response to the conflict of goals in the disarray of some current trends*. Particularly dramatic developments are taking place at the interface between competition law and privacy law. It reflects the conflict of interest between the public interest in the competitiveness of the economy on the one hand and the purely private interest in data protection on

Nevertheless, I see one fundamental methodological difference between the two recently emerging antitrust-related aspects: the digitalization viewpoint and the ecological (or broader sustainability) dimension. Digitization aspects in AT originate from technological developments. They are "endogenous", or "internal", "inside", possibly "own" challenges. They fall *within antitrust's remit* and they simply must be dealt with in pursuit of its (and not wider societal) objectives, and include, among others, the evaluation of digital platforms and their operators, pricing algorithms, killing acquisitions etc. It is a question whether and how the traditional AT-toolbox could be used or changed in these areas as a consequence of rapidly changing conditions in digitalized markets.

On the other hand, digitization expands and improves the ability of competition authorities to fight anti-competitive behaviour by using sophisticated digital investigation tools in terms of "fighting technology with technology".[62]

Ecological (sustainability) viewpoint or challenge to AT is rather different. It is a kind of a so-called "exogenous" (or "imported", "external", "outside", possibly "foreign") challenge, which in my opinion threatens the essence and very functionality of AT more than endogenous challenges, for it attacks the traditional goals of AT. It arises as if outside the scope of the AT, or affects its scope only marginally, or it is artificially imposed into the remit of the AT.

The number of out-of-competition normative goals that could be taken into account in the competition law assessment is practically unlimited.[63] However, they practically oscillate around a few ethically and media attractive topics, the solutions to which are offered at the cost of weakening (or at least risking) the self-regulatory effect of competition.

"Sustainability" is one of the most attractive topics of this kind. By the way, sustainability is a very broad word that hardly might be labelled as a true concept because of its fuzziness, its ability to opportunistically draw in (or, on the contrary, exclude) almost anything that just fits or does not. Far from being just about environmental issues, it has a much broader scope, which in some conceptions has directly social engineering ambitions that cannot remain without impact on competition law.

3.1 DIGITALIZATION AS BOTH A BOON AND A MENACE TO COMPETITION LAW?

Digitalization is probably one of the two most difficult challenges (besides sustainability) that the current AT is facing.[64] In my working typology, this is an endogenous challenge, not a specific AT goal. The AT must deal with the digitalization of the economy in a similar way as it has done with a number of other technological

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the other. For more details see KOKKOT, J. Regulierung zwischen Datenmacht und digitaler Autonomie. *Wirtschaft und Wettbewerb*. 2022, Jhrg. 72, Nr. 12, p. 641.

62 See LORENZONI, I. Why do Competition Authorities need Artificial Intelligence? *Yearbook of Antitrust and Regulatory Studies*. 2022, Vol. 15, No. 26, pp. 33–56.

63 THOMAS, S. Normative Goals in Merger Control: Why Merger Control Should Not Attempt to Achieve "Better" Outcomes than Competition. In: *Concurrences* [online]. 2021, p. 10 [cit. 2023-02-21]. Available at: https://awards.concurrences.com/en/awards/2021/academic-articles/normative-goals-in-merger-control-why-merger-control-should-not-attempt-to.

64 As we have shown above, there is currently even some discussion about a "digital-ecological transformation" of society.

challenges. Fortunately, however, new advanced digitalized methods for detecting anti-competitive behaviour are also evolving as a result.[65]

Digitized economy is based on the processing of huge amounts of data and their interconnection. Digital platforms have become synonymous with the digital economy. Some of the huge digital platforms (especially GAFA) have gained so much power that they have become gatekeepers with the potential to stifle competition, especially through self-preferencing, killer acquisitions, leveraging their power into other markets, etc. Some GAFA members may, in parallel, be guilty of both unfair trade practices and abusive exclusionary conduct due to their bottleneck position.[66]

A global consensus is rapidly growing, that BigTech companies cannot anymore be left alone. A lot of classical economic wisdom is being modified or denied in the digital economy and the law must respond to this. This includes recognising a single global or pan-European market for online services and harmonising consumer protection in online contracts. So, the aim of EU competition law is to take back the control over the digital economy and self-determination of those who depend on the biggest digital platforms,[67] though without endangering or reducing network effects.

A justifiable and understandable fear of the great power of gatekeepers, which can also be pre-emptively secured by acquiring promising would-be competitors by incumbent undertakings, even gives way to somewhat bizarre ideas about retroactive divestiture. This would mean total destruction of legal certainty and security not only for the merging parties but also for third parties trading with them. Stronger ex post regulation is proposed as an alternative to the need for new ex ante regulation. Ex post supervision of mergers should depend on an assessment of a possible anticompetitive plan and could even take the form of a challenge to a legally cleared consummated transaction.[68]

There is widespread scepticism that AT cannot meet this challenge without additional special regulation (incl. creating new regulatory body) and an opinion is growing that "using the regulatory approach is much better than using the AT process as a form of quasi-regulation".[69] This approach is implicitly confirmed by the European Commission

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65 See e.g. NADLER, J. et al. *Investigation of Competition in Digital Markets* [online]. Washington: U.S. Government Publishing Office, 2022 [cit. 2023-02-21]. Available at: https://www.govinfo.gov/content/pkg/CPRT-117HPRT47832/pdf/CPRT-117HPRT47832.pdf.

66 GERADIN, D. – KATSIFIS, D. The Antitrust Case against the Apple App Store. *Journal of Competition Law&Economics*. 2021, Vol. 17, No. 3, p. 503.

67 DE STREEL, A. – LAROUCHE, P. The European Digital Markets Act proposal: how to improve a regulator revolution. *Concurrences*. 2021, No. 2, p. 63.

68 HEMPHILL, C. S. – WU, T. Nascent Competitors. *University of Pensylvania Law Review*. 2020, Vol. 168, No. 7, pp. 1879–1910. The DMA presupposes a. o. that gatekeepers will be required to inform the Commission of an intended concentration involving another provider of core platform or any other services provided in the digital sector, irrespective of whether the transaction is notifiable in terms of merger regulation. Special attention is devoted to structural impact of great digital firms, to analysing the substantive assessment of digital and technology merger cases against the background of the growing concern about the market power of Big Tech, to identifying theories of harm and considering remedies adopted to address these competition concerns. See one of the very latest researches ROBERTSON, V. *Merger review in digital and technology markets: insights from national case law: final report*. Luxembourg: Publications Office of the European Union, 2022.

69 MOSS, D. L. Moss says U.S. Needs a Digital Market Regulator to Curb Big tech Power. In: *American Antitrust Institute* [online]. 5.11.2021 [cit. 2023-02-21]. Available at: https://www.antitrustinstitute.org/moss-says-u-s-needs-a-digital-market-regulator-to-curb-big-techs-power/.

with its DSA and DMA. Implicitly this approach for they go beyond the existing AT standards and lay down special rules of conduct (inter alia self-preferencing, leveraging, use of data preventing interoperability/portability) for a specific group of actors, effectively regulating their behaviour ex ante.[70] In doing so, they are clearly based on many years of experience with GAFA-established practices and are in fact a casuistic response to this behaviour, which led to an apparent market failure.

It may be reminiscent of "preparations for the last war". However, this is certainly a more appropriate approach than anticipating and misjudging future developments in information technology and committing overregulation. Yet the objectives of these regulations are more ambiguous, aiming mainly at fairness or transparency and accountability); it is, of course, questionable whether the desired global standard will emerge.[71]

Some commentators have even spoken in this context of the emergence of "hybrid competition law", which has gone beyond the existing supervision of abuse of market power[72] and which relies rather on classical regulatory approaches; it should only be a complementary tool to competition policy and not a substitute for it; it could, however, turn into a double jeopardy overlapping with Art. 102 TFEU.[73] There is also the problem of the enumerative list of prohibited conduct, which will have to be updated, and the fact that the possibility of justifying prohibited conduct is not allowed, so that the direct applicability of the prohibition also covers innovative and pro-competitive conducts.[74]

Experience with digital multinational giants and (perhaps well-intentioned) efforts to harness them have also motivated ideas for more far-reaching changes to AT. Thus, for example, senator Klobuchar's proposal (The Competition and Antitrust Enforcement Act of 2021)[75] included the idea of banning mergers that *"may create an appreciable risk* [!] *of materially lessening competition"* and of enacting a presumption that would have to be rebutted by the parties.[76] Given the difficulty for even an expert antitrust authority to establish credible positive evidence of a substantial competitive harm as a result of a merger, shifting the burden of proof of credible negative evidence to the parties could effectively block mergers.

This proposal might really be a kind of "firing squad". Similarly remarkable is the suggestion that the exclusionary conduct is anticompetitive regardless of market power. The presumption could be rebutted by its addressee, which is a firm or group of firms that have over 50% market share or otherwise have (only) "significant market power".[77]

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70 GUERSENT, O. The Commission's proposal for a Digital Markets Act. *Wirtschaft und Wettbewerb*. 2021, Jhrg. 71, Nr. 2, p. 69.

71 EIFERT, M. – METZGER, A. – SCHWEITZER, H. – WAGNER, G. Taming the giants: the DMA/DAS Package. *Common Market Law Review*. 2021, Vol. 58, No. 4, p. 1028.

72 Shifting to a stand-alone approach distinct from an established competition law frame of reference; see HAUS, F. – WEUSTHOF, L. The Digital Markets Act – a Gatekeeper's Nightmare? *Wirtschaft und Wettbewerb*. 2021, Jhrg. 71, Nr. 6, p. 318.

73 HAUS – WEUSTHOF, *c. d.*, p. 324.

74 POILLEY, R. – KONRAD, F. A. Der Digital Markets Act – Brüssels neues Regulierungskonzept für Digitale Märkte. *Wirtschaft und Wettbewerb*. 2021, Jhrg. 71, Nr. 4, p. 206.

75 See BIDAR, M. – TURMAN, J. Klobuchar pushes for antitrust enforcement of big tech. In: *CBS News* [online]. 19.3.2021 [cit. 2023-02-21]. Available at: https://www.cbsnews.com/news/antitrust-laws-enforcement-big-tech-klobuchar/.

76 OHLHAUSEN, *c. d.*, p. 9.

77 Not inevitably dominant position – ibid., p. 10.

We need to monitor the discussion of these proposals closely, as they may be important and even fatal for the development of AT worldwide.

Digitally driven and boosted changes are manifold and they are hardly to describe, let alone analyse on such a small space, even just as an update to the outcomes of last year's conference "EU Antitrust: Hot Topics & Next Steps". It concerns among others the general issues of the development and protection of competition in the digital economy[78] and in particular online platforms,[79] pricing algorithms undermining the category of intent or mutual understanding underlying the classic cartel doctrine. Pricing algorithms have recently begun to outgrow the already quite complex issue of instantaneous automated responses to market price movements. Self-learning algorithms go even further and obscure the will of their real operators even more. Their ability to learn and adapt themselves makes it difficult to define and punish anticompetitive conduct and to separate it from an otherwise desirable and pro-competitive response to market changes.[80]

Digital economy nevertheless does not affect the goals of competition law and their constellation. It does not change the fact that AT is embedded in an ideology (or even a subcategory of an ideology) and that it is necessarily influenced by interest groups. Thus, digitalization only adds another technological aspect to the traditional method of measuring and balancing different goals, without affecting them themselves as to their substance.[81]

3.2 "SUSTAINABILITY" ENDANGERING SUSTAINABILITY OF GOALS AND ANALYTICAL METHODS OF AT?

Digitalization as the first part of the name of the declared stage of social development (under the shorthand label of digital-ecological transformation) does not impose new goals on competition law. It forces them to adopt new practices in order to achieve the original (traditional) goals of AT, however constantly they are debated. It is kind of an endogenous challenge.

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[78] See COLANGELO, G. et al. Competition Policy in the Digital Economy. *Concurrences*. 2021, No. 2, pp. 1–51.

[79] For the most recent contributions see BAKER, J. B. Protecting and Fostering Online Platform Competition: the Role of Antitrust Law. *Journal of Competition Law & Economics*. 2021, Vol. 17, No. 2, pp. 493–501; BERNHARD, L. – VOGES, P. Kartellrechtsdurchsetzung in Plattformmärkten. *Wirtschaft und Wettbewerb*. 2022, Jhrg. 72, Nr. 12, pp. 651–659; EZRACHI, A. – STUCKE, M. E. The Darker Sides of Digital Platform Innovation. In: *Network Law Review* [online]. 11.8.2022 [cit. 2023-02-21]. Available at: https://www.networklawreview.org/ezrachi-stucke/.

[80] See e.g. among the newest contributions HOYNG, A. C. – VANDENBORRE, I. – JANSSENS, C. Pricing Algorithms: thoughts on a framework for competition law analysis. *European Competition Law Review*. 2022, Vol. 43, No. 1, pp. 28–39; OTT, L. The Future is now: machine learning pricing algorithms and tacit collusion. *Wirtschaft und Wettbewerb*. 2022, Jhrg. 72, Nr. 11, pp. 590–596; DESCAMPS, A. – KLEIN, T. – SHIER, G. Algorithms and competition: the latest theory and evidence. *Competition Law Journal*. 2021, Vol. 20, No. 1, 32–39; GAL, M. Limiting Algorithmic Cartels. *Berkeley Journal of Law and Technology*. 2023, Vol. 38, No. 1.

[81] Similarly EZRACHI, A. *Discussion Paper The Goals of EU Competition Law and the Digital Economy* [online]. Brussels: BEUC – The European Consumer Organization, 2018 [cit. 2023-02-21]. Available at: https://www.beuc.eu/sites/default/files/publications/beuc-x-2018-071_goals_of_eu_competition_law_and_digital_economy.pdf.

"Sustainability" is a different case representing one of the recently most preferred attractive challenges. It is often just a buzzword that has not escaped its use as a mere label, which is undeserving of the respectable value it implies and denotes. Despite its weak conceptual and terminological anchoring,[82] it has far-reaching ambitions to change the life of society and, among other things, to redefine the goals of competition law.[83] This is obviously an exogenous influence even if the values that are promoted under this name are just *"reflexes or beneficial side effects"*, rather than *"immediate goals that ought to be achieved directly by specific government intervention in antitrust cases"*.[84]

Despite the penetration potential of "sustainability"[85] (or perhaps because of it), it is not at all clear what is meant by it. It is far from being just a question of environmental sustainability, which is inherently dynamic. Some relevant and otherwise systematic sources[86] even speak of some vague and arbitrarily adaptable "green quality improvements", "green investing direction", "carbon-neutrality targets".

The experience with the once-famous "more economic approach" to the law of competition is instructive. It was the evergreen of conferences and publications around the world, and a bit of a fashion. However, the tendency to see things "more economically" led, among other things, to the removal of the section on environmental agreements from the Horizontal Guidelines on the application of Art. 101/3 TFEU.[87] It is now apparently going to be reintroduced again, and probably as a very important issue.

The term sustainability also might include aspects such as fair trade, or even the welfare-being of animals in the farms has been considered a new possible theory of

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82 Attempts to clarify this concept are most welcome – see the very latest EU draft of Sustainability agreements in agriculture – consultation on draft guidelines on antitrust exclusion. In: *European Comission: Competition Policy* [online]. 2023 [cit. 2023-02-21]. Available at: https://competition-policy.ec.europa.eu/public-consultations/2023-sustainability-agreements-agriculture_en.

83 See another very recent step to sustainable economy: Directorate-General for Internal Market. Just and sustainable economy: commission lays down rules for companies to respect human rights and environment in global value chains. In: *European Comission: Internal Market, Industry, Entrepreneurship and SMEs* [online]. 23.2.2022 [cit. 2023-02-21]. Available at: https://single-market-economy.ec.europa.eu/news/just-and-sustainable-economy-commission-lays-down-rules-companies-respect-human-rights-and-2022-02-23_en.

84 FUCHS, A. Characteristic aspects of competition and their consequences for the objectives of competition law – comment on Stucke. In: ZIMMER, D. (ed.). *The Goals of Competition Law*. Cheltenham: Edward Elgar, 2012, pp. 53–60, p. 58.

85 See e.g., MIAZAD, *c. d.*, asserting that "addressing" climate change is an economic necessity that ensures continuous profitability (p. 1666); fuzzy "addressing" implicitly incorporates efficiency as a traditional microeconomic goal of AT, and this "addressing" even goes well beyond efficiency (Sustainability objectives may be doubtlessly in many cases viewed as economic efficiencies; remark JB). Confusing "market failure" with "consumer failure" in context with sustainability is remarkable, too (p. 1683).

86 OECD. *Environmental Considerations in Competition Enforcement* [online]. OECD Competition Committee Discussion Paper. OECD, 2021 [cit. 2023-02-21]. Available at: https://www.oecd.org/daf/competition/environmental-considerations-in-competition-enforcement-2021.pdf.

87 MAYER, CH. Der Beitrag des Kartellrechts zum Green Deal. *Wirtschaft und Wettbewerb*. 2021, Vol. 50, No. 5, p. 259. However, environmental protection has been included in Art. 3(3) of the European Treaty since the very beginning, so it is by no means a new goal. Removing environmental considerations from the Horizontal Guidelines and their envisaged revival 10 years later demonstrates the purpose-driven nature and political volatility of the out-of-competition goals. In addition to the general proclamation in Art. 3/3, the TFEU refers to the environment in Art.191, but this is aimed primarily at the EU institutions (and therefore the legislature) and not at private individuals or undertakings. See BKA, *c. d.*, p. 20.

harm[88] in this context of sustainability. The 2019 European Green Deal does not foresee AT being at the forefront or the main instrument for its enforcement. Rather, it is about applying existing rules in a way that supports policy objectives in favour of environmental protection.[89]

The "more holistic" approach involving out-of-competition goals has a strange flavour of sectoral regulation outside the remit of the competition authority.[90] Traditionally, such considerations of out-of-markets effects are fundamentally incompatible with the nature of the competitive assessment. AT built on the achievement of using the rule of reason in a graspable sense in relation exclusively to competition benchmarks should not give up this methodological advantage.

Sustainability can be achieved primarily through appropriate environmental protection policies and legislation. There is no fundamental contradiction between the public interest objectives (which include the protection of the environment and the sustainable development of society) and the objective of protecting competition. As a rule, the competition will also lead to the achievement of public welfare goals.[91] Within a well-designed ecological framework, competition works in favour of environmental protection, leads to efficient use of scarce resources and prevents waste.[92] The complementarity between the objectives of competition law and whatever defined goals of sustainability is undeniable in many cases.

It is generally true that consumer welfare does contain and take into account a variety of values that it can optimise, unless these values are protected by direct public instruments outside the market. Because if consumers internalize these values, they are also willing to pay for them. But if such normative values are imposed on consumers against their will in the market, it means that someone else knows better than they do what the market should properly look like which is *"*[…] *the opposite of what competition is supposed to do. Ultimately, antitrust authorities could become subject to undue influence by political stakeholders. This could eventually undermine their role as impartial competition watchdogs."*[93]

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[88] DREYER, J. – AHLENSTIEHL, E. Berücksichtigung von Umweltschutzaspekten bei der kartellrechtlichen Bewertung von Kooperationen. *Wirtschaft und Wettbewerb*. 2021, Jhrg. 71, Nr. 2, p. 79.

[89] Green Deal starts to be understood as a far-reaching regulatory framework including a very risky call for the "establishment of a new societal order"; similar attempts to introduce something like that have historically backfired so many times… See CHITI, E. Managing the Ecological Transition of the EU: the European Green Deal as a Regulatory Process. *Common Market Law Review*. 2022, Vol. 59, No. 1, pp. 19–48.

[90] So, the proposal that the Commission might also be willing to look at sustainability aspects to actually justify a clearance decision for a merger that would otherwise negatively affect competition and so to admit out-of-market "green efficiencies", such as cleaner water or air, that not only the customers of the merging parties would benefit from, but society at large; see GEISEL, B. – UWAGO, C. *Sustainability Belgium – The Impact of the Green Deal on EU Competition Law* [online]. Allen & Overy, 2021, p. 7 [cit. 2023-02-21]. Available at: http://documents.jdsupra.com/1ca18a18-d9a1-4831-9132-4f5ccf569301.pdf.

[91] Bundeskartellamt, *c. d.*, p. 6.

[92] HEINEMANN, A. Umweltschutz und Wettbewerb. *WRP*. 2021, Jhrg. 67, Nr. 4, p. I [editorial].

[93] THOMAS, *c. d.*, p. 10. Consumers value mostly (65%) positively ecological products and services even if only 26% are ready to pay more for it. They are called "elusive green consumes" (see Monopolkommission, *c. d.*, 9, p. 220). This is nevertheless not a sufficient reason to paternalistically eliminate the competition. The way forward is probably through strict environmental public standards, beyond which businesses can compete for more conscious consumers willing to pay…

Moreover, competition authorities are busy enough with the protection of competition and it is questionable whether they can at all intervene (not only formally in terms of remit but also substantively and with their professional staff) in environmental protection and other matters of general welfare.[94]

We can also encounter a more broad than narrow ecological concept of sustainability, which is even harder to operationalise; e.g. in addition to the environmental issues, the progressive Dutch Competition Authority includes biodiversity, health, animal welfare, fair trade, fair working conditions including the protection of child labour and the right to form trade unions and human rights among its sustainability objectives.[95] This is clearly an over-ambitious goal, which places demands on the Authority at the level of the government or perhaps a modern-day "Committee for the Public Good", but certainly higher than is desirable.

On 1 March 2022, the European Commission launched public consultation on the draft revised Horizontal Guidelines.[96] Although it concerns only horizontal agreements between competitors, Chapter 9 provides a number of suggestions for incorporating sustainability considerations into the competition analysis.[97]

The scope of this overview paper does not allow us to dwell on the proposal in detail, but we will note some of the more general topics. On the one hand, the proposal very sensibly interprets the legal aspects of the exceptions to the prohibition of agreements restricting competition so that they can also include environmental considerations.[98] On the other hand, it refers to very vague aspects of what is actually meant by sustainability.[99]

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[94] MAYER, *c. d.*, p. 259.

[95] ACM. Guidelines on Sustainability Agreements – Opportunities within competition law. In: *Authority for Consumers and Markets* [online]. 2021 [cit. 2023-02-21]. Available at: https://www.acm.nl/en/publications/second-draft-version-guidelines-sustainability-agreements-opportunities-within-competition-law. Apart from "stretching" the concept of sustainability to include even animal welfare (what do they actually have in common?), this approach smacks of social engineering. It is argued that *"an agreement between competitors that benefits the environment and therefore society as a whole could be allowed even if the companies' customers were left worse off"* (quotation of M. SNOEP in: JEPHCOTT, M. – SHAH, D. – KINGSBURY, L. Climate change, sustainability, and competition law: where are we now? *E.C.L.R.* 2022, Vol. 43, No. 8, pp. 366–371, p. 369). We have also had unfortunate experiences with the primacy of so-called society-wide interests over consumer interests and its consequences.

[96] Public consultation on the draft revised Horizontal Block Exemption Regulations and Horizontal Guidelines. In: *European Commission: Competition Policy* [online]. 1.3.2022 [cit. 2023-02-21]. Available at: https://competition-policy.ec.europa.eu/public-consultations/2022-hbers_en.

[97] It is noteworthy that, after the deletion of environmental agreements from the 2010 Guidelines, they reappear in the last draft.

[98] See points 541–621 of the draft. Promising might be in particular the path of "green standards" as a special kind of standardisation agreements already meeting the conditions for exemption from the prohibition under Article 101/3 TFEU. See GASSLER, M. The new sustainability chapter in the draft Horizontal Guidelines. *E.C.L.R.* 2022, Vol. 43, No. 10, pp. 449–457.

[99] See point 543 of the draft, where there is an open-ended list of aspects that could include not only climate change, eliminating pollution, reducing the exploitation of natural resources, respect for human rights, reducing food waste, facilitating the transition to healthy and nutritious food, ensuring animal welfare, but also gender equality, improving education, ensuring decent wages for workers, combating poverty, etc. Sustainability is therefore supposed to be certain, although it's very "definition" is at least uncertain. Such a broad "definition" is unreasonable and methodologically worthless. Depending on political circumstances, it may lead either to an inability to apply it at all or to its arbitrary application "as needed". Or to something "between", which is also undesirable from the point of view of legal certainty. See

As the German Monopolkommission stated,[100] balancing between sustainability and competition can and should still take place within the framework of AT. Other non-competitive effects that cannot be assessed as economic efficiency should not be taken into account by the competition authorities, in order not to compromise the protection of competition with other policy objectives. Out-of-competition considerations can be developed outside antitrust law, but should be as transparent and objectively verifiable as possible. Internalisation of (ecological, among others) externalities should be preferentially made by instruments outside of competition policy, e.g. through regulation and legislative setting of minimum standards.

4. CONCLUSION

Competition is an agnostic principle[101] serving directly or indirectly to some form of consumer welfare. Society at large and the legislature may, of course, be interested in various outcomes arising in a competitive environment. But not through antitrust, but perhaps through environmental, labour, social and other regulation. That is, through linear instruments that pursue other normative goals besides competition. The anonymous parametric influence of competition should not be conflated with the pursuit of other direct normative objectives. The evaluative considerations then confuse and contradict each other, leading to arbitrary (and ultimately political) decision-making.

The much talked-about ecological and digital transformation of society and the economy is no exception. This is just one of the additional traps set to threaten the competition order. These traps include[102] lobbyism;[103] strong state influence and a tendency towards renationalisation and remonopolisation; promotion of national points of view and national and EU-wide protectionism; problem with public welfare objectives that must first be carefully identified and then it is necessary to examine how competitive processes can be used to achieve these public welfare goals; asymmetry in the protective welfare state that listens more to employees of incumbent firms than to those who might work for would-be rivals; the complexity and interconnectedness of today's digitized economy, its increasingly networked nature, which deprives traditional AT of its effectiveness against GAFA-companies and leads to the creation of hybrid practices on the border between antitrust and regulation (like Digital Market Act and Digital Services Act); problem of competition as such and its functions in a market economy being socially and ecologically mitigated.

LITTLE, D. – BERG, W. – PRADILLE, C. – AUBRY, A. The European Commissions' Draft Guidelines on Sustainability Agreements. *E.C.L.R.* 2022, Vol. 43, No. 9, p. 407.

[100] See Monopolkommission, *c. d.*, points 474–477, p. 228.

[101] THOMAS, *c. d.*, p. 14.

[102] See KÜHLING, *c. d.*, pp. 524 ff.

[103] Facebook and Google are undertakings with the largest annual lobbying expenditure in the EU which hardly cannot be connected with their market power.

Paternalistic control of societal wellbeing, even if it pursues worthy goals to which nothing can be objected, must not deprive the consumers of the ability to finally decide about the outcomes; and precisely this ability is guaranteed by the undeformed AT.[104]

I also recommend that competition law sticks to its mission to protect a self-correcting functional competitive environment. The hardly substitutable role of competition as a discovery process should not be sacrificed in favour of arbitrarily set political achievements. It should not be "changed" and instrumentalised to achieve extra-competitive objectives that can be better addressed by direct regulation, and certainly not to comply with various vague mainstream slogans hiding interests that are not consistent (complementary) with the protection of competition. AT is neither a "collection basket" nor a "lamb of God" that takes away the sins of the world. Transformation of AT to all-purpose cure for socioeconomic ills would backfire.[105]

No branch of law or any part of legal regulation can avoid the natural evolution in response to changing social conditions. It must not, however, lose its essence and main function and dissolve into a micromanagement of current socially supported problems. Society should not deprive itself of competition as an indispensable instrument of self-regulation, nor should it weaken its legal protection. Otherwise it could easily slide into detailed central control and influence over anything, which has failed more than once in history, and one just recently.

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[104] THOMAS, *c. d.*, pp. 15, 23.

[105] See LAMMI, G. Transformation Of Antitrust Law To All-Purpose Cure For Socioeconomic Ills Would Backfire. In: *Forbes* [online]. 23.7.2019 [cit. 2023-02-21]. Available at: https://www.forbes.com/sites/wlf/2019/07/23/transformation-of-antitrust-law-to-all-purpose-cure-for-socio-economic-ills-would-backfire/?sh=451392dc74a8.

ABUSE OF DOMINANCE AND THE DMA – DIFFERING OBJECTIVES OR PREVAILING CONTINUITY?[1]

VÁCLAV ŠMEJKAL

Abstract: A new EU regulation called the Digital Markets Act aims to keep digital markets open and fair in the face of the power of the so-called internet gatekeepers. Although the DMA has, at the first sight, much in common with Article 102 TFEU, which prohibits abuse of dominant positions, it declares itself to be a different instrument pursuing different objectives and protecting different legal interests. This text seeks to identify the similarities and differences in the values and objectives pursued between Article 102 TFEU and the DMA. Both are tools in the toolbox of the European Commission's DG Competition and their complementarity is desirable in theory and practice if competition-incompatible regulation of selected online platforms is not to occur, possibly leading to their unwanted double punishment for the same thing. The analysis carried out leads to the conclusion that, despite the insistence on their separate nature and on differences in their objectives, a value consensus prevails between the two instruments.

Keywords: Digital Markets Act; Article 102 TFEU; process of competition; welfare; efficiency; consumers; contestability; fairness; modernisation of EU competition law; internet gatekeepers; online platforms

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INTRODUCTION

"A small number of large undertakings providing core platform services have emerged with considerable economic power that could qualify them to be designated as gatekeepers…" one can read in the opening recitals of the Digital Markets Act (DMA).[2] In the same place there are listed characteristics of core online platforms services provided by these gatekeepers. Most of these in one way or another tempt one to think that the new EU regulation will go for the issue of monopolization and its negatives for undistorted competition: extreme scale economies, very strong network effects, a significant degree of dependence of both business users and end users, lock-in

[1] This paper has been written as part of the 2023 Cooperatio/LAWS project of the Faculty of Law, Charles University.

[2] Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act), recitals 3–6 of the Preamble.

effects, vertical integration, and data-driven advantage…, while it is pointed out that these characteristics can be exploited by gatekeepers to harm business users and end users by decreasing their choice through unfair practices.

Although all of the above sounds familiar to anyone who deals with competition law and specifically its prohibition on abuse of dominance (i.e., with Article 102 TFEU), the EU regulation on contestable and fair markets in the digital sector, as the Digital Markets Act (DMA) is actually called, also emphasises that it aims to protect a different legal interest from that protected by classical competition rules, and it should apply without prejudice to their application.[3] Terms such as protection of competition, or undistorted competition, do not appear in the text of the DMA. Internet gatekeepers are not necessarily the dominant players in their relevant markets and the designation of their status (in Article 3 of DMA) is quite different from the determination of market dominance of an undertaking. While the application of Article 102 TFEU rests on an ex-post assessment of the individual behaviour of the dominant player, the DMA ex-ante prohibits some and imposes other conduct uniformly on all recognised gatekeepers. The legal basis of the DMA does not indicate as its legal basis any of the provisions of Chapter 1 of Title VII of TFEU (Rules of Competition), but the Article 114 TFEU, which belongs to Chapter 3 of the same Title and allows the EU institutions to adopt the measures for the approximation of the provisions… which have as their object the establishment and functioning of the EU internal market.

On the other hand, it should be noted that this new instrument will not be enforced by the European Commission's DG Internal Market, Industry, Entrepreneurship and SMEs, nor by its DG for Communications Networks, Content and Technology, but by DG Competition, in parallel with the enforcement of classical EU competition law. The above-mentioned difference regarding the anchoring in EU primary law does not separate the DMA from competition law in any significant way. *"A system ensuring that competition is not distorted"* is an integral part of the internal market under EU primary law,[4] and EU competition law has also always had as its specific objective to help build and operate the EU internal market.[5] The debate that led to the DMA proposal itself began with the notion of a *"new competition tool"*,[6] and even Competition Com-

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[3] Article 1(6) DMA reads as follows: This Regulation is without prejudice to the application of Articles 101 and 102 TFEU. It is also without prejudice to the application of: (a) national competition rules prohibiting anti-competitive agreements, decisions by associations of undertakings, concerted practices and abuses of dominant positions; (b) national competition rules prohibiting other forms of unilateral conduct insofar as they are applied to undertakings other than gatekeepers or amount to the imposition of further obligations on gatekeepers; and (c) Council Regulation (EC) No 139/2004 and national rules concerning merger control.

[4] Consolidated version of the Treaty on European Union – Protocol (No 27) on the internal market and competition. OJ C 115, 9 May 2007, pp. 309–309.

[5] Sauter for instance, maintains that the internal market is *"the pre-eminent objective"* of EU competition law. See in SAUTER W. *Coherence in EU Competition Law*. Oxford: Oxford University Press, 2016. The Factsheet of the European Parliament opens its chapter on Competition policy by stating: *"The main objective of the EU competition rules is to enable the proper functioning of the EU's internal market…"* (Competition policy. In: *European Parliament: Fact Sheets on the European Union* [online]. 2022 [cit. 2023-10-01]. Available at: https://www.europarl.europa.eu/factsheets/en/sheet/82/competition-policy).

[6] European Commission, Directorate-General for Competition – SCHWEITZER, H. *The New Competition Tool: its institutional set up and procedural design* [online]. Publications Office, 2020 [cit. 2023-10-01].

missioner M. Vestager did not shy away from the notion of competition in her speeches on the new regulation of large online platforms, presenting the DMA as a new tool of EU competition policy,[7] that is *"to complement vigilance in competition law enforcement"*.[8] In the text of a DG Competition expert, it is possible to read that the DMA is aimed at *"restricting competition in access to digital markets"*.[9] The DMA is clearly inspired by the practice of competition law application not only in Articles 5–7, which impose obligations and prohibitions on gatekeepers, but also in its Chapter V regulating the investigative, enforcement and monitoring powers of the European Commission.[10]

The question therefore arises as to how exactly to understand Commissioner Vestager's words that DMA is a new tool to the Commission's toolbox, alongside merger control, and antitrust action under Articles 101 or 102.[11] Certainly, DMA is typologically a sectoral *ex ante* regulation, the key method of achieving the desired result of which will be inherently different from *ex post* enforcement of Article 102 TFEU in individual cases of abuse of dominance. Because of the possibilities presented by the different nature of the market intervention mechanism, the EU eventually resorted to the DMA solution. At the same time, starting from the simplest definition of complementarity as *"the state of working usefully together"*,[12] it is clear that old and new tools in the toolbox of the same enforcer should have rather similar value anchoring and targeting if they are not to conflict with each other.

This study therefore asks the question of whether the values targeted by the DMA are the same or different from those according to which competition law interprets and applies Article 102 TFEU, which is also intended to prevent the largest market players from abusing their position to exploit others and foreclose the market. The following analysis seeks to establish, as its title states, whether there is a prevailing continuity or difference of objectives between Article 102 TFEU and the DMA. The research question posed in this way is undoubtedly very theoretical in part, as it aims at the doctrinal foundations of one or another legal regulation, asking about their value anchoring and

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Available at: https://op.europa.eu/en/publication-detail/-/publication/1851d6bb-14d8-11eb-b57e-01aa75ed71a1.

7 VESTAGER, M. *Address to the 6th conference of the Technical University of Denmark "The road to a better digital future"*. Copenhagen, 23 September 2022, speech/22/5763.

8 VESTAGER, M. *On the Commission proposal on new rules for digital platforms*. Brussels, 15 December 2020, statement/20/2450.

9 MUSIL, A. Legislativní návrhy aktu o digitálních trzích a aktu o digitálních službách, společná historie, rozdílné dopady [Legislative proposals for the Digital Markets Act and the Digital Services Act – Common history, different impacts]. *Antitrust*. 2021, Vol. 13, No. 2, p. 36.

10 The similarity between the concepts of competition law and the Commission's enforcement powers on the one hand, and the regulation introduced by the DMA on the other, is frequently mentioned in commentaries. See for instance: KOMNINOS, A. The Digital Markets Act (DMA) goes live. In: *White & Case* [online]. 12.10.2022 [cit. 2023-10-01]. Available at: https://www.whitecase.com/insight-alert/digital-markets-act-dma-goes-live; KOMNINOS, A. The Digital Markets Act: How Does it Compare with Competition Law? In: *SSRN* [online]. 14.6.2022 [cit. 2023-10-01]. Available at: https://ssrn.com/abstract=4136146; NERSESJAN, R. Akt o digitálních trzích vstoupil v platnost [The Digital Markets Act entered into force]. *Antitrust*. 2022, Vol. 14, No. 4, pp. 116–117.

11 VESTAGER, M. *Speech at the Fordham's 49th Annual Conference on International Antitrust Law and Policy "Antitrust for the digital age"*. New York, 16 September 2022, speech/22/5590.

12 See in *Cambridge Dictionary* [online]. Cambridge: Cambridge University Press, 2023 [cit. 2023-10-01]. Available at: https://dictionary.cambridge.org/dictionary/english/complementarity.

the resulting implications for the policies pursued in the situations of enforcement of legal rules. At the same time, however, the author is convinced that such research also has practical implications for predicting, in particular, how differently the Commission will approach the application of Article 102 TFEU to undertakings also regulated by the DMA and, more broadly, across the sector of digital economy. The apparently declared "different legal interest" that is protected by DMA and Article 102 TFEU immediately raises the question of the possibility of double jeopardy, which has been addressed quite extensively in the commentary literature since the CJEU judgment in *bpost* (C-117/20).[13] While this study does not directly extend this debate, it seeks to answer the related question of whether competition protected by Article 102 TFEU is seen in principle in the same way as that protected by the DMA, in other words, whether there are doctrinal guarantees of complementarity between the two instruments in the hands of DG Competition.

The method of finding an answer to the research question formulated in this way will consist in the comparison of two key documents from the European Commission: the Guidance of the enforcement priorities in applying Article 82 from 2009[14] and the DMA and the texts accompanying them, in particular the opinions on the issue highlighted in the speeches of the senior representatives of DG Competition of the European Commission on both documents. The basic characteristics of competition, the objectives of its protection, and the related criteria for its distortion will be selected from both sets of sources. Both obvious correspondences and possible connections will then be sought between them, as well as clear differences. On this basis, a conclusion will then be offered as to whether or not the DMA and Article 102 TFEU can be integrated into a coherent framework of protected interests and values.

1. MODERNISATION OF COMPETITION LAW IN THE COMMISSION GUIDANCE ON ARTICLE 82 ENFORCEMENT

The preparation of the Commission's Guidance on Article 82 enforcement priorities (the EC's Guidance) falls at the height of the modernisation of EU competition law that the Commission has been pursuing since the turn of the millennium. In terms of values and objectives, the essence of this modernisation was succinctly summarised in 2007 by the then Director General of DG Competition, P. Lowe: *"Consumer welfare and efficiency became the new guiding principles of EU Competition policy."*[15]

[13] RIBERA MARTÍNEZ, A. An inverse analysis of the digital markets act: applying the Ne bis in idem principle to enforcement. *European Competition Journal* [online]. 15.12.2022 [cit. 2023-10-01]. Available at: https://doi.org/10.1080/17441056.2022.2156729; KATSIFIS, D. Ne bis in idem and the DMA: the CJEU's judgments in bpost and Nordzucker – Part I, Part II. In: *The Platform Law Blog* [online]. 28.3.2022, 29.3.22022 [cit. 2023-10-01]. Available at: https://theplatformlaw.blog/2022/03/29/ne-bis-in-idem-and-the-dma-the-cjeus-judgments-in-bpost-and-nordzucker-part-ii/; NERSESJAN, *c. d.*, pp. 116–117.

[14] European Commission. Communication from the Commission – Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, (2009/C 45/02) OJ C 45/7, 24 February 2009.

[15] LOWE, P. *Consumer welfare and efficiency – New guiding principles of Competition Policy*? Munich 13th International Conference on Competition Policy, 27 March 2007.

Protection of competition, originally understood as a freedom to compete, should not be any more an aim in itself, it must be a means of the enhancing consumer welfare and of ensuring an efficient allocation of resources. Enforcers should therefore focus not on the characteristics of the competition process, but on its effects – hence the well-known *"effect-based approach"* – which, in line with the then dominant neoliberal ideology, should be quantifiable, especially in terms of price indicators, as impacts on efficiency, and hence on consumer welfare. Competition protection was to get rid of formalism, a certain arbitrariness resulting from the application of soft aspects of better or worse functioning competition, and thus to reduce the so-called type I errors (over-enforcement). This opened the way for firms, even dominant ones, to justify their behaviour on the basis of efficiency defence, i.e., winning by better performance, in short *"competition on the merits"*,[16] which included superior efficiency, higher quality of products, or significant innovation from which the consumer could benefit.[17]

Specifically for the prohibition of abuse of dominance under Article 82 TEC (now 102 TFEU), this approach emerged from the EC's Guidance and accompanying statements by DG Competition officials[18] as follows:

a) *Priority targeting of protection*: the Commission has promised to focus on those types of conduct that are most harmful to consumers. At the same time, it stressed that it would not protect competitors as a matter of principle, although the shift in focus from process to outcome was never absolute: consumer interests were, even in the Commission's view at the time, best protected by the competitive process in the EC single market (reflected, *inter alia*, in the choice of the as efficient competitor test to distinguish abuses from competition on the merits, as will be shown below). The key concern, however, is to achieve greater efficiency through competitive pressure, not fairness of the process, hence the shift in focus was also summarised as *"from fairness to welfare"*.

b) *Beneficiaries of protection and their pursued interests*: The Commission has included all customers among consumers, either at the intermediate level or at the level of final consumers or at both levels at the same time. If the declared ultimate aim was to avoid consumer harm, this therefore concerned the interest of all actors on the buyer-customer side, and not only in buying at a better price. The Commission even

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16 Competition on the merits was a key criterion in justifying the prohibition of abuse of a dominant position both before the modernisation of competition law (see judgment of the Court of 9 November 1983, *Nederlandsche Banden-Industrie-Michelin v. Commission*, 322/81 EU:C:1983:313 paras 30 and 57, as well as during its course (Judgment of the General Court of 1 July 2010, *AstraZeneca AB and AstraZeneca plc v European Commission*, T-321/05. EU:T:2010:266, para. 355) and it remains so (Judgment of the General Court of 10 November 2021, *Google Inc. and Alphabet, Inc. v. European Commission (Google Search-Shopping)*, T-612/17, para. 144).

17 For an overview of the EC's Competition policy modernisation focus on consumers and their interests, see for instance STUYCK, J. EC Competition Law After Modernisation: More Than Ever in the Interest of Consumers. *Journal of Consumer Policy*. 2005, Vol. 28, pp. 1–30.

18 In addition to the Commission's Guidance (ref. 13), it is drawn from LOWE, *Consumer welfare and efficiency*; LOWE, P. *The Commission's current thinking on Article 82*. London, BIICL Annual Trans-Atlantic Antitrust Dialogue, 15 May 2008; KROES, N. *Preliminary thoughts on policy review of article 82*. New York, Fordham Corporate Law Institute, 23 September 2005, speech/05/537; KROES, N. *Exclusionary abuses of dominance – the European Commission's enforcement priorities*. New York, Fordham University Symposium, 25 September 2008, speech/08/457.

stressed that the term "prices", or impact on prices, also included other parameters of competition, i.e., besides prices also output, innovation, the variety or quality speech of goods and services; although price indicators of efficient or inefficient behaviour by the dominant party held a privileged position. Even here, therefore, the shift towards welfare as understood by welfare economics was not absolute, since even highly efficient and price-friendly behaviour by a dominant player that appreciably restricted consumer choice could be prohibited (as in the key case of those years T-201/04 concerning the free provision of Windows Media Player when buying Windows from Microsoft).[19]

c) *Temporal aspect of anticompetitive effects*: Although it is mainly the short-term price effects of a market practice that are certain and quantifiable in microeconomic terms, the Commission has not (as the above also shows) in principle abandoned the assessment of long-term effects. Only with such an approach could it sanction dominant players for predatory pricing or rebates with a foreclosure effect, i.e., for practices which in the short term can have a positive impact on the prices paid by the customer and the final consumer. The belief that a dominant will not remain efficient, innovative, consumer-friendly and choice-friendly in the long run unless it is continuously exposed to competitive challenges has been maintained even after the EC's Guidance on Art 82 was issued.

d) *Definition of the main types of anticompetitive conduct*: It was already apparent from the title of the EC's Guidance that the focus should be on exclusionary conduct, i.e., practices that may have a foreclosure effect. Dominant undertakings were therefore in particular prohibited from impairing effective competition by foreclosing their competitors in an anti-competitive way, thus having an adverse impact on consumer welfare. Exclusive purchasing, conditional rebates, tying and bundling, predation, refusal to supply and margin squeeze were explicitly identified in the EC's Guidance as practices of a dominant undertaking which usually lead to foreclosure.

e) *The standard for determining abuse and proving it*: In this field the change should have been the most substantial, because according to all the above-mentioned aspects it could only be a change of emphasis within sufficiently broad and soft categories. Although the focus was no longer to be on the process so much as on the outcome of the competition, distinguishing one from the other was not easy even here. The Commission promised to intervene where, on the basis of cogent and convincing evidence, the allegedly abusive conduct is likely to lead to anti-competitive foreclosure. The negative effect was therefore bound to be negative, the question remained whether for competition or for consumers, or which came first. Given that this is a case of exclusionary practices leading to foreclosure, it is the competitors, their competitive pressure, and therefore competition that come first. The Commission has explained the bridge to consumers by its approach to a dominant party's conduct that will have both an efficiency enhancing as well as a foreclosure effect. The balance should have been on whether conduct with a likely foreclosure effect is at the same time likely to harm consumers. The Commission introduced the label consumer welfare balancing test for this, which

[19] Judgment of the Court of First Instance of 17 September 2007, *Microsoft Corp. v. Commission*, T-201/04, EU:T:2007:289.

was to be a uniform standard for abuses of dominance, and also for agreements and for mergers.

Rather, the progress of the evidence confirmed the weight of the competition process. If the Commission does not capture direct evidence of a strategy to exclude competitors (for instance in a dominant party's internal documents) it will have to rely on a counterfactual analysis showing that as efficient competitor would survive without the dominant party's problematic conduct, and conversely will be foreclosed if the dominant party's problematic conduct is in place for a sufficient period of time. Moreover, the effect-based approach thus conceived was extended by taking into account likely effects not only on prices but also on quality, choice, and innovation. This was especially in the long term, allowing a discussion of the degree of likelihood of these effects and, at the same time, whether competition as a process of ongoing and open competition was not being protected in the name of this distant outcome. At the very least, this approach opened up greater scope for efficiency defences of dominant firms.

Here too, however, the Commission has retained a "back door" in the form of certain naked restrictions for which, according to the Commission, it was not necessary to carry out a detailed assessment of effects, and whose anti-competitive impact (automatically also on consumer welfare) could have been inferred. As examples, the Commission cited conduct by which a dominant party prevents its customers to test products of competitors or pays a distributor or a customer to delay introduction of a competitor's product. Again, therefore, these are practices that infer subsequent consumer harm through the prior harm to the competitive process by removing competitive constraints.

2. EFFICIENCY AND CONSUMER WELFARE ALWAYS AND EVERYWHERE, OR NOT QUITE?

It is clear from the above summary of the Commission's still valid approach to assessing abuse of dominance that, even in the modernisation period, the Commission has not consistently moved to the neoliberal canon of the Chicago School of anti-trust and has been prepared to look beyond microeconomic efficiency in terms of consumer welfare gains.[20] Consumer welfare as a criterion has never been defined in any legally binding competition law instrument and similarly has never been narrowed down to an economically quantifiable consumer surplus.[21]

A detailed empirical study carried out by Stylianou and Iacovides[22] in 2021 documented that the Commission, even after issuing its Guidance, did not abandon the multitude of objectives and never shifted to one constant priority, i.e., never consistently

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[20] See for instance PAGE, W. H. The Chicago School and the Evolution of Antitrust: Characterization, Antitrust Injury, and Evidentiary Sufficiency. *Virginia Law Review*. 1989, Vol. 75, No. 7, pp. 1221–1308; KRABEC, T. *Teoretická východiska soutěžní politiky* [Theoretical foundations of competition policy]. Studie Národohospodářského ústavu Josefa Hlávky No. 1/2006. Praha, 2006.

[21] For the thorough discussion of these issues see in DASKALOVA, V. Consumer Welfare in EU Competition Law: What Is It (Not) About? *The Competition Law Review*. 2015, Vol. 11, No. 1, pp. 133–162.

[22] STYLIANOU, K. – IACOVIDES, M. C. The Goals of EU Competition Law: a Comprehensive Empirical Investigation. *Konkurrensverket* [online]. 28.1.2021, Dnr. 407/2019 [cit. 2023-10-01]. Available at: https://

shifted its focus from the process of competition to the outcome of competition, and did not consistently apply everything it emphasized in speeches and soft law in its decision-making.[23] There are also well-known decisions of the CJEU in which this Court has rejected the primacy of consumer welfare, even after the EC's Guidance was issued (e.g., *GlaxoSmithKline* or *T-Mobile Netherlands*, both from 2009).[24]

Thus, the concern for consumers emphasized in the speeches was manifested in practical terms by greater attention to consumer organizations (creation of the Consumer Liaison Officer position), prioritization and media emphasis of cases with clear impact on consumer interests, support for private enforcement (compensation for injured consumers), and possibly selection of remedies with a preference for those that were also relevant to consumers.[25] Some economization of EU competition law in the sense of seeking economically demonstrable effects of firms' conduct on competition has indeed taken place, although not in the sense of analytically calculating the effects on users or final consumers.[26] The latter were considered to have been shown to benefit from the maintenance of effective competition.

Perhaps the best example that EU competition law, despite its announced emphasis on consumer welfare, has never adopted consumer surplus as its key criterion and has not followed the US example[27] even in the years of peak modernisation is the approach of the Commission and the EU Courts to predatory pricing by dominant undertakings. Preserving as efficient competitors in the competition process has remained the main target value, hence abusive conduct has always been derived from the dominant party's prices being reduced below its average variable costs (the so-called AKZO-test)[28]

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www.konkurrensverket.se/globalassets/dokument/kunskap-och-forskning/forskningsprojekt/19-0407_the-goals-of-eu-competition-law.pdf.

[23] In the same vein Woźniak-Cichuta showed in her statistically oriented research that specifically consumer welfare was referred to only very seldom in the Commission's (merger) decisions, and CJEU during reviewing those decisions has never referred to this goal or value. See WOŹNIAK-CICHUTA, M. Teleological Perspective of EU Merger Control and its interplay with Killer Acquisitions on Digital Markets. In: ŠMEJKAL, V. (ed.). *EU Antitrust: Hot Topics & Next Steps, Proceedings of the International Conference held in Prague on January 24–25, 2022*. Prague: Faculty of Law of the Charles University, 2022, p. 157.

[24] Judgment of the Court of 6 October 2009, *GlaxoSmithKline Services Unlimited v. Commission of the European Communities*, C-501/06 P and *Commission v. GlaxoSmithKline Services Unlimited*, C-513/06 P and *European Association of Euro Pharmaceutical Companies (EAEPC) v. Commission*, C-515/06 P and *Asociación de exportadores españoles de productos farmacéuticos (Aseprofar) v. Commission*, C-519/06 P, EU:C:2009:610; Judgment of the Court of 4 June 2009, *T-Mobile Netherlands BV, KPN Mobile NV, Orange Nederland NV and Vodafone Libertel NV v. Raad van bestuur van de Nederlandse Mededingingsautoriteit*, C-8/08, EU:C:2009:343.

[25] MADILL, J. – MEXIS, A. Consumers at the heart of EU competition policy. *Competition Policy Newsletter*. 2009, No 1, pp. 27–28.

[26] In 2003, the Chief Economist and his team started to work in DG Competition; the ratio between lawyers and economists, originally 7:1, was balanced to 1:1, and the economic side of the Commission's decisions became not only more extensive but also much better. For the changes in competition policy and law during the period of its modernisation, see ŠMEJKAL, V. *Soutěžní politika a právo Evropské unie 1950–2015* [EU Competition policy and law 1950–2015]. Praha: Linde, 2016, chapters VI.–VII., pp. 156–158, 188–206.

[27] This is despite the fact that at the time of modernisation there was an attempt at some convergence with US antitrust on the part of the Commission, see e.g., MONTI, M. *Antitrust in the USA and Europe: a history of convergence*. Washington, 14 November 2001, speech/01/540.

[28] See for details DE LA MANO, M. – DURAND, B. A. *Three-Step Structured Rule of Reason to Assess Predation under Article 82* [online]. DG Competition, European Commission Office of the Chief

and has never required the recoupment of losses proof, which is mandatory in the US. However, only a sharp increase in prices after a price war has been won is an interference by the dominant party with consumer surplus, since consumers benefit from artificially low prices throughout the price war and their surplus increases as a result. However, it cannot be said that such an approach was inconsistent with what the Commission stated in its modernisation Guidance on Article 82. Indeed, even there it emphasised the monitoring of the long-term effects on consumer welfare, which included the variety of choice that in most cases will suffer by driving the losers of a price war out of the market.

Highlighting this inconsistency of practical EU competition policy with what might have been implied by some of the rather radical formulations used by DG Competition officials in the years of modernisation, is important to appreciate the debate that has developed following the massive emergence of digitalization and online platforms. On the face of it, the vocabulary of DG Competition officials had once again been radically transformed in the years leading up to the taming of the major online platforms. In the four speeches analysed above from 2005–2008, the term consumer was used 56 times and welfare 10 times. In contrast, Commissioner M. Vestager, in four speeches on anti-trust in the digital age and the DMA proposal (2019–2022),[29] mentioned consumer 11 times and welfare not once, but emphasised fairness, which was neglected in the modernisation process at the beginning of the century, 9 times. The term fairness, trailing behind contestability, is also the most frequent target term not only of the DMA but also of its dedicated "predecessor", Regulation 2019/1150 on fairness in online intermediation services.[30] The new glossary, which can be traced from documents on DG Competition's website dedicated to digital antitrust, does not discard the terms consumer and efficiency, but associates them far more often with the term's innovation, choice and fairness than with the term welfare.

Expert analyses and commentaries on digital antitrust do not always agree on whether it is necessary to move straight to "Competition Law 4.0"[31] or just to creatively adapt

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Economist Discussion Paper, 12.12.2005 [cit. 2023-10-01]. Available at: https://ec.europa.eu/dgs/competition/economist/pred_art82.pdf.

29 VESTAGER, M. *Digital Power and the service of humanity*. Copenhagen, Conference on Competition and Digitalization, 29 November 2019; VESTAGER, M. *On the Commission's proposal on new rules for digital platforms*. Brussels, statement/20/2450; VESTAGER, M. *Competition in a digital age*. European Internet Forum, 17 March 2021; VESTAGER, M. *Defending competition in a digital age*. Florence Competition Summer Conference, 24 June 2021.

30 Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services. OJ L 186/57, 11 July 2019.

31 A term borrowed from an extensive study of the German Federal Ministry for Economic Affairs and Energy (BMWi) titled *A new competition framework for the digital economy. Report by the Commission 'Competition Law 4.0'*. Berlin, September 2019. The debate on the necessity or futility of changing EU competition law due to the new characteristics of the digital environment is very extensive, see e.g., CREMER, J. – DE MONTJOYE, Y.-A. – SCHWEITZER, H. *Competition Policy for the digital era: final report*. EC Directorate-General for Competition, European Union, 2019; JENNY, F. Competition Law Enforcement and regulation for digital ecosystems. Understanding the issues, facing the challenges and moving forward. *Concurrences*. 2021, No. 3, pp. 38–62; ALEXIADIS, P. – DE STREEL, A. Designing an EU Intervention Standard for Digital Platforms. *EUI Working Paper RSCAS*. 2020/14; FUNTA, R. – HORVÁTH, M. Peculiarities of Abuse Control in the Platform Economy. *Online Journal Modelling the New Europe*. 2022, No. 40, pp. 98–110.

the existing toolbox based on the stable provisions of the TFEU, but they generally agree that some of the target values and approaches associated with EU competition law at the time of its modernisation are quite fundamentally unsuited to the digital environment. And it is far from being the case that some markets for key online services such as internet search or social networks do not compete on price, and thus it is difficult to include the impact on price in a competition analysis. What is probably most important in terms of competition law objectives is that efficiency gains and consumer surplus have ceased to coincide with functioning competition, at least in the short- and medium-term. And not just in exceptional cases, as this is a rather dominant feature of digital business. Extreme economies of scale, extraordinary network effects, vertical integration within platform ecosystems and Big Data mining are undoubtedly highly efficient for the enterprise as well as for its clients – if we traditionally calculate their total surplus or user surplus. Moreover, large online platforms with global reach are inherently more efficient than small ones.

What suffers, on the contrary, is the openness or contestability of (i.e., fair access to) these online eco-systems by other market players and, in the long run, consumer choice and very probably the pace of innovation. Thus, in the spirit of competition law modernisation, focusing on the outcome rather than the process of competition ceases to make sense in online markets. This is because the outcome may remain micro-economically efficient and attractive to consumers long after these tipped into closed ecosystems under the control of the creators and operators of some of the core platform services. Moreover, there was a legitimate concern that the spontaneous play of market forces (or market self-regulation) could not cope with this control by the largest players. The Internet gatekeepers are not guided by any neoliberal-invoked, invisible hand of the market; on the contrary, they themselves have become regulators of well-fenced markets and shapers of consumer preferences,[32] so they themselves are guiding this hand. The consequence is that *"the digitalised hand of the market alone will not ensure consumer welfare"*.[33] The question therefore arises as to whether there is not an urgent need to return fully to protecting the process of competition, if not creating it, by opening up markets to new competition, ensuring their contestability (through fair access and treatment) and, as a consequence, allowing alternatives and their unbiased choice.

3. THE DMA VALUE VECTOR

DG Competition was initially reticent to *ex ante* regulation of unfair practices, as demonstrated by its approach to Directive 2019/633, which defined and *ex ante* prohibited such practices in business-to-business relationships in the agricultural and

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[32] See in VESTAGER, M. *Digital power at the service of humanity*. Copenhagen, Conference on Competition and Digitalization, 29 November 2019.

[33] BEJČEK, J. "Digitalizace antitrustu" – móda, nebo revoluce? ["Digitization of antitrust" – fashion or revolution?]. *Antitrust*. 2018, Vol. 10, No. 3, p. VIII.

food supply chain.[34] However, the increasing digitalization of the traditional economy and the resulting call for national regulation of the largest online platforms, not least the procedural and evidentiary complexity, and thus the slowness, of the *ex post* application of competition prohibitions in this sector, have forced a somewhat paradoxical reversal of DG Competition's approach. Unfair practices, which previously should not have been a European competition problem, have now become supporting reasons for the introduction of a new *ex ante* protection instrument in the online platform sector.[35] Hence the aforementioned rise of fairness among the most frequent words in current DG Competition documents.

If, as was the case with the Commission's 2009 Guidance, we subject the text of the DMA and the Commissioner's four speeches on the digital economy and large online platforms from 2019–2022[36] to a structured analysis, we get the following picture:

a) *Priority targeting of protection*: The very name of the DMA states that its mission is contestable and fair markets and its preamble is rich with related concepts such as fairness of commercial relationship, fair economic outcomes, access to markets. It is perhaps not surprising that this extensive preamble (109 recitals) and the Commissioner's speeches are brimming with value and objective concepts, while the actual operative text of the regulation is understandably much poorer in using them. As mentioned above, the DMA's operative text consistently avoids the concepts of competition, undistorted competition, and consumer welfare or efficiency. As expected, the concepts of market power, exclusion, foreclosure, so typical of the EC's Guidance on Article 82, are also absent. However, especially from Chapter III of the DMA, titled "Practices of gatekeepers that limit contestability or are unfair", something can be deduced. Indeed, all obligations and prohibitions imposed on gatekeepers, be it the prohibition of self-preferencing, the obligation to ensure access and interoperability, the ability to uninstall pre-installed software, the ability to offer the same products and services outside the gatekeeper platform, to mine data obtained from third party sales, etc., have a common denominator, which is access to the market (i.e., its contestability) for other service providers and the users' (both business and end users') choice.

Complementing this overview of the targets with a look at Commissioner Vestager's speeches on the digital economy and the regulation of online platforms from 2019–2022, we see that we need to stop the big tech companies from wiping out competition, restore competition, recreate a competitive market, and keep markets open and competitive in the future, keeping the digital world open and fair. Business users and end users of online platforms should have access to a wide choice, they must be able to choose between tools, applications, providers and their services. This brings us from the parameters of online markets and online competition, which should therefore be open, fair and contestable, to the desired effects of such markets and their new regulation on users. And therefore it cannot be written that, by its nature, the DMA is exclusively deontological

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[34] MUSIL, *c. d.*, p. 37.

[35] Ibid.

[36] VESTAGER, *Digital power at the service of humanity*; VESTAGER, *On the Commission's proposal on new rules for digital platforms*; VESTAGER, *Competition in a digital age*; VESTAGER, *Defending competition in a digital age*.

and not at all consequentialist. Its emphasis on both processes and outcomes is already underlined in the preamble, which states that the DMA aims to *"ensure a competitive and fair digital sector in general and core platform services in particular, with a view to promoting innovation, high quality digital products and services, fair and competitive prices, and high quality and choice for end users in the digital sector"* (Recital 107).

b) *Beneficiaries of protection and their pursued interests*: Despite the above emphasis on the characteristics of competition (and no doubt also on the basis of criticism of the proposal by European consumer organisations)[37] the DMA clearly names its beneficiaries and the benefits that it will bring to them, and places end users at the forefront. Key Articles 5–7 of the DMA, containing the obligations and prohibitions imposed on gatekeepers, refer to business users 21 times, end users 43 times; in the full text of the DMA the same ratio is 171:216. Although it may have appeared from the Commissioner's speeches preceding the finalization of the DMA text that the primary mission would be for platforms to treat their business customers fairly, the order of beneficiaries has subsequently reversed and *"digital markets must be open and fair for consumers and for businesses of all sizes"*.[38]

The DMA is therefore targeting the interest of competitors and gatekeepers' business clients as well as end users, among whom real consumers are massively represented. Their interests, however, are not defined in economic terms of welfare, surplus, lower or better price or profit, but in terms such as promote access, interoperability, non-discrimination, multi-homing, and freedom (no prevention) to offer, provide, communicate, choose, use, download etc. Similarly, protection concerns their security, personal data or business secrets, not their welfare or efficiency. In the words of Commissioner Vestager: DMAs (as well as its twin DSA[39]) have one purpose: to make sure that we, as users, as customers, as businesses, have access to a wide choice of safe products and services online.[40]

c) *Temporal aspect of anticompetitive effects*: the DMA makes no mention of short- or long-term perspective, impact or interests. Of course, an ex-ante regulation prohibiting and imposing certain conduct on selected entities does not need to explicitly specify whether it is concerned with the short- or long-term effects of the regulated conduct, because what it imposes is intended to apply permanently, always, and everywhere. After all, if one wanted to be more specific, one could start from the premise that the DMA operates by analogy with naked restrictions, the always (*per se*) prohibited practices of gatekeepers which, in the words of the Commissioner, experience has shown to be *"bad for fair and open markets"*.[41] Given that Commissioner Vestager speaks in this context

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37 BEUC criticised the original DMA proposal for not focusing sufficiently on consumers' interests compared with those of business users. See BEUC. *Factsheet Proposal for an EU Digital Markets Act* [online]. April 2021 [cit. 2023-10-01]. Available at: https://www.beuc.eu/sites/default/files/publications/beuc-x-2021-031_proposal_for_an_eu_digital_markets_act.pdf.

38 VESTAGER, *Competition in a Digital Age*.

39 The Digital Services Act (DSA) is the Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services in EU law which updates the Electronic Commerce Directive of 2000 regarding illegal content, transparent advertising, and disinformation.

40 VESTAGER, *On the Commission's proposal on new rules for digital platforms*.

41 VESTAGER, *Competition in a Digital Age*.

of maintaining competition, restoring or even recreating it, there is no doubt that this is a long-term effort for long-term effects, or for the enduring quality of the competitive environment or process. Even the aforementioned values that the DMA wants to promote, i.e., innovation, high quality of digital products and services, fair and competitive prices, as well as a high quality and choice for end users in the digital sector, are more indicative of the pursuit of a long-term or permanent benefits of the online environment.

d) *Definition of the main types of problematic conduct*: The vast majority of the DMA's ordered or prohibited gatekeepers' conduct has a competitive content, is based on the previous practice of the Commission and the EU Courts (possibly also some national competition authorities) and could be interpreted with reference to exploitative and exclusionary practices known from the application of Article 102 TFEU. These are in particular cases where gatekeepers are prohibited from enforcing exclusivity by preventing the use of other platforms, payment systems, or un-installation of their pre-installed applications, furthermore by locking-in their users and preventing their multi-homing or switching (transfer of data and profiles) to competitors, and of course so-called self-preferencing, whether by setting up a ranking algorithm, enforcing a most favoured treatment clause, combining user data generated from different sources, or mining competitors' sales data through the gatekeeper platform. For example, Nersesjan's analysis of the DMA aptly showed how many of the practices regulated therein are based on the past experience of competition authorities with cases involving members of the proverbial GAFAM (Google-Apple-Facebook-Amazon-Microsoft) quartet.[42] Critically minded authors openly insist that EU competition law has already been well up to the task and it has never been convincingly demonstrated that its existing flexible framework could not scrutinize several practices described as new and peculiar to app stores.[43]

However, for some gatekeepers' obligations, such as the obligation of automatic and extensive interoperability (eliminating incompatibility of applications), combining and sharing of accumulated data, providing tools and information necessary to conduct business efficiently via the gatekeeper's platform, it may be questioned whether competition law with its current toolbox (except in specific situations leading to exclusivity and to liquidating exclusion from the market) would be sufficient. Although even in these obligations imposed by the DMA on internet gatekeepers it is possible to find a pro-competitive purpose, it is quite likely that such conduct on such a scale and terms

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[42] NERSESJAN, *c. d.*, pp. 114–115. The author shows that Article 5(3) of the DMA corresponds to one of the commitments made by the Commission in the *Amazon* case (2017); Article 6(3) of the DMA corresponds to the prohibition in the Commission's decision in *Google Android* (2018); Article 6(4) of the DMA has a parallel in the statement of objections addressed to *Apple* (2021); Article 6(5) of the DMA reflects the *Google Shopping* case decision (2017); Article 6(7) relates to the Commission's decision in *Microsoft Corp*. (2004) and a parallel can be found in the 2019 decision of the German Competition Authority in the *Facebook* case with the obligation imposed in Article 5(2)(c) DMA.

[43] RADIC, R. Final DMA: Now We Know Where We're Going, but We Still Don't Know Why. In: *The Truth of the Market* [online]. 25.3.2022 [cit. 2023-10-01]. Available at: https://truthonthemarket.com/2022/03/25/final-dma-now-we-know-where-were-going-but-we-still-dont-know-why/. In particular, the author demonstrates that various forms of self-preferencing by potential gatekeepers are already sanctioned at the European and national level under Article 102 TFEU.

requires *ex ante* sectoral regulation with all its specificities.[44] What all practices have in common (as has already been and will be pointed out) is that they are prohibited *per se*, i.e., without further qualification and of course without the need to prove their anti-competitive impact.

The common denominator of many practices is the so-called self-preferencing (although the term does not appear as such in the text of the DMA), which, as Colangelo states, *"has come to embody the zeitgeist of competition policy in digital markets"*.[45] For the behaviour of the gatekeeper, who is the creator of the core platform service (search engine, marketplace, social network…), its administrator and at the same time tries to monetise its goods or services through it in competition with others, it is a situation not dissimilar to that of a company that controls an essential facility or a standard essential patent (SEP). It must also share what it controls with its competitors on fair, reasonable, and non-discriminatory terms, so that it does not gain an automatic competitive advantage over them.[46] However, the similarity does not go far enough for the Commission to decide to suppress self-preferencing by gatekeepers under the same rules as competition law provides for abuse of essential facilities or SEPs by their holder. The general neutrality of conduct imposed on gatekeepers is actually "extra-competitive" in light of the standards invoked by the EC's Guidance on Article 82. It is not related to any qualified and demonstrated harm to competition or to consumers, it is not measured by any exclusionary effect, it is essentially a universal rule of conduct by gatekeepers towards business users of their platforms.

If one were to look for an analogy with the special responsibility of a dominant party in competition law, it would be an obligation *ad absurdum*, since the dominant party could not, under any circumstances, prioritize its own competitive advantage and pursue its own benefit.[47] With the DMA, then, to use Reyna's phrase, the parallel *"what is legal offline should also be legal online"* cannot be held.[48] Here, then, the difference between

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[44] For instance, in order to find a compatible existence with the GDPR, the DMA (Article 5(2)) allows for the relaxation of certain prohibitions on the handling of client data. If an internet gatekeeper gives an end user a choice, it can obtain their consent to process, combine and cross-use their personal data. The consent of the other party to certain conduct is irrelevant in competition law for determining liability for a competition offence.

[45] This is only inaccurately and remotely the so-called leveraging abuse, the terms of which were set out by the General Court in its decision in *Google Search Shopping*, see Judgment of the General Court of 10 November 2021, *Google Inc. and Alphabet, Inc. v. European Commission (Google Search- Shopping)*, T-612/17, EU:T:2021:763.

[46] DMA also imposes the *"fair, reasonable, and non-discriminatory"* conditions/terms – see its Article 6 (paras 11, 12) that deals with the ranking of online search services and access to software application stores.

[47] This does not mean, however, that the concept of special responsiveness of the dominant undertaking *"not to allow its conduct to impair genuine undistorted competition on the common market"* cannot facilitate the application of Article 102 TFEU to cases of abuse in the digital economy, as suggested, for example, by F. Marty. Here it is only to say that, as an interpretative concept of the DMA, special responsibility would already go far beyond the meaning it has in the application of Article 102 TFEU. See for the concept itself the judgment of the Court of 9 November 1983, *NV Nederlandsche Banden Industrie Michelin v. Commission*, 322/81, EU:C:1983:313 and for its modern interpretation: MARTY, F. Is Consumer welfare obsolete? A European Union Competition Perspective. *Prolegómenos*. 2022, Vol. 24, No. 47, pp. 55–78.

[48] REYNA, A. How to ensure Consumers get a fair share of the benefits of the digital economy? In: ŠMEJKAL, V. (ed.). *EU Antitrust: Hot Topics & Next Steps, Proceedings of the International Conference held in Prague on January 24–25, 2022*. Prague: Faculty of Law of the Charles University, 2022, p. 36.

the environment of large online platforms and competing sectors of the economy – at least in the DMA's understanding – shows up very markedly, or comes very close to the broader regulation of public utilities.

e) *The standard of the infringement and its proof*: Given the nature of *ex ante* regulation, which the DMA clearly and purposefully distinguishes from the *ex post* application of Article 102 TFEU, it is obviously a case of preferring rules over standards. In the application of Article 102, the Commission, or more definitively the Court of Justice, derived from general prohibition clauses certain standards (of predatory pricing, of rebates leading to exclusionary etc.) which they calibrated so that in specific cases the likeliness of exclusionary effect, i.e., a negative impact on competition and ultimately perhaps on consumers, could be demonstrated with sufficient probability. The DMA's divergence from such an approach is not surprising, however, as the need to "do it differently" vis-à-vis internet gatekeepers was a motive for its initiation and adoption from the outset.

DMA is not based on the general clause approach, it is about putting *per se* harmful actions in front of a bracket, or creating in advance specific content of commanded and forbidden behaviour of key players.[49] EU competition law also works in some cases with the prohibition of *per se* harmful conduct (cases of hardcore cartels, certain types of abuse of dominance, but ultimately also of prohibited mergers), but it always does so with regard to the specific circumstances of the case, it's at least reasonably foreseeable negative effects on competition, and not without exception. Unlike the application of Article 102 TFEU, the anticompetitive effect of DMA-regulated conduct, whether exploitative or exclusionary, is neither required nor demonstrated. Certain gatekeepers' conduct is presumed to be always detrimental to the fairness and contestability of markets, i.e., without further qualification, calibration, and case-specific proof.

Under the DMA, if a gatekeeper can cite mitigating circumstances that would suspend the application of an obligation against it or allow it to avoid a penalty for non-compliance, they do not consist of evidence of greater efficiency or, more generally, a clearly outweighing economic benefit to society. A gatekeeper may cite in its defence only the need not to endanger the integrity, security, and privacy of its services, the economic viability of its operation in the Union and reasons grounded in public health or public security. The Commission itself may suspend certain obligations of a gatekeeper in view of their potentially problematic impact on third parties, in particular SMEs and consumers (Articles 9–10 DMA).

4. THE POSSIBILITY OF RECONCILING BOTH APPROACHES IN THE NAME OF COHERENCE AND CONTINUITY

In view of the differences in the method of regulation, manifested most notably in the standards for proving breaches inherent in Article 102 TFEU and the DMA, the DMA is a genuinely new and different instrument, unprecedented in the application

[49] For a more detailed comparative analysis of the general clauses of competition law and the per se prohibitions of the DMA cf.: KOMNINOS, *The Digital Markets Act (DMA) goes live*; KOMNINOS, *The Digital Markets Act: How Does it Compare with Competition Law?*.

of competition law to date. It is more akin to the regulation known from the energy, telecommunications, or banking sectors than to competition protection (a similarity often mentioned in speeches by DG Competition officials). The finding of such a difference on the basis of a comparative analysis of the EC' Guidance on Article 82 and the DMA is not surprising, so the real benefit of this analysis must lie specifically in determining whether the value and target anchoring of the two instruments can bridge this gap and make the two instruments compatible in practice.

This bridging may arise from the following findings, for which support can be found in the above characteristics of the Commission's approach to the application of Article 102 TFEU and the regulation of large online platforms through the DMA:

a) Neither in the modernisation of EU competition law in the first decade of the 21st century, nor since, has a consistently consequentialist approach focused on consumer welfare prevailed in the application of Article 102 TFEU. The preservation of competitive pressures on the dominant undertaking that can be exercised by its as efficient competitors has always been present in decision-making, and the preservation of efficient competition has therefore preceded what the consumer could derive from it. The *preservation of competition as a process* based on rivalry and peer competitive pressures is also inherent in the DMA, although it calls this the contestability of markets.

b) The *fairness* of the competition process, somewhat overlooked in the modernisation of EU competition law in the wake of its effects, is back among the core values with the DMA's emphasis on the neutrality of gatekeepers' actions towards their business users and competitors. But fairness considerations have never entirely disappeared from the application of Article 102 TFEU either. The consistently invoked *competition on the merits* has always had a fairness component to it,[50] emphasising that what is not a victory based on better performance is suspect for competition law – although unlike the DMA (which identifies the ability of a competitor to challenge the gatekeeper on the *merits* of their products and services as a feature of contestability) it has yet to be shown that such an unfair victory also has anticompetitive effects.

c) Consumer interests in EU competition law have never been narrowed down to consumer welfare in the welfare economics' sense of the word, but rather to consumer well-being as a category encompassing both good price and sufficient choice from alternative offers, preservation of quality and incentives to innovate in these offers.[51] A consumer has also always meant any buyer, customer, or user, so that the intermediate addressees of the protection have always included business users. If the CJEU declared in 2011 about competition rules that *"*[t]*he function of those rules is precisely to prevent competition from being distorted to the detriment of the public interest,*

[50] As a general benchmark of whether or not a dominant undertaking is competing in accordance with competition law, the competition on the merits is also referred to extensively in both of the General Court's judgments in *Google,* see Judgment of the General Court of 10 November 2021, *Google Inc. and Alphabet, Inc. v. European Commission (Google Search- Shopping)*, T-612/17, EU:T:2021:763 and Judgment of the General Court of 14 September 2022, *Google and Alphabet v. Commission (Google Android)*, T-604/18 EU:T:2022:541.

[51] See for instance in ERZACHI, A. *EU Competition law and the digital economy*. Brussels: BEUC, 2018.

individual undertakings, and consumers, thereby ensuring the well-being of the European Union",[52] it gave them a definition that could apply without change to the regulation introduced by the DMA.

d) Even most of the practices, for the time being (the regulation is open to continuous updating) specified in the DMA, have a clear link to the previous application of Article 102 TFEU to online platforms. The DMA therefore does not aim at something fundamentally different from the foreclosure of markets and the exploitation of its participants by the arbitrary behaviour of its largest market players than Article 102 TFEU. But it does so by different methods and instruments, which the EU hopes will be easier to apply and more comprehensive, whereas the application of Article 102 TFEU would take a long time and affect fewer cases, sometimes only exceptionally and still with an uncertain outcome. As Reyna sums it up: the DMA shares similar objectives as competition law, but the way of achieving these objectives is different… which makes the DMA in its very essence and nature different from competition law.[53]

One can therefore agree with Musil that the DMA is based on the twin objectives of promoting competition and fairness[54] and add that almost ideally the DMA would be consistent in values and objectives with the concept of competition protection that prevailed in the EU before its modernisation, but even after it is not fundamentally at odds with it. On the contrary, the overlaps are considerable and, if interpreted sympathetically, should not lead to a fundamentally different understanding of what and why Article 102 TFEU and the DMA protect. This is without having to go back to the pre-modernisation and pre-EC's Guidance on Article 82 days for the interpretation and application of Article 102 TFEU. In essence, it would be enough to rid the language of EU competition law (i.e., in particular the values and objectives emphasised in the explanations) of the references and terminology that welfare economics, with its emphasis on outcomes to be examined through the efficiency of the micro-level of the individual undertaking's conduct, has tried to impose on it. In fact, if the welfarist approach is followed consistently, the fairness of the competitive process would be completely irrelevant if the result is greater efficiency and its product in the form of surplus, which will eventually be enjoyed by the consumer. And this would, of course, be in stark contradiction to the DMA, which mentions efficiency neither as an objective, nor as a criterion, nor as a justification.

An interpretation of the competition law approach to Article 102 TFEU that is not revisionist, but only critical of the influence of welfare economics, and at the same time fully compatible with the values and objectives of the DMA, was offered by Behrens as

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[52] Judgment of the Court of 17 February 2011, *Konkurrensverket v. TeliaSonera Sverige AB*, C-52/09 EU:C:2011:83, para. 22.

[53] REYNA, A. Why the DMA is much nore than competition law (and should be treated as such). In: *Chillin' Competition* [online]. 16.6.2021 [cit. 2023-10-01]. Available at: https://chillingcompetition.com/2021/06/16/why-the-dma-is-much-more-than-competition-law-and-should-not-be-treated-as-such-by-agustin-reyna/.

[54] MUSIL, *c. d.*, p. 39. And e.g., Komninos directly claims that the *"DNA of the DMA is competition law"* and the proclaimed goals of one and the other are inextricably linked. See in KOMNINOS, *The Digital Markets Act: How Does it Compare with Competition Law?*, pp. 6–7.

early as 2015[55] (i.e., completely unrelated to the new instrument of regulation of internet gatekeepers). As a supporter of German ordoliberalism and its modern interpretation for the needs of contemporary economy and competition, his recommendations are based on the conviction that a restraint of competition is characterized by a limitation of consumers' choice which depends on the rivalry among a sufficient number of producers. Hence, from an ordoliberal point of view, a restraint of competition may be found wherever (1) the number of freely competing producers is artificially reduced in ways that do not result from the normal process of competition itself, and (2) where this reduces the scope of alternatives among which consumers may freely choose.

For Behrens, it is precisely *"the scope of alternatives among which consumers may freely choose"* that is the link between allocative and dynamic efficiencies and the protection of the process of effective competition, which must not be restricted by exclusionary behaviour. Efficiencies cannot in practice be reliably measured for each case and undertaking, so they must be understood as the result of effective competition, measurable through the freedom and breadth of consumer choice. The process of competition is therefore primary, not its outcome, although the process is best viewed through the outcome in the form of consumer choice. If the process is based on rivalry and remains open to new competition, then we get at the macro-level a system of competition where consumers can really and freely decide what they want, which will also ensure the maintenance of allocative and dynamic efficiency.

Thus, by rejecting welfare economics, to which EU competition law has not fully adhered even in the modernisation era, it is possible to formulate a basis of values and objectives common to the application of Article 102 TFEU and the DMA. Both instruments in the hands of DG Competition can protect the process of competition viewed through the lens of freedom of consumer choice. In the digital economy, this of course includes both the choice of multiple search results, purchase offers or payment options, as in the brick 'n' mortar economy, but also no lock-in, free multi-homing, data portability, and un-installation of pre-installed applications. Both targeting the anti-competitive effect of individual behaviour on the one hand and maintaining fair and contestable markets on the other can meet on this value base. They can remain complementary even if the former is enforced by methods and instruments inherent in the ex-post enforcement of legal standards and the latter in the ex-ante prohibition of certain categories of behaviour.

CONCLUSION

Going beyond what has already been written in the previous Chapter 4, it can be summarised that there is much more to be said for the value continuity of Article 102 TFEU and the DMA than for the conclusion of their different objectives.

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[55] BEHRENS, P. *"Consumer choice" or "consumer welfare"? Ordoliberlism as the normative basis of EU competition law* [online]. [Speech at Svatomartinská conference]. Brno: ÚOHS, 2015 [cit. 2023-10-01]. Available at: https://www.uohs.cz/cs/informacni-centrum/konference-a-seminare/uskutecnene-akce/svatomartinska-konference-2015/predstaveni-prednasejicich-a-jejich-prezentace.html.

The language of speeches and legal documents should not obscure what they have in common in terms of their target values. Nor is the proposed default value of preserving the process of open competition, of which free consumer choice is the product and benchmark, to be seen as some entirely new approach. Rather, it is just a more solid, ideologically more clearly anchored interpretive underpinning, which recalls something that has long been there and still is… in the name of the public interest, for individual undertakings and consumers, and overall, for the well-being of the European Union. Among other things, implicit in this conclusion is that, for cases of *ne bis in idem* litigation, the conviction of the identity of protected interests between this new regulation of internet gatekeepers and Article 102 TFEU should – notwithstanding the DMA's own assertion – prevail in the future. For the sake of maintaining coherence in the use of DG Competition's toolbox and orienting businesses as to what is required of them, this would certainly be appropriate.

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EFFICIENCIES UNDER THE DIGITAL MARKETS ACT – IS THERE SPACE FOR *THE RULE OF REASON*?[1]

ONDREJ BLAŽO

Abstract: The aim of this paper is to evaluate, if competition-like efficiencies of European-style *rule of reason* shall apply also in the context of the *ex-ante* regulation by the DMA. The rationale of such consideration lies in the concept of proportionality of the EU regulation and the assumption that EU law cannot proscribe behaviour with beneficial outcomes and effects that does not have negative consequences on the internal market outweighing the positive effects.
The analysis is divided into three parts in this paper: position of the *rule of law* and the *per se* prohibition in the legal development of the EU competition law, the relationship between the DMA and competition law, including competition-based efficiencies brought in digital market cases and finally the *per se* prohibition included in the DMA.
The analysis of the development of the case law showed that in the EU competition law the principle of *per se* prohibitions was never accepted and the CJEU accepted justifications outside the text of the statutory exemptions. Even though the aim of the DMA may be the introduction of a *per se* prohibition in order to facilitate the Commission's enforcement, it cannot be surprising if the CJ EU will, in some case in the future, follow the path of the EU-style *rule of reason* in the framework of the DMA as well on the basis of proportionality principle. The lesson learned from application of *rule of reason* in the context of agreements restricting competition or as a specific form of *objective justification* in the context of abuse of dominant position does not undermine effectiveness of competition law. The *quasi per se* concept can satisfy both: it shows that it is not probable that such a behaviour will be allowed and at the same time it dodges proportionality objections because the prohibition is not, at least theoretically, absolutely, *per se*.

Keywords: digital markets; European Union law; Digital Markets Act; *per se* prohibition; economic efficiencies; *rule of reason*

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1. INTRODUCTION

In 2022, the Digital Markets Act (DMA)[2] was adopted as a political compromise between the European Union's (EU) legislatures and its final wording was significantly changed comparing to the Draft DMA[3] published in 2020 by the European Commission. The preparation and adoption of the DMA not only caught the attention of politicians, practitioners, and prospective addressees of the regulation, but was also broadly discussed in academia.[4] Not only the substantive content of the Draft DMA

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[2] Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act) OJ L 265, 12.10.2022, pp. 1–66.

[3] Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act) (Text with EEA relevance) {SEC(2020) 437 final} – {SWD(2020) 363 final} – {SWD(2020) 364 final}, 15.12.2020, COM(2020) 842 final, 2020/0374(COD).

[4] PETIT, N. The Proposed Digital Markets Act (DMA): a Legal and Policy Review. *Journal of European Competition Law and Practice* [online]. 2021, Vol. 12, No. 7, pp. 529–541 [cit. 2023-03-09]. Available at: https://academic.oup.com/jeclap/article/12/7/529/6333059; e.g., BUDZINSKI, O. – MENDELSOHN, J. *Regulating Big Tech: from Competition Policy to Sector Regulation ?* [online]. Ilmenau Economics Discussion Papers [cit. 2023-03-09]. Available at: https://www.db-thueringen.de/servlets/MCRFile NodeServlet/dbt_derivate_00054484/Diskussionspapier_Nr_154.pdf; CABRAL, L. et al. *The EU digital markets act: a report from a panel of economic experts* [online]. Luxembourg: Publications Office of the European Union, 2021 [cit. 2023-03-09]. Available at: https://publications.jrc.ec.europa.eu/repository /handle/JRC122910; KERBER, W. Taming Tech Giants with a Per-Se Rules Approach? The Digital Markets Act from the 'Rules vs. Standard' Perspective. In: *SSRN* [online]. 2.6.2021 [cit. 2023-03-09]. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3861706; DI PORTO, F. et al. "I see something you don't see": a computational analysis of the Digital Services Act and the Digital Markets Act. *Stanford Journal of Computational Antitrust* [online]. 2021, Vol. 6, No. 1, pp. 84–116 [cit. 2023-03-09]. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3780938; CENNAMO, C. – SANTALÓ, J. Value in Digital Platforms: the Choice of Tradeoffs in the Digital Markets Act. In: *SSRN* [online]. 1.7.2022, pp. 1–9 [cit. 2023-03-09]. Available at: https://papers.ssrn.com/sol3 /papers.cfm?abstract_id=4152113; COLANGELO, G. The European Digital Markets Act and Antitrust Enforcement: a Liaison Dangereuse. *European Law Review*. 2022, Vol. 47, No. 5, pp. 597–621; GEORGIEVA, Z. The Digital Markets Act Proposal of the European Commission: Ex-ante Regulation, Infused with Competition Principles. *European Papers* [online]. 2021, Vol. 6, No. 1, pp. 25–28 [cit. 2023-03-09]. Available at: https://www.europeanpapers.eu/en/system/files/pdf_version/EP_EF_2021_I_003 _Zlatina_Georgieva_00448.pdf; BANIA, K. Fitting the Digital Markets Act in the existing legal framework: the myth of the "without prejudice" clause. *European Competition Journal* [online]. 2022, pp. 1–34 [cit. 2023-03-09]. Available at: https://www.tandfonline.com/doi/full/10.1080/17441056.2022.2156730; BLAŽO, O. The Digital Markets acts: between market regulation, competition rules and unfair trade practices rules. *Strani pravni zivot* [online]. 2022, Vol. 66, No. 1, pp. 117–136 [cit. 2023-03-09]. Available at: https://doi.org/10.5937/spz66-34993; LAMADRID DE PABLO, A. – BAYÓN FERNÁNDEZ, N. Why the Proposed DMA Might Be Illegal under Article 114 TFEU, and How to Fix It. *Journal of European Competition Law and Practice* [online]. 2021, Vol. 12, No. 7, pp. 576–589 [cit. 2023-03-09]. Available at: https://academic.oup.com/jeclap/article/12/7/576/6340860; BENDIEK, A. The Impact of the Digital Service Act (DSA) and Digital Markets Act (DMA) on European Integration Policy Digital market regulation as one of five major digital policy projects of the EU 1 Annegret Bendiek Content. *Research Division*. 2021, Vol. 2, No. 2, pp. 1–15; VAN DEN BOOM, J. What does the Digital Markets Act harmonize? – exploring interactions between the DMA and national competition laws. *European Competition Journal* [online]. 2022, pp. 1–29 [cit. 2023-03-09]. Available at: https://www.tandfonline.com/doi/full /10.1080/17441056.2022.2156728; LAROUCHE, P. – DE STREEL, A. The European Digital Markets Act: a Revolution Grounded on Traditions. *Journal of European Competition Law and Practice* [online]. 2021, Vol. 12, No. 7, pp. 542–560 [cit. 2023-03-09]. Available at: https://academic.oup.com /jeclap/article/12/7/542/6357796; https://doi.org/10.1093/jeclap/lpab066; ROBERTSON, V. Delineating Digital Markets under EU Competition Law: Challenging or Futile? *The Competition Law Review*. 2017,

underwent academic scrutiny but also the more theoretical implication of the legal basis of the DMA, relation to competition rules, allegiance to the *ne bis in idem* principle, as well as rigidity of the framework of the *ex-ante* regulation.

In the context of competition law, the DMA is understood as a complement to current regulatory framework set by competition rules. Under the DMA, Article 114 of the Treaty on the Functioning of the European Union (TFEU) is its only legal basis and therefore it does not rely on the possibility to expand enforcement of competition rules under Articles 103 and 352 TFEU. Comparing to directive on B2B unfair trade practices, the concept and notion of the DMA refer to concepts of protection of competition (the title refers to "contestable and fair markets"). On the other hand, the concept of "gatekeeper" under the DMA resembles network operators under sector regulations,[5] i.e., regulation of sector is failing or still non-existing.

The aim of this paper is to evaluate, if competition-like efficiencies of European-style *rule of reason* shall apply also in the context of the *ex-ante* regulation by the DMA. The rationale of such consideration lies in the concept of proportionality of the EU regulation and the assumption that the EU law cannot proscribe behaviour with beneficial outcomes and effects that does not have negative consequences on the internal market outweighing the positive effects.

The analysis is divided into three parts in this paper: position of the *rule of law* and *per se* prohibition in the legal development of the EU competition law, the relationship between the DMA and competition law, including competition-based efficiencies brought in digital market cases, and finally the *per se* prohibition included in the DMA.

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[5] LAROUCHE – DE STREEL, *c. d.*, p. 544.

2. THE *RULE OF LAW* IN COMPETITION LAW AS A CONCEPT IN COMPETITION LAW AND *PER SE* PROHIBITION[6]

2.1 THE PRE-HISTORY AND HISTORY OF *RULE OF LAW* AND *PER SE* PROHIBITION IN THE ASSESSMENT OF AGREEMENTS RESTRICTING COMPETITION

The *rule of reason* in competition law can be traced back to United States antitrust law based on § 1 of the Sherman Act. The rule of reason appeared in American case law in 1911 in the *Standard Oil Co. of New Jersey* case.[7] According to the Supreme Court, Congress did not intend by enacting the Sherman Act to make all agreements that might worsen competition illegal, because many ordinary commercial agreements have a similar effect. The procompetitive and anticompetitive assessment of an agreement was articulated by the Supreme Court in 1918 in the *Chicago Board of Trade* case,[8] where the test of the legality of an agreement is whether the restraint merely regulates and perhaps thereby improves competition, or whether it may stifle or even destroy competition. In order to resolve this question, the court must consider: (1) the facts inherent in the type of trade to which the restraint relates; (2) the conditions prior to and after the restraint was applied; (3) the nature of the restraint and its effect, actual or potential; (4) the history of the restraint; (5) the harmful effect; (6) the reason for adopting the legal instrument; and (7) the objective or purpose pursued. However, some agreements, because of their content or nature, cannot be examined in light of the rule of reason. A clear division of agreements was made by the Supreme Court in *National Soc. of Professional Engineers*,[9] according to which the first category of agreements consists of those that are so clearly anticompetitive by their nature and their inevitable consequences that it is not necessary to scrutinize the industry in question to determine their unconscionability – they are illegal *per se*. The second group consists of those agreements whose effect on competition can be determined only by examining the facts inherent in the type of trade in question, the history of the restraint and the reasons for the restraint in question. Thus, case law in American competition law has established the doctrine of the *rule of reason* as a method of assessing each agreement in its context by balancing the anticompetitive and procompetitive effects.

The situation for European competition law is different from the US regime because, while § 1 the Sherman Act does not provide any legal exception and therefore the courts have been forced to find some rules of interpretation that would allow a less strict interpretation of the prohibition, European law does contain a legal exception to the prohibition by Article 101(1) TFEU in Article101(3) TFEU.

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6 This part is partially benefiting from publication in Slovak BLAŽO, O. Rule of Reason, pridružené obmedzenia a systém výnimiek v príprade dohôd obmedzujúcich súťaž v európskom a slovenskom práve [Rule of Reason, associated restrictions and the system of exceptions to restrictive agreements in European and Slovak law]. *Acta Facultatis Iuridicae Universitatis Comenianae*. 2012, Vol. 12, No. 1, pp. 17–81.

7 221 U.S. 1 (1910); *Standard Oil Co. of New Jersey v. United States*.

8 246 U.S. 231 (1918); *Chicago Board of Trade v. United States*.

9 135 U.S. 679 (1978); *National Soc. of Professional Engineers v. United States*.

The existence and scope of the *rule of reason* has been the subject of controversy in European competition law, both among theorists and in individual proceedings before the European institutions.

If the *rule of reason* is regarded as a principle which is the opposite of prohibition *per se*, there is no other conclusion than that the rule of reason applies in European competition law. Therefore, if the *per se* prohibition does not apply to all agreements which have the object or effect of endangering competition, that fact is itself a manifestation of the rule of reason, since it considers the rationality of sanctioning the agreement in relation to the rationality of the restrictive agreement. Providing exemption from the application of Article 101(1) TFEU in Article 101(3) TFEU by an economic assessment of the harmfulness of agreements rather than a formal assessment of the conduct of undertakings, can be regarded as a manifestation of *the rule of reason* in European law. However, directly linking the concepts of the US antitrust regime to EU competition law can be misleading and several commentators pointed to these divergences, e.g., the difference between the US *rule of reason* and the application of Article 101(3) TFEU is that the US rule of reason allows agreements that are not prohibited *per se* to be justified, whereas Article 101(3) TFEU allows all agreements, even those that are anticompetitive, to be exempted from the prohibition (Waelbroeck),[10] Article 101(3) TFEU refers to the preservation of residual competition, it also permits a substantial degree of restraint, thus falling outside the categories of the Sherman Act (McLachlan and Swann),[11] the existence of block exemptions issued to facilitate the application of Article101(3) TFEU, whereby the *rule of reason* is always applied on a case-by-case basis (Fejø).[12]

Indeed, the above arguments support the conclusion that the US *rule of reason* established by case law is not identical to the procedure envisaged by Article 101(3) TFEU. However, that fact cannot alter the postulation that, if the *rule of reason* is regarded as a general principle of law and not as a specific legal practice, the *rule of reason* as a requirement to assess an agreement according to its actual or potential consequences or its purpose, applies in European law and Article 101(3) TFEU is one of its manifestations. Most importantly, by not applying the *per se* prohibition in European law as it does in US law, the scope of the *rule of reason* is wider than in US law.

Even by not applying *ex lege* an unconditional *per se* prohibition to any category of agreements, and this is not apparent from the case law either, it can be said that European competition law is governed exclusively by the *rule of reason* principle.

First, it does not follow from the wording of Article 101 TFEU that certain acts are *per se* prohibited. All conduct must equally satisfy the conditions of Article 101(1) TFEU, and the fact that some of the most common conduct is given as an example and the alternative in the part of the sentence defining the prohibition of agreements: 'for an object or effect' do not alter that. At the same time, an agreement prohibited *per se*

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[10] FEJØ, J. *Monopoly law and market: studies of EC Competition Law with US American Antitrust Law as a frame of reference and supported by basic market economics*. Deventer, Boston: Kluwer Law and Taxation Publishers, 1990, p. 119.

[11] Ibid., p. 119.

[12] Ibid., p. 119.

would not be eligible for the exemption under Article 101(3) TFEU. However, the conditions of Article101(3) TFEU are given in general terms and apply to all agreements.

Second, there is no provision of secondary legislation which determines the category of agreements which are subject to the prohibition under Article101(1) TFEU in all circumstances.

Third, the existence of a *per se* prohibition has not been confirmed by the case law of the courts. In the *Société Technique Minière* case[13] the Court held that agreements under which a manufacturer entrusts a single distributor with the sale of its products in a specified territory are not automatically covered by the prohibition in [now Article 101(1) TFEU] and the German version having used the term *per se*.

Although it can be concluded from the above analysis that European law does not recognise *per se* prohibited practices, *hard core* cartels are almost always prohibited. Hard core restrictions:

1. are exempted from the *de minimis* doctrine and are therefore prohibited regardless of the market shares of the undertakings involved;
2. they have the object of restricting competition and therefore there is no need to examine their effect; and
3. they are grounds for withdrawal of the block exemption or for non-application of the block exemption.

While the Commission states in its Notice[14] that no agreements are a priori exempted from the scope of Article101(3) TFEU and thus rejects the existence of a *per se* prohibition rule, it further acknowledges that severe restrictions such as those blacklisted and identified as hard-core restrictions in the Commission's Communications and Guidelines are unlikely to qualify under Article 101(3) TFEU. Hard core restrictions by their very nature generally do not satisfy the first two conditions of Article101(3) TFEU and thus neither confer an economic benefit nor benefit customers and are usually not even necessary.

Summing up, considering a category of hard-core restrictions which may be considered *quasi per se* prohibited is not a manifestation of the limitation of the *rule of reason*, but of its application, since such agreements are not *per se* prohibited, but only barely justifiable.

However, this discussion seems superfluous from a practical point of view, since the US rule of reason constitutes an exemption from the prohibition despite the absence of a legal exception *expressis verbis* stated in the legislation, but EU law contains a direct exception in Article 101(3) TFEU. More important, both from a theoretical point of view and from a practical point of view, appears to be the assessment of the agreement under Article 101(1) TFEU and whether the rule of reason is also at play in this analysis. Moreover, similar analysis is relevant for Article 102 TFEU that does not contain any derogation.

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[13] Judgment of 30 June 1966, *Société Technique Minière v. Maschinenbau Ulm*, C-56/65, EU:C:1966:38.
[14] Guidelines on the application of Article 81(3) of the Treaty (OJ C 101, 27.4.2004, pp. 97–118).

2.2 THE JUDICIAL BATTLE OVER THE RULE OF REASON IN THE ASSESSMENT OF AGREEMENT RESTRICTING COMPETITION

Proponents[15] of the application of the rule of reason concede that such a rule has never been explicitly adjudicated, but its features can be found in particular in the judgments of *Société Technique Minière*, *Metro*,[16] *Nungesser*,[17] *Pronuptia*.[18] Opponents[19] of the application of a principle similar to the US *rule of reason* point in particular to the *Consten and Grundig*[20] judgment and, in particular, to the *Métropole*[21] judgment, in which the Court expressly rejected the existence of a rule of reason in European competition law.

In *Pronuptia*, the Court compared the effect of strengthening inter-brand competition as the franchisor expands the supply of its goods or services without additional investment, thereby increasing competition, and the effect of suppressing intra-brand competition, which is nevertheless justified and counterbalanced by an increase in inter-brand competition, provided that it is only aimed at protecting the franchisor's know-how and the support provided and does not entail market sharing. Similarly in *Nungesser*, the Court confirmed that restriction of intra-brand competition can be outweighed by an increase in inter-brand competition as long as there is no territorial division of markets. In *Remia*, the Court held that non-compete clauses between the seller and the buyer of an undertaking may have a positive effect on competition because they increase the number of undertakings on the market, but in order not to be prohibited under [now Article 101(1) TFEU] they must contain only the measures necessary to effect the transfer and their duration must also be limited to that purpose.

In *Gøttrup-Klim*,[22] the Court recognises that, in a market where the price of goods depends on the quantity demanded, the activities of a purchasing association, depending on the number of its members, may constitute a counterweight to the purchasing power of large producers and thus pave the way for more effective competition; this may, however, be jeopardised by the membership of a member of the purchasing association in question in another competing purchasing association, since this will jeopardise the very functioning of the association and weaken its purchasing power. The prohibition of dual membership does not therefore necessarily imply a restriction of competition

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15 E.g., VOGELAAR, F. O. W. – STUYCK, J. – REEKEN, B. L. P. VAN. *Competition law in the EU, its member states and Switzerland*. The Hague, Deventer: Kluwer Law International, W. E. J. Tjeenk Willin, 2002, p. 30; NAZZINI, R. Article 81 EC between time present and time past: a normative critique of "restriction of competition" in EU law. *Common Market Law Review* [online]. 2006, Vol. 43, No. 2, pp. 497–536 [cit. 2023-03-09]. Available at: https://kluwerlawonline.com/journalarticle/Common+Market+Law+Review/43.2/COLA2006005.

16 Judgment of 25 October 1977, *Metro v. Commission*, C-26/76, EU:C:1977:167.

17 Judgment of 8 June 1982, *Nungesser v. Commission*, C-258/78, EU:C:1982:211.

18 Judgment of 28 January 1986, *Pronuptia*, C-161/84, EU:C:1986:41.

19 E.g., FEJØ, Monopoly law and market: studies of EC Competition Law with US American Antitrust Law as a frame of reference and supported by basic market economics, p. 115; WHISH, R. *Competition Law*. London: LexisNexis, 2003, pp. 125–126.

20 Judgment of 13 July 1966, *Consten and Grundig v. Commission of the EEC*, C-56/64, EU:C:1966:41.

21 Judgment of 18 September 2001, *M6 and Others v. Commission*, T-112/99, EU:T:2001:215.

22 Judgment of 15 December 1994, *Gøttrup-Klim and Others Grovvareforeninger v. Dansk Landbrugs Grovvareselskab*, C-250/92, EU:C:1994:413.

within the meaning of [now Article 101(1) TFEU] and can even have a positive effect on competition. Obviously, the restrictions imposed on the members of an association by its statutes must be limited to what is necessary to ensure the proper functioning of the cooperative function and the maintenance of purchasing power vis-à-vis producers.

In all of the above cases, the legality of the agreement was assessed not on the basis of the exemption under [now] Article 101(3) TFEU, but only on the basis of an assessment of whether the conditions of [now] Article101(1) TFEU were met in conjunction with the objectives and aims of the [now] Union. While in the case of Article 101(3) TFEU the net negative effect of the agreement is outweighed by the technological efficiencies from which consumers partly benefit and residual competition is preserved, in the abovementioned cases there was a net positive effect of the agreement itself where competition or net consumer welfare was ultimately increased and therefore the agreement did not fall under the prohibition of Article 101(1) TFEU at all and there was no need to justify it on the basis of Article 101(3) TFEU. The *European Night Services*[23] synthetized abovementioned approaches: *"*[…] *it must be borne in mind that in assessing an agreement under Article 85(1) of the Treaty, account should be taken of the actual conditions in which it functions, in particular the economic context in which the undertakings operate, the products or services covered by the agreement and the actual structure of the market concerned* […]*, unless it is an agreement containing obvious restrictions of competition such as price-fixing, market-sharing or the control of outlets* […]*. In the latter case, such restrictions may be weighed against their claimed pro-competitive effects only in the context of Article 85(3) of the Treaty, with a view to granting an exemption from the prohibition in Article 85(1).*"[24]

In *Métropole* the Court of the First Instance (CFI) put to the end any further discussion on weighting positive and negative effects of an agreement within the scope of [now] Article 101(1) TFEU and out of the reach of [now] Article 101(3) TFEU: *"[72]* […] *in various judgments the Court of Justice and the Court of First Instance have been at pains to indicate that the existence of a rule of reason in Community competition law is doubtful … [74]* […] *It is only in the precise framework of that provision that the pro and anti-competitive aspects of a restriction may be weighed* […]*. Article 85(3) of the Treaty would lose much of its effectiveness if such an examination had to be carried out already under Article 85(1) of the Treaty.* […] *[107] As regards the objective necessity of a restriction, it must be observed that inasmuch as,* […] *the existence of a rule of reason in Community competition law cannot be upheld, it would be wrong, when classifying ancillary restrictions, to interpret the requirement for objective necessity as implying a need to weigh the pro and anti-competitive effects of an agreement. Such an analysis can take place only in the specific framework of Article 85(3) of the Treaty."*

Although the CFI rejected *rule of reason* assessment within [now] Article 101(1) TFEU it accepted the concept of *ancillary restraints* that linked to the main operation or transaction and thus their legality is assessed together with that main operation, provided they are necessary and proportionate to that main operation. The type of the

[23] Judgment of 15 September 1998, *European Night Services and Others v. Commission*, T-374/94, EU:T:1998:198.

[24] *European Night Services*, para. 136.

ancillary restrains can be identified in the block exemption regulations and merger regulation and their accompanying notices and guidelines as well as in the case law. It can be noticed that assessment of the *ancillary restrains* resembles the proportionality test described in the *Cassis de Dijon* case.[25] However, the suitability or facilitating character of a measure are not sufficient or confirming the *ancillary* character of a restriction but *"*[it] *is necessary to inquire whether that operation would be impossible to carry out in the absence of the restriction in question*. […] *the fact that that operation is simply more difficult to implement or even less profitable without the restriction concerned cannot be deemed to give that restriction the 'objective necessity' required in order for it to be classified as ancillary."*[26]

Thus, even adverse effects for the functioning of an undertaking in case of non-application of the restriction in issue does mean that the restraint is indispensable and "objective necessary" if the transaction can pursue without that restriction.[27]

The concept of the *ancillary restraints* can be expanded through *"regulatory ancillary restraints"*, i.e., restraints of competition that are necessary to pursue objectives stemming from other policies that competition law and are linked to protection of legal interests covered by other legal regulation. This concept was introduced in the *Wouters* case where restrictions found inherent to pursuing the integrity of legal professions.[28]

2.3 *RULE OF REASON* AND ABUSE OF DOMINANT POSITION

The legal regulation of the prohibition of abuse of a dominant position (Article 102 TFEU) is in a different situation compared to the prohibition of agreements restricting competition. Compared to agreements restricting competition, no exemption is directly provided in the wording of Article 102 TFEU. However, the concept of *"objective justification"* can allow the behaviour of a dominant firm to escape from consequences of violation of Article 102 TFEU. On the other hand, this concept was more volatile[29] than the concepts related to the agreements restricting competition until the European Commission cemented it in its Communication of 2009.[30] In fact, the European Commission mirrored Article 101(3) TFEU *mutatis mutandis* in the terms of abuse of a dominant position. Finally, the conditions for *objective justification* were summarized by the CJ EU in *Post Danmark: "[40]* […] *it is open to a dominant undertaking to provide justification for behaviour that is liable to be caught by the prohibition under Article 82 EC* […]. *[41] In particular, such an undertaking may demonstrate, for that purpose, either that its conduct is objectively necessary* […], *or that the exclusionary*

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[25] Judgment of 20 February 1979, *Rewe v. Bundesmonopolverwaltung für Branntwein*, C-120/78, EU:C:1979:42.

[26] Judgment of 11 September 2014, *MasterCard and Others v. Commission*, C-382/12 P, EU:C:2014:220, para. 91.

[27] *MasterCard*, para. 94.

[28] Judgment of 19 February 2002, *Wouters and Others*, C-309/99, EU:C:2002:98, para. 97.

[29] ROUSSEVA, E. The Concept of 'Objective Justification' of an Abuse of a Dominant Position: Can it help to Modernise the Analysis under Article 82 EC? *Competition Law Review*. 2006, Vol. 2, No. 2, p. 27.

[30] Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (OJ C 45, 24.2.2009, pp. 7–20).

effect produced may be counterbalanced, outweighed even, by advantages in terms of efficiency that also benefit consumers […]. *[42] In that last regard, it is for the dominant undertaking to show that the efficiency gains likely to result from the conduct under consideration counteract any likely negative effects on competition and consumer welfare in the affected markets, that those gains have been, or are likely."*[31]

Thus, the *objective justification* mirrors the content of the exemption by Article 101(3) TFEU but resemble legal techniques of the *rule of reason* based on Article 101(1) TFEU, i.e., if criteria for *objective justification* are met, the practice does not fall into the scope of the prohibition by Article 102 TFEU.

2.4 LESSONS LEARNED FROM THE *RULE OF REASON* STORY

The evaluation of possible exemptions from the prohibitions imposed by competition law as well as the identification of practices that do not fall into the scope of prohibitions themselves is linked with the overall concept of competition law and its purpose. The EU model of competition law was not developed into the form of a rigid market regulation or social engineering but accepts market players with different market power and also accepts *reasonable* restrictions of freedom of other participants of market, including customers (in broader sense).

The discussion on application of the US-style *rule of reason* within the context of agreements restricting competition entailed in its partial refusal in the terms of Article 101(1) TFEU and confirmation of the effectiveness and broad interpretation of Article 101(3) TFEU, but at the same time of confirmation of the concept of ancillary restraints, including *regulatory ancillary restraints*. These latter concepts allow practices restricting competition to escaping from prohibition if they are indispensably attached to the legal operation or enforcement of legitimated interest recognized by law.

On the other hand, the *rule of reason* out of the scope of any exemption stipulated by law was fully introduced in the context of abuse of dominant position.

The system of legal (statutory) exceptions and *rule of reason (objective)* justification in EU competition law is coherent with the whole system of the rules set for the functioning of the internal market of the EU where statutory exceptions, or more precisely allowed restrictions, are complemented by justified proportionate restrictions necessary to achieve mandatory requirements.

The DMA as a form of regulation on the internal market should not outflow from this *rule of reason* framework in order not to be challenged due to the test of proportionality of the EU regulation. This requirement is much more compelling owing to the legal basis of the DMA: Article 114 TFEU, i.e., harmonization of laws on the internal market and removing obstacles of. Therefore, a quite lengthy storyline of the consideration of the principle of *rule of reason* and rebuttal of any *per se* prohibition principle can give a lesson for the application of the DMA. The history of considering the *rule of reason* concept and tackling the *per se* concept shows that the Commission as well the CJ EU

[31] Judgment of 27 March 2012, *Post Danmark*, C209/10, EU:C:2012:172.

were not only reluctant to accept existence of the *per se* prohibitions in EU competition law, but they directly refused its application.

3. IS THE DMA A COMPETITION RULE?[32]

In general, the relation of the DMA to competition rules is crucial for several reasons. First, the internal market, in general, is the shared competence of the EU and the Member States, while protection of competition on the internal market is subject to the exclusive competence of the EU. Secondly, possible sanctions under the DMA and sanctions for infringements of competition rules can raise the question of violation of *ne bis in idem* safeguard as embedded in Article 50 of the Charter of Fundamental Rights of the European Union. Thirdly, full compliance with the DMA requirements can create a safe harbour for gatekeepers, or they can still face investigation and sanctions for violation of competition rules. For the purposes of the analysis presented by this paper, the relationship between the DMA and competition law is relevant also for the transfer of the principles of the EU-style *rule of reason*.

The DMA proposal was one of the answers to an insufficient legal framework created by the EU competition rules to tackle the market strength of digital platforms on the one hand and support the innovation, on the other.[33] This approach of tackling competition issues by "non-competition" law was also underlined by the Commission in its Communication "A competition policy fit for new challenges"[34] The Commission refers to its ongoing investigations on gatekeepers and competitive concerns regarding possible abuse of a dominant position committed by those undertaking. The proposal of the DMA was described as one of the solutions of these competition concerns: *"Once adopted, the Digital Markets Act and competition enforcement will work in tandem: the Digital Markets Act will set ex ante rules applicable to designated gatekeepers to ensure contestable and fair digital markets, while competition rules will continue to be enforceable ex post on a case-by-case basis."* Thus, the solution based on the DMA is enshrined in the topic of the Commission's Communication labelled "Keeping the market power of dominant platforms in check".

3.1 THE LEGAL BASIS FOR THE DMA AND THE LEGAL HIERARCHY

Although the DMA resembles competition rules in too many instances, including procedural rules or level of fine for infringement are drafted based on Regulation 1/2003 and obligations of gatekeepers reflect the main antitrust investigations

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[32] This part is partially based and benefitting from BLAŽO, *The Digital Markets acts…*

[33] KALESNÁ, K. – PATAKYOVÁ, M. T. Digitálne platformy: súťažné právo verzus regulácia ex ante [Digital platforms: competition law versus ex ante regulation]. *Právny obzor*. 2021, Vol. 104, No. 1, p. 37; LAROUCHE – DE STREEL, *c. d.*, p. 545.

[34] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. A competition policy fit for new challenges. COM/2021/713 final.

vis-à-vis digital platforms during the recent years.[35] The necessity of ex-ante regulation (comparing to ex-post evaluation of Article 101 and 102 TFEU) is not a convincing argument for removing the DMA from the scope of competition rules because merger control is also an ex-ante competition measure. Nevertheless, the Commission chose Article 114 TFEU as a sole legal basis and co-legislatures accepted it.

Article 114 TFEU cannot be used as a legal basis for harmonisation if there is a specific tool stipulated in the treaties ("Save where otherwise provided in the Treaties…" para. 1 thereof). Although the Damages Directive[36] is based on the dual legal basis, as for coherence of public enforcement (Article 101 et seq. TFEU) and private enforcement (based primarily on private law of the Member States), using Article 114 TFEU as a single legal basis simply out manoeuvres EU competition rules as a legal basis for the DMA. Article 114 TFEU is inapplicable in the areas of the EU's exclusive competence since it presupposes at least the possibility of the existence of national rules. Moreover, the provisions of EU competition law (Article 101 to 103 TFEU) are not even mentioned as a legal basis for the DMA and Larouche and De Streel stress that the Commission put the DMA outside of the competition law framework on substantive reasons, although being rather unconvincing and the substantive gap between competition law and the DMA is narrower than the Commission tries to show.[37] There can be seen a link with several aspects of competition law: previous decision-making practices of the Commission at digital markets where the Commission had no difficulty to define markets and dominant position at those markets,[38] aim to achieve openness and a competitive market and measures against foreclosure of a market. Also, the structure of remedies, interim measures as well as fines seem to be copied from competition rules (Article 18 et seq. DMA).[39]

The question, whether the DMA shall be an instrument of competition law or not is not purely theoretical, and it is relevant in the context of *ne bis in idem* safeguard and also regarding the question, whether fulfilment all obligations stipulated in the DMA provides a safe harbour for the gatekeeper.

The final text of the DMA in its Recital 10 tries to be clear that the DMA is no competition rule: *"*[…] *this Regulation aims to complement the enforcement of competition law…"* Recital 11 is even much more explicit: *"This Regulation pursues an objective that is complementary to, but different from that of protecting undistorted competition*

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35 BOTTA, M. Sector Regulation of Digital Platforms in Europe: Uno, Nessuno e Centomila. *Journal of European Competition Law and Practice* [online]. 2021, Vol. 12, No. 7, p. 504 [cit. 2023-03-09]. Available at: https://academic.oup.com/jeclap/article-abstract/12/7/500/6295374?redirectedFrom=fulltext.

36 Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (OJ L 349, 5.12.2014, pp. 1–19).

37 LAROUCHE – DE STREEL, *c. d.*, pp. 545–549.

38 Microsoft (Case COMP/AT.37792) Commission Decision of 24 March 2004; Microsoft (Tying) (Case COMP/AT.39530) Commission Decision of 16 December 2009; Google Search (Shopping) (Case COMP/AT.39740) Commission Decision of 27 June 2017; Google Android (Case COMP/AT.40099) Commission Decision of 18 July 2018.

39 Compare 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 (OJ L 1, 4.1.2003, pp. 1–25).

on any given market, as defined in competition-law terms, […] *This Regulation therefore aims to protect a different legal interest from that protected by those rules and it should apply without prejudice to their application."*

This "separation" from competition law envisaged in the preamble was reflected in Article 1(6) DMA, since the DMA should be applied without prejudice to the application:

a) Articles 101 and 102 TFEU;
b) national rules prohibiting anticompetitive agreements, decisions by associations of undertakings, concerted practices, and abuses of dominant positions;
c) national competition rules prohibiting other forms of unilateral conduct insofar as they are applied to undertakings other than gatekeepers or amount to imposing additional obligations on gatekeepers; and
d) Council Regulation (EC) No 139/2004[40] and national rules concerning merger control.

While Article 6(1) DMA left the EU competition rules legally untouched, it outmanoeuvred any national competition rules covering unilateral practices that can be more lenient than *ex-ante* regulation by the DMA [contrary, Article 1(5) DMA prohibits more strict *ex-ante* national regulation of gatekeepers).

The implication for the existence of a "safe harbour" appears to be obvious. Even the fulfilment of all obligations under DMA does not absolve a gatekeeper from due respect to competition rules under Article 101 and 102 TFEU. The DMA cannot serve as a "block exemption" to Article 101 or 102 TFEU since it is not based on Article 103 TFEU that provides legal basis for such an exemption and enforcement rules for Article 101 TFEU. On the other hand, following one legal rule cannot constitute a violation of another rule. In the sphere of competition law, the judgment in the *CIF* case[41] consolidates this contradiction based on the principle of rule of law. Indeed, the *CIF* case dealt with the contradiction between national and Community competition rules. However, its conclusions[42] may be useful in the DMA case as well as *mutatis mutandis*: *"Where* [gatekeeper] *engage in conduct contrary to* [Article 101 or 102 TFEU] *and where that conduct is required or facilitated by* [the DMA] [the Commission]*, one of whose responsibilities is to ensure that* [Article 101 or 102 TFEU] *is observed:*

- *has a duty to disapply the* [DMA];

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40 Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) (OJ L 24, 29.1.2004, p. 1).

41 Judgment of 9 September 2003, *CIF*, C-198/01, EU:C:2003:430.

42 *"Where undertakings engage in conduct contrary to Article 81(1) EC and where that conduct is required or facilitated by national legislation which legitimises or reinforces the effects of the conduct, specifically with regard to price-fixing or market-sharing arrangements, a national competition authority, one of whose responsibilities is to ensure that Article 81 EC is observed:*
- *has a duty to disapply the national legislation;*
- *may not impose penalties in respect of past conduct on the undertakings concerned when the conduct was required by the national legislation;*
- *may impose penalties on the undertakings concerned in respect of conduct subsequent to the decision to disapply the national legislation, once the decision has become definitive in their regard;*
- *may impose penalties on the undertakings concerned in respect of past conduct where the conduct was merely facilitated or promoted by the national legislation, whilst taking due account of the specific features of the legislative framework in which the undertakings acted;* […]*"*

- *may not impose penalties in respect of past conduct on the* [gatekeeper] *concerned when the conduct was required by the* [DMA];
- *may impose penalties on the* [gatekeeper] *concerned in respect of conduct subsequent to the decision to disapply the* [DMA]*, once the decision has become definitive in their regard;*
- *may impose penalties on the* [gatekeeper] *concerned in respect of past conduct where the conduct was merely facilitated or promoted by the* [DMA]*, whilst taking due account of the specific features of the legislative framework in which the undertakings acted."* [the text in brackets replaces the text of *CIF* ruling]

Hence, in this particular case, a possible violation of Article 101 or 102 TFEU can lead to misapplication of the provision of the DMA on obligations of a gatekeeper on the one hand, and to the impossibility to impose a fine according to Regulation (EC) No 1/2003. This imaginable outcome also flows from the "constitutional" hierarchy between Article 101 and 102 TFEU (primary law) and the DMA (secondary law). It must be admitted that the situation described above is more theoretical compared to a situation when a violation of the DMA constitutes, at the same time, an infringement of Article 101 or 102 TFEU. This paper will not tackle the *ne bis in idem* issue, that can be partially solved by case law in *Slovak Telekom*,[43] *Toshiba*,[44] *Showa Denko*,[45] *Powszechny Zakład Ubezpieczeń na Życie*,[46] *Nordzucker and Others*,[47] and *bpost*.[48]

The CJ EU had to deal with the hierarchy of competition rules and sectoral regulation[49] in several cases. In the *Telefónica* case, it rejected any consideration of previous regulatory decision of national authority since *"*[…] *the Commission's implementation of Article 102 TFEU is not subject to any prior consideration of action taken by national authorities"*.[50] The previous intervention of national regulatory authority is definitely irrelevant in cases when the authority merely encourages an undertaking to engage in still autonomous behaviour that leads to infringement of EU competition rules,[51] since the undertaking in dominant position *"have a special responsibility not to allow their conduct to impair genuine undistorted competition on the common market"*.[52] However, in *Deutsche Telekom* cases[53] the CJ EU confirmed the relevance of the prior regulatory decision and tis different approach was confirmed in *DB Station & Service*[54] case in

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43 Judgment of 25 February 2021, *Slovak Telekom*, C-857/19, EU:C:2021:139, para. 41.
44 Judgment of 14 February 2012, *Toshiba Corporation and Others*, C 17/10, EU:C:2012:72, para. 97.
45 Judgment of 29 June 2006, *Showa Denko v. Commission*, C-289/04 P, EU:C:2006:431.
46 Judgment of 3 April 2019, *Powszechny Zakład Ubezpieczeń na Życie*, C-617/17, EU:C:2019:283.
47 Judgment of 22 March 2022, *Nordzucker and Others*, C-151/20, EU:C:2022:203.
48 Judgment of 22 March 2022, *bpost*, C-117/20, EU:C:2022:202.
49 However, there were differencies form competition law identified: BEEMS, B. The DMA in the broader regulatory landscape of the EU: an institutional perspective. *European Competition Journal* [online]. 2022, p. 14 [cit. 2023-03-09]. Available at: https://www.tandfonline.com/doi/full/10.1080/17441056.2022.2129766; IBÁÑEZ COLOMO, *c. d.*, p. 569.
50 Judgment of 10 July 2014, *Telefónica and Telefónica de España v. Commission*, C-295/12 P, EU:C:2014:2062, para. 135.
51 Judgment of 14 October 2010, *Deutsche Telekom v. Commission*, C-280/08 P, EU:C:2010:603, para. 83.
52 Judgment of 9 November 1983, *Michelin v. Commission*, 322/81, EU:C:1983:313, para. 57.
53 Judgment of 14 October 2010, *Deutsche Telekom v. Commission*, C280/08 P, EU:C:2010:603, judgment of 25 March 2021, *Deutsche Telekom v. Commission*, C-152/19 P, EU:C:2021:238.
54 Judgment of 27 October 2022, *DB Station & Service*, C-721/20, EU:C:2022:832.

which the court required prior evaluation of the case by the regulatory body in order to pursue private enforcement of competition law.

3.2 WHAT IF THE DMA WAS A COMPETITION RULE?

As in some of its prohibitions the DMA mirrors previous or envisaged practice of the Commission in the field of abuse of dominance, the question is whether it also included the Commission's efficiency test employed in antitrust enforcement.

The self-preferencing ban enshrined in Article 6(5) DMA[55] apparently followed *Google Search (Shopping)* case.[56] Google suggested five justifications of its behaviour. The Commission refused all five possible justifications, however, some of them refused to accept as such and some of them refused on the basis that Google failed to prove its claims.

In *Google Search (Shopping)* case the Commission accepted, that an undertaking can apply adjustment mechanisms (para. 661) categories of specialised search results, such as shopping results, in its general search results pages when it determines that they are likely to be relevant or useful to a query (para. 662) but these practices cannot be discriminatory vis-à-vis non-platform products. However, regarding the expectations of consumers, the Commission concluded that *"*[…] *Google has provided no evidence to demonstrate that users do not expect search services to provide results from others…"* (para. 663). Since the wording is different from the previous *quasi per se* statements, does it mean that if Google succeeded in proving of the requests of the consumers, the Commission was ready on the basis that *"a requirement on Google to treat competing comparison shopping services no less favourably than its own comparison shopping service within its general search services does not generally prevent it from monetising its general search results pages"* (para. 664). Thus, contrary to this conclusion, would be the restriction non-abusive if it was the only way for monetising its general search results? And finally, the Commission argued that Google had failed to demonstrate that it cannot use the same underlying processes and methods in deciding the positioning and display of the results of its own comparison shopping service and for those of a competing comparison shopping services (these are technically feasible (para. 671). Again, on contrary, could be the technical unfeasibility a possible justification?

The obligation not to restrict, technically or otherwise, the ability of end users to switch between, and subscribe to, different software applications and services that are accessed using the core platform services of the gatekeeper, including as regards the choice of Internet access services for end users [Article 6(5) DMA] was inspired by the *Google Android* case.[57] In the part on tying relating to its proprietary mobile apps, the Commission rejected objective justifications by Google on following grounds: (1) Google had not demonstrated that the tying of the Google Search app with the Play

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[55] *"The gatekeeper shall not treat more favourably, in ranking and related indexing and crawling, services and products offered by the gatekeeper itself than similar services or products of a third party. The gatekeeper shall apply transparent, fair and non-discriminatory conditions to such ranking."*

[56] Google Search (Shopping) (Case COMP/AT.39740) Commission Decision of 27 June 2017.

[57] Google Android (Case COMP/AT.40099) Commission Decision of 18 July 2018.

Store and the tying of Google Chrome with the Play Store and the Google Search app is necessary to monetise its investment in Android and its non-revenue generating apps (para. 995); (2) Google had not demonstrated that the tying of the Google Search app with the Play Store and the tying of Google Chrome with the Play Store and the Google Search app is necessary in order to provide a consistent out-of-the-box experience for users (para. 1000); and (3) Google had not demonstrated that the tying of the Google Search app with the Play Store and the tying of Google Chrome with the Play Store and the Google Search app is necessary to avoid the need for Google to charge OEMs a fee for the Play Store (para. 1004). Hence, similarly to previous analysis regarding *Google Search (Shopping)*, in the contrary situation described in decision, would it be possible for Google to escape from prohibition if it had proved the necessity of tying (1) to monetise its investment in Android and its non-revenue generating apps; (2) to provide a consistent out-of-the-box experience for users; or (3) to avoid the need for Google to charge OEMs a fee for the Play Store?

Based of aforementioned notes, its apparent that the Commission, at least theoretically, accepted the possibility that also "gatekeeper" can escape from prohibition of abuse of dominance in the case of proving *objective justification,* even in the practices corresponding to the DMA's prohibitions.

4. THE DMA AND *PER SE* PROHIBITION

Recital 10 made it clear that the DMA regime will not accept any competition-based justification due to efficiency or objective necessity of restrictions: *"*[I]*t should apply without prejudice to Articles 101 and 102 TFEU, to the corresponding national competition rules and to other national competition rules regarding unilateral conduct that are based on an individualised assessment of market positions and behaviour, including its actual or potential effects and the precise scope of the prohibited behaviour, and* ***which provide for the possibility of undertakings to make efficiency and objective justification arguments for the behaviour in question,*** *and to national rules concerning merger control. However, the application of* ***those rules should not affect the obligations imposed on gatekeepers*** *under this Regulation and their uniform and effective application in the internal market."* [emphasis added]

Thus, the DMA is planned not to be applied completely "without prejudice" to the application of the EU or national competition rules since it aims to limit possible justifications that can be contrary to the rules of the DMA and would have been normally accepted within the application of competition law. Hence the DMA introduces a true *per se*[58] regime.

The only exceptions can be found in Article 6(4) and (7) DMA that allow gatekeepers to protect the integrity of their hardware and operation systems and to ensure that interoperability does not compromise the integrity of the operating system, virtual

[58] KERBER, *c. d.*

assistant, hardware, or software features. These measures shall be duly justified by the gatekeeper and shall be proportionate. Moreover, in the case of protection of security in relation to third-party software applications or software application stores the measures and settings cannot be default [Article 6(4) DMA]. Hoverer, these justifications are more technical justification than economic justification and can be, in fact, linked to security obligations imposed on gatekeepers.

The completely different types of exemptions can be found in Article 9 and 10 DMA. The suspension due to *"to exceptional circumstances beyond the gatekeeper's control"* allow the Commission to lift duties of a particular gatekeeper if those circumstances *"would endanger* […] *the economic viability of its operation in the Union* [Article 9(1) DMA]. *Although the suspension can resemble an individual exemption, but the necessity cannot be 'within the control of a gatekeeper'."* Nevertheless, the concept of "beyond control" is broader than *force majeure* because it can cover behaviour of other persons as well, including the behaviour of a gatekeeper's competitors. Exceptions for grounds of public health and public security (Article 10 DMA) do not have any link to the position or behaviour of a gatekeeper, as well. Both, suspension and exceptions under the DMA have to satisfy the division of powers between the EU and its Member States and principle of proportionality of EU law than considering possible justification by a gatekeeper.

Finally, the separation form the concepts of competition law was promulgated by mouthpiece of Recital 23 DMA: *"Any justification on economic grounds seeking to enter into market definition or to demonstrate efficiencies deriving from a specific type of behaviour by the undertaking providing core platform services should be discarded, as it is not relevant to the designation as a gatekeeper."*

5. CONCLUSIONS

The DMA was adopted after quite a lengthy legislative procedure when the European Parliament and the Council in several aspects changed the Commission's proposal. However, the final text of the DMA did not depart form the *per se* framework of the prohibitions as they were proposed by the Commission.

Although the aim of the DMA is to maintain "competitiveness", the legislatures stressed several times that the DMA is not a competition rules, notwithstanding that it is based on the previous competition enforcement practice, procedural rules and remedies resemble competition rules, and also the institutional framework is linked to the competition authorities. The analysis of the development of the case law showed that in EU competition law the principle of *per se* prohibitions was never accepted and the CJEU accepted justifications outside the text of the statutory exemptions. Even though the aim of the DMA may be introduction of a *per se* prohibition in order to facilitate the Commission's enforcement, it cannot be surprising if the CJ EU will, in some case in the future, follow the path of the EU-style *rule of reason* in the framework of the DMA as well. The principle of proportionality as a crucial principle of EU law may,

in some circumstance, erode the *per se* monolith of the DMA. In particular in those cases that will target behaviour similar to cases previously handled in the competition law regime.

The lesson learned from application of *rule of reason* in the context of agreements restricting competition or as is specific form of *objective justification* in the context of abuse of a dominant position does not undermine effectiveness of competition law. The *quasi per se* concept can satisfy both: it shows that it is not probable that such a behaviour will be allowed and at the same time it dodges proportionality objections because the prohibition is not, at least theoretically, absolute and *per se*.

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THE INTERPLAY BETWEEN THE ESSENTIAL FACILITY DOCTRINE AND THE DIGITAL MARKETS ACT: IMPLICATIONS TO BIG DATA[1]

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Abstract: Today many companies are collecting and extracting data from different sources to help them with their strategic decision-making. Big data is the basis of data-driven economy, bringing significant competitive advantage and market power to companies who are able to harness and exploit its potential. Digital transformation of markets and economy challenges the existing structures of consumer protection, data protection and competition law. Data is a commodity as well as a strategic asset. The term Big data refers to the amount of data that cannot be processed in a short time by traditional informatics devices. Undertakings possessing a large scale of different data have a competitive advantage.

Possible application of the essential facility doctrine to Big data issues has not attracted much attention in competition assessment. This paper will try to fill the gap by providing some insights into competition and data issues. Also, the question whether data can be considered under the essential facility doctrine will be analysed. Furthermore, it will be shown that essential facility criteria are applicable, although there is room for some adjustments to data markets. The last part of the paper will scrutinize the Digital Markets Act that tries to shed some light and clear some possible problematic behaviour of the so-called gatekeepers. The regulation leaves the conventional approach and shortens the process of tackling possible anti-competition concerns. It regulates only those undertakings that have significant impact on market and the possibility to become an important gateway in the future. When the status of a gatekeeper is established in accordance with all prescribed criteria, there will be no need to show that the elements of the essential facility doctrine are fulfilled. The essential facility doctrine will still be relevant to undertakings that are not designated as gatekeepers.

Keywords: Big data; EU competition law; essential facility doctrine; Digital Markets Act; gatekeeper

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INTRODUCTION

Technical revolution, digitalization, improvement of Internet technologies, and advances in Artificial Intelligence convey numerous benefits together with risks and concerns to the usual ways of conducting business. The role of innovation in competition cases has been challenged over the years. The dilemma is whether competition law is capable of adapting to new developments and innovations. It all centres on the flexibility of the existing rules that are able to take into consideration specificities of digital markets. It will be shown that some traditional concepts need to be improved and tailored to economic developments. Today we are witnessing some improvements in mutual understanding of competition and innovation concepts. Their interchangeability and mutual influence has been described by two different approaches. The first one is more or less the approach of the European Commission and does not analyse innovation arguments in competition assessment. A market screen and an undertaking's behaviour are scrutinized, while non-price considerations, such as quality and innovation, are left aside. The opposite view sees innovation as essential part of the competition evaluation in order to justify or condemn certain competition infringement. Although innovation has numerous benefits to the whole society, undertakings invest in the development of innovative products which attract new users.[4] Competition enforcers are confronted with challenges as on the one side they have to protect the traditional concepts of the market and on the other side open the market for new technologies and innovations. There is always the need to find the balance between the market development, flourishing of new products and services, and the protection of existing rules without suppressing innovation. With the emergence of innovative products that enhance consumer welfare, existing practices and norms are being deteriorated, especially with flow of Big data and data analytics. During the years there have been attempts to pay more attention to various data accumulation and to try to find new tools in its assessment.[5]

The paper will try to fill the gap by providing some insights into competition and data issues, particularly the question whether access to data can be considered under the essential facility doctrine. The open queries will be analysed in comparison to the newly Digital Markets Act[6] that tries to shed some light and clear some possible problematic behaviour of the so-called gatekeepers. Before going into deeper scrutiny, it is necessary to define the term Big data.

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4 See: POŠĆIĆ, A. – MARTINOVIĆ, A. Rethinking Effects of Innovation in Competition in the Era of New Digital Technologies. *InterEuLawEast*. 2020, Vol. VII, No. 2, pp. 245–261.

5 ROBERTSON, V. Antitrust Law and Digital Markets: a Guide to the European Competition Law Experience in the Digital Economy. In: KURZ, H. D. – SCHÜTZ, M. – STROHMAIER, R. – ZILIAN, S. S. (eds.). *The Routledge Handbook of Smart Technologies: an Economic and Social Perspective* [online]. New York: Routledge, 2022, Chapter 21, p. 3 [cit. 2022-02-24]. Available at: https://ssrn.com/abstract=3631002.

6 Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act). *Official Journal of the European Union*. L 265, 12.10.2022.

DEFINITION OF BIG DATA

Data is seen as a valuable asset that can bring a lot of benefits in terms of new products and services with increasing number of efficient companies.[7] Nowadays everything is just one click away. The digital platforms have been part of our everyday life. They are an instrument for our social interactions as well as shopping and working. A vast amount of data is collected and processed. This phenomenon is called Big data. There has not been a uniform definition accepted, however, various definitions have been proposed.

The main elements of Big data are summarised under the so called 4 V's: volume, variety, velocity, and value. Volume refers to the vast amounts of data that companies have collected, as facilitated by the decreased costs of data collection, storage and analyses.[8] Duhigg stresses that data trail begins before one's birth and lasts and increases until one's death.[9] Variety refers to different types of data collected. Velocity means the speed at which Big data is generated and is closely associated with time frame, as with time the value decreases. Volume, variety and velocity increase the value of data. Some authors add two more features: veracity and valence.[10] Veracity means truthfulness of data. Valence shows the level of connections between different data.[11] Definitions are focused on *"large dimension of datasets and the need to use large scale computing power and non standard methods to extract value therefrom"*.[12] Put in simple words Big data refers to the amount of data that cannot be processed in a short time by traditional informatics devices. Here, algorithms come to scene. They have to process, storage, and analyse it in order to have certain value. Small undertakings do not have sufficient tolls to process huge amounts of data in a short time. Undertakings possessing a large scale of different data may have a competitive advantage. The mass of stocked, anonymous data has certain economic value.[13] The issue is: can we force those companies to open their data sets to new entrants?

APPLICATION OF THE ESSENTIAL FACILITY DOCTRINE

The essential facility doctrine refers to the obligation of an undertaking in dominant position owning an indispensable facility to grant access to that facility to its

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7 Report from the Commission to the Council and the European Parliament: Final report on the E-commerce Sector Inquiry, Brussels, 10.5.2017, COM(2017) 229 final.

8 STUCKE, M. E. – GRUNES, A. P. *Big Data and Competiton Policy*. Oxford: Oxford University Press, 2016, p. 17.

9 Ibid., reference 25, p. 19.

10 GALLO CURCIO, M. *Big data, abuse of dominance and the enforcement of article 102 TFEU in digital markets: the Google Cases* [Bachelor's Degree Thesis]. Roma: Luiss Guido Carli, 2020. In: *Luiss Biblioteca: LuissThesis* [online]. [cit. 2022-02-24]. Available at: http://tesi.luiss.it/27445/.

11 Ibid.

12 GAMBARO, M. Big Data Competition and Market Power. *Market and Competition Law Review*. 2018, Vol. 2, No. 2, pp. 99–122.

13 INGLESE, M. *Regulating the Collaborative Economy in the European Union Digital Single Market*. Cham: Springer, 2019, p. 138.

competitors. Other undertakings need access to such a facility owned by a dominant undertaking in order to produce their products or perform services. It puts pressure on exclusionary conduct of some dominant undertaking that denies access to certain infrastructure or other form of assets. The doctrine has been developed in the context of infrastructure but also in the sphere of intellectual property rights.[14]

The first decision in this area was *Sea Containers v. Stena Sealink*,[15] where an essential facility has been defined as *"a facility or infrastructure without access to which competitors cannot provide services to their customers"*.[16]

Digital market with various collected data opens vast opportunities. Data can be considered a valuable asset that permits an undertaking to compete on the relevant market or to develop its own products or services. The dilemma is: can we apply the essential facility doctrine to situations regarding data access? Can a refusal of access to data be qualified as an abuse of a dominant position? Do we have to modify the existing criteria or maybe abandon the doctrine?

Possible application of the essential facility doctrine to Big data issues has not attracted much attention in competition assessment. We believe that its basics are still relevant for possible data access cases. Although we are referring to the "essential facility doctrine", this phrase itself has not been mentioned in the CJEU's case law. The CJEU simply speaks of "refusal to supply" or "refusals to deal".[17] In our situation, the essential facility doctrine would entail granting access to data to other competitors in order to offer equal opportunities to every undertaking. It is called "portability of data". Competition regulators pay increasing attention to it. We can easily imagine a situation where a small undertaking cannot access data owned by a dominant undertaking.[18] The data portability has not been subject to CJEU scrutiny yet.

Although data access situations have some peculiarities, the usual elements of the essential facility doctrine may still be appropriate. The conditions should be interpreted strictly. Some elements are applicable, although there is room for some adjustments to data markets. The situations may be diverse but we shall focus on the one where data as an input is really difficult to obtain or to develop on its own. In such cases, the refusal to give access to data is liable to trigger the conditions for the application of the classical essential facility doctrine. It is therefore necessary to recall the conditions for the essential facility doctrine developed in the case law.

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[14] GRAEF, I. Rethinking the Essential Facilities Doctrine for the EU Digital Economy. *TILEC Discussion Paper* [online]. 2019, No. DP2019-028, p. 1 [cit. 2022-02-24]. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3371457.

[15] Commission Decision of 21 December 1993 relating to a proceeding pursuant to Article 86 of the EC Treaty (IV/34.689 – Sea Containers v. Stena Sealink – Interim measures). *Official Journal of the European Union*. L 015, 18.1.1994, pp. 0008–0019.

[16] See DACAR, R. Is the Essential Facilities Doctrine Fit for Access to Data Cases? *CYELP*. 2022, Vol. 18, No. 1, pp. 61–81.

[17] GRAEF, *c. d.*, p. 2.

[18] CHIRITA, A. D. The Rise of Big Data and the Loss of Privacy. In: BAKHOUM, M. et al. (eds.). *Personal Data in Competition, Consumer Protection and Intellectual Property Law*. MPI Studies on Intellectual and Competition Law, Vol. 28. Cham: Springer, 2018, p. 159.

The essential facility doctrine is part of Article 102 TFEU[19] assessment. According to the well-established case law of the CJEU, there are five elements for determining whether a refusal to supply amounts to an abuse: is there a refusal to supply, does the accused undertaking have a dominant position in an upstream market, is the product indispensable to someone wishing to compete in the downstream market, would a refusal to grant access lead to elimination of effective competition in the downstream market, and can the refusal to supply be objectively justified?[20]

Although all the elements have to be determined in order to apply the essential facility doctrine, we find the indispensability test interesting. It was developed in the Bronner[21] case. The case confirmed that a refusal to supply may amount to an abuse of dominant position where the input is incapable of being duplicated or it is extremely difficult to duplicate, especially where it is physically and legally impossible and economically not feasible.[22] The case concerned denial of access to a newspaper home delivery scheme. Mediaprint had developed a home-delivery scheme for newspapers and it refused access to the newspaper published by Oscar Bronner. The Court found that the indispensability element has not been satisfied as other alternatives have been available for the delivery.[23] According to Graef, it is a rather restrictive approach but it can be justified. As argued by the Advocate General in this case, *"retaining facilities which the company developed for its own use is generally pro-competitive and in the interest of consumers, whereas granting access to the same facilities too easily to other competitors might disincentivise companies to develop new products or invest in new facilities in the long term"*.[24] The duty to grant access may accelerate competition in the short term but in the long term may put pressure on innovation process.

The famous Microsoft case[25] is also worth mentioning. Several elements attracted much attention but one that is relevant for us is the element of interoperability. The usual standards have been applied but the threshold for the fulfilment of some criteria has been lowered. The facts of the case are complicated but we shall stress only one element that can be of particular concern to us. The Sun, the undertaking that has been active in the downstream market for work group server, needed access to the interoperability information in order to allow its services to communicate to Microsoft's dominant PC operating system Windows. The General Court followed the Commission in applying lower standards for the fulfilment of essential facility conditions. With regard to the indispensability requirement, the General Court explained that in order to compete viably on the market it is necessary for competitors to be able to interoperate with Windows

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19 Treaty on the Functioning of the European Union (consolidated version 2016). *Official Journal of the European Union*. C 202, 7.6.2020.

20 WHISH, R. – BAILEY, D. *Competition Law*. Oxford: Oxford University Press, 2018, p. 716.

21 CJEU, C-7/97, *Oscar Bronner GmbH & Co. KG v. Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG, Mediaprint Zeitungsvertriebsgesellschaft mbH & Co. KG and Mediaprint Anzeigengesellschaft mbH & Co. KG*., ECLI: EU:C:1998:569.

22 WHISH – BAILEY, *c. d*., p. 719.

23 Oscar Bronner, para. 43.

24 See GRAEF, *c. d*., p. 4; and Opinion of Advocate General Jacobs on Case C-7/97 Oscar Bronner, para. 57.

25 Case T-201/04, *Microsoft Corp. v. Commission of the European Communities*, ECLI:EU:T:2007:289.

"on an equal footing".[26] The court later stated that it is not required that all competition on the market is eliminated as a result of a refusal to license. It is enough to show that the refusal is liable, or is likely to, eliminate all effective competition on the market.[27] The Bronner test requires that access is not indispensable if there are alternatives available and the General Court added that it is not necessary to show that all competition on the market is eliminated. The latter interpretation could suggest that we are witnessing a more flexible approach to refusals to deal/supply.

Further development can be found in the recent Slovak Telekom and Deutsche Telekom[28] case, where the Court and the General court among other things discussed the indispensability test. They concluded that it is not a necessary condition. The facts of the case are as follows. The case started in 2014 when the European Commission fined Deutsche Telekom and its Slovak subsidiary Slovak Telekom for abuse of dominant position.[29] Slovak Telekom, the incumbent telecom operator in Slovakia, refused to provide alternative operators with fair access to its local loop network and engaged in margin squeeze that prevented the entry of new competitors. The Commission's decision was challenged before the General Court. The General Court dismissed the argument that the Commission erred in failing to demonstrate that Slovak Telekom's local loop network was indispensable for competitors. Later the Court[30] dismissed the appeals against the General Court's rulings. The Court confirmed that the General Court had rightly rejected the argument that the Commission was required to establish that access to local loop network was indispensable before concluding on the potential abuse. The Court distinguished two possible situations of abusive behaviour regarding the infrastructure: no access and unfair access. Regarding the first, it reaffirmed the previous established conditions that need to be fulfilled: the refusal is likely to eliminate all competition on the part of the rival requesting access, the refusal cannot be objectively justified, and the access to infrastructure is indispensable for the rival to carry on its business, in that there is no actual or potential substitute for the infrastructure.[31] The last condition sets extremely high standard. It is probably because the duty to grant access can have implications on companies' property rights and may have negative impact in the long term in terms of affecting future investments and developing competing facilities.

The Court concluded that the Slovak Telekom was required to give access to rival companies under the existing telecommunications framework so the General court did not err in law when finding that the Commission was not required to demonstrate indispensability for the qualification of the practice as abuse.

There are two possible filters for the application of the Bronner criteria. One relates to the situation where the access to the facility is mandated by law, and the other where practice concerns a total refusal to make a facility available. The first one is covered

[26] Microsoft, para. 421.
[27] Microsoft, para. 563. See also GRAEF, *c. d.*, p. 5.
[28] T-851/14, *Slovak Telekom, a.s. v. European Commission*, ECLI:EU:T:2018:929.
[29] Commission decision of 22 June 2011 relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union (TFEU) (COMP/39.525 – Telekomunikacja Polska).
[30] C-165/19 P, *Slovak Telekom, a.s. v. European Commission*.
[31] Ibid., para. 55.

by the relevant legal framework. There is no need to apply the Bronner criteria as the law mandates access to certain infrastructure. The latter situation is the one that was analysed above and includes actual refusal. Circumstances where access is not totally refused are left out. The competitor can gain access to data but with some difficulties or restrictions. The Bronner criteria will be relevant only to cases including refusals to make infrastructure accessible to competitors excluding those covered by legal mandate and those where the access is allowed but with some difficulties.[32]

It is worth making a distinction between the competition *in* the market and competition *for* the market. The essential facility doctrine can encourage competition in the market. On the other side, without the duty to deal the competition for the market will be intensified. There is not enough literature explaining possible consequences concerning competition for the market. Presently, reference is given to the competition in the market. In this situation we are faced with a dominant position that will last as long as there are no new competitors wishing to enter the market. It will be especially relevant for the digital markets that are highly concentrated with strong network effects and possible leveraging effects.[33]

Exclusion of effective competition and new product requirement have to be reversed in order to fit better to digital markets.[34] The first situation is the one where the facility holder wants to reserve the downstream market for itself and denies competitors access to the input. But what if the holder of essential facility does not have the motivation to enter the downstream market or it will only potentially develop such aspirations in the future? This could be particularly interesting for the digital markets as very often competitors need access to data to enter the market where the dominant firm is not active. Does it mean that the dominant undertaking can refuse to give them access to such products? Usually, it is the new market that is interesting. Strict application of the requirements of the essential facility doctrine would mean that the first element is not satisfied. It will be relevant only in the hypothetical situation if the dominant undertaking holder of the essential facility decides to be engaged in the downstream market in the future. In this scenario we can think of a possibility of denying access. The main question is whether the essential facility holder reserves the downstream market to itself by denying a competitor access to the input. It all depends on the future plans of the essential facility holder, i.e. whether it has an incentive to be active in the new market. We believe that the essential facility should be applied also to previous situations. The new product requirement could also be problematic. Graef holds that the requirement of the new product should remain applicable in order to keep up with new developments in new markets. It means that the competitor seeking access should not be obliged to show that it will introduce a new product with the data received. The digital markets are characterised with high tipping effects. It is proposed to apply more flexible approach

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[32] MANDRESCU, D. Online platforms and the essential facility doctrine – a status update following Slovak Telekom and the DMA. In: *lexxion: The Legal Publisher* [online]. 6.4.2021 [cit. 2022-02-24]. Available at: https://www.lexxion.eu/en/coreblogpost/online-platforms-and-the-essential-facility-doctrine-a-status-update-following-slovak-telekom-and-the-dma/.

[33] GRAEF, *c. d.*, p. 9.

[34] Ibid., p. 20 and on.

to digital markets with external market failures. The new product requirement can be interpreted to include any asset involved.[35]

We have to have in mind that the essential facility doctrine has been developed before emergence of tech giants that could restrict third party access to their platforms or data. Today we are witnessing an ever-expanding need of competitors to access the platform or the data generated by the platform in order to compete on the market.

ADOPTION OF THE DIGITAL MARKETS ACT

Over the last years the European Commission is willing to promote competitive digital economy. A lot of initiatives are underway with different acts enacted. In March 2022 the Commission introduced the Digital Markets Act in order to tackle specific practices of the so-called gatekeepers.[36] It is supposed to be one of the crucial documents of the digital markets. The idea is to regulate large tech companies that have strong economic power.

Digitalization has enhanced the position of some undertakings that control whole ecosystems where it is extremely difficult or almost impossible to penetrate. The digital market is characterised by high investment costs with high entry barriers. It is the principle "winner takes it all". Besides controlling access to their platforms, tech giants become inevitable partners for numerous small undertakings and consumers. The data plays an important role, as despite having and developing new ideas, access to data for small undertakings is sometimes precluded or made difficult. Usually, the service offered by the platform is intermediation in matching the platform users in marketplace. Besides intermediation, it usually provides some services that allow it to build its own ecosystem that forecloses alternative undertakings. As some authors rightly point out, the platform sets the rule of the scene and plays the role of the player and the referee at the same time.[37]

In order to promote proper functioning of the internal market, the EU enacted a regulation in order to ensure contestability and fairness for the markets in the digital sector, especially for business users and end users of core platform services provided by gatekeepers.[38] The regulation leaves the conventional approach and shortens the process in tackling possible anti-competition concerns.[39] As it will be later explained, as soon as gatekeepers are identified they have to satisfy a set of defined obligations.

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35 Ibid., pp. 21 and 22.

36 The Regulation entered in force on 1 November 2022. However, it will be applicable from 2 May 2023. Potential gatekeepers will have time until 3 July 2023 to register their core platform services with the European Commission. The European Commission will have 45 days to assess whether the thresholds are met in order to designate a gatekeeper. After that, the gatekeeper will have to comply with the obligations until 6 March 2024.

37 PODSZUN, R. – BONGARTZ, P. – LANGENSTEIN, S. The Digital Markets Act: Moving from Competition Law to Regulation for Large Gatekeepers. *EuCML*. 2021, Vol. 7, No. 2, p. 61.

38 Preamble of the Regulation, para. 7.

39 PODSZUN – BONGARTZ – LANGENSTEIN, *c. d.*, p. 61.

The Regulation regulates only those undertakings having significant impact on market and having the possibility to become an important gateway in the future.

It has special rules for platforms that are considered to be gatekeepers. The *rationale* is to complement the existing competition rules and to cover situations which until now have been left out. The Regulation does not oppose traditional competition mechanisms. It takes inspiration from the competition cases and posed problems.[40] The Regulation explicitly states that it is without prejudice to Articles 101 and 102 TFEU (Article 1 (6)). It means, when the undertaking does not satisfy conditions to be classified as gatekeeper, the Treaty articles will still be relevant. During the years and especially with the emergence of digital markets, some short-comings have emerged. One is the definition of the relevant market and process of a market screen with difficulties of defining market shares. Digital transformation suggests new situations and possible difficulties not always connected to dominant undertaking or susceptible agreements or concentrated practices.

The main difference between the mechanisms envisaged by the Regulation is the timing. The Regulation is an *ex-ante* tool, while the "old" competition rules are *ex-post*. The Treaty articles are based on an effects-based analysis with a flexible clause, while the Regulation lists strict prohibition. The Regulation aims to tackle potential competition problems, some of which remain unresolved.[41] Despite the difference in approach, the two instruments complement each other.

The Regulation covers eight platform services. It is targeted to four tech giants called GAFAs[42] but also to other subjects. Some of them can have a bottleneck position. To be qualified as a gatekeeper, both qualitative and quantitative condition must be fulfilled.

The gatekeeper means an undertaking providing core platform services. The core platform services cover ten services (Article 2 (2)).[43] Those are basically services covered primarily by big tech companies. Some electronic communications network and streaming services as well as business to business industrial platforms are not included.[44]

Three conditions need to be satisfied in order for an undertaking to be designated as a gatekeeper: the undertaking has a significant impact on the internal market; it provides a core platform service which is an important gateway for business users to reach end users; and it enjoys an entrenched and durable position, in its operations, or it is foreseeable that it will enjoy such a position in the near future (Article 3 (1)). Those are qualitative criteria that have to be supported by quantitative criteria. The first condition will be satisfied if the undertaking achieves an annual Union turnover equal to

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40 KOMNINOS, A. The digital Markets Act and Private Enforcement: Proposals for an Optimal System of Enforcement. In: CHARBIT, N. – GACHOT, S. (eds.). *Eleanor M. Fox: Antitrust Ambassador to the World: Liber Amicorum* [online]. New York: Institute of Competition Law, 2021, p. 426 [cit. 2022-02-24]. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3914932.

41 Ibid.

42 RENDA, A. *Can the EU Digital Markets Act Achieve its Goals?* [online]. The Digital Revolution and the New Social Contract series. Centre for the Governance of Change, IE University, 2022, p. 4 [cit. 2023-02-24]. Available at: https://www.ie.edu/cgc/news-and-events/news/new-policy-paper-eu-digital-markets-act-achieve-goals/.

43 Those are: online intermediation services, online search engines, online social networking services, video-sharing platform services, number-independent interpersonal communications services, operating systems, web browsers, virtual assistants, cloud computing services and online advertising services.

44 PODSZUN – BONGARTZ – LANGENSTEIN, *c. d.*, p. 63.

or above EUR 7,5 billion in each of the last three financial years, or where its average market capitalisation or its equivalent fair market value amounted to at least EUR 75 billion in the last financial year, and it provides the same core platform service in at least three Member States. Further, the quantitative criteria specify that such an undertaking provides a core platform service which in the last financial year has at least 45 million monthly active end users established or located in the Union and at least 10,000 yearly active business users established in the Union (Article 33 (2)). These thresholds are not that high. There is the so-called anxiety of overinclusion.[45]

The undertaking providing core platform services has a possibility to present sufficiently substantiated arguments to demonstrate that, exceptionally, although it meets all the thresholds listed before, due to some special circumstances in which the relevant core platform service operates, it does not satisfy necessary requirements (Article 3 (5)) The Commission is empowered to investigate and designate as a gatekeeper, any undertaking providing core platform services even where the thresholds are not met. There is a possibility for the Commission to open its own market investigation for the purpose of examining whether an undertaking providing core platform services should be designated as a gatekeeper or in order to identify the core platform services of the gatekeeper.

A gatekeeper can have a dual role. It can provide core platform service to some business users and also be a competitor to the same users on similar or same services to the end user. The gatekeeper can exploit its dual role and gather data from its business users or end users based on own searches or searches undertaken on other downstream platforms. The Regulation intends to prevent gatekeepers from using their aggregated and non-aggregated data including personal data. The value of platform increases with the number of users. The idea is to allow other undertakings to have access on fair, reasonable, and non-discriminatory terms. It should apply to every practice that is generated by an undertaking designated as a gatekeeper. The gatekeepers should ensure free and effective interoperability to an operative system that is used for its services to others under equal conditions.

The main and only regulator is the Commission that decides whether an undertaking providing core platform services should be designated as a gatekeeper. It investigates and decides if the undertaking fulfils all qualitative criteria for being identified as a gatekeeper. After being designated as a gatekeeper, it has to comply with the obligations listed in Articles 5 and 6.

The gatekeeper shall comply with the obligations within six months after a core platform service has been listed in the designation decision. The Commission is entitled to reconsider, amend or repeal a decision especially, if there is a change in the facts on which the decision was based or it was based on incomplete or incorrect information. Every three years the Commission will reassess weather the gatekeeper satisfies those requirements as well as publish and update the list of core platform services that need to comply with obligations listed in the Regulation (Article 4).

Everything is in line with an *ex ante* assessment based on market investigations. The regulation has strict obligations for gatekeepers. It is interesting to note how the

[45] Ibid., p. 64.

Commissioner Vestager compared the introduction of the regulation with the introduction of traffic lights in some American cities in order to bring order to a previously chaotic traffic system. It is supposed to tame the tech-giants.[46]

The Regulation is seen as a means in fulfilling some gaps and a way to abandon the traditional outdated system that did not take into consideration the special power of some big techs. The system differentiates from the previous approach in several ways. The broad definition of possible abuses is replaced by very specific rules. The work of the Commission will become easier as it does not need to apply economic assessment every time. It only has to prove that quantitative and qualitative criteria are fulfilled. The Regulation is based on two blacklists. Due to the size restraints, it is not possible to list and elaborate on every obligation but basically the list reminds familiar practices of which some are still disputed.[47] It is really difficult to manage the long list provided by the Regulation. The list is influenced by some unresolved cases and is more or less case by case structured. It includes so many different practices. Some of them oblige gatekeepers not to process personal data of end users using services of third parties that make use of core platform services of gatekeepers for the purpose of online advertising or combine personal data from any further core platform service. While the list in Article 5 is self-executable,[48] Article 6 provides a black list with the possibility to be further specified.

The list includes random practices, some still dubious and unresolved. For example, one practice refers to the combination of data from different sources, which is reminiscent of an unresolved Facebook case, or anti-steering rules that are under investigation. If a list is too closely built on specific existing cases, it may not be general and abstract enough to fit other cases that might arise in the future. In any case, a long and too complex list could lead to many misinterpretations and misunderstandings in practice, thus failing to achieve its purpose. A viable alternative would be to refer to the more general business practices, instead of enumerating possible factual situations with too much details.

Despite possible difficulties in reading and understanding the Regulation, it is welcomed as from now on, the defining of a relevant market, determining market shares and other elements showing dominance for the gatekeeper will be unnecessary. If we have a gatekeeper that fulfils all the criteria, there will be no need to show that the elements of the essential facility doctrine are fulfilled. The essential facility doctrine will be relevant to undertakings that are not designated as gatekeepers.

CONCLUSION

With the emergence of Big data, competition regulators might be confronted with possible new abuses. Big data is the basis of data-driven economy, bringing significant competitive advantage and market power to companies who are able to harness

[46] Ibid., p. 60 and on.
[47] RENDA, *c. d.*, p. 5
[48] PODSZUN – BONGARTZ – LANGENSTEIN, *c. d.*, p. 61.

and exploit its potential. Given their possible effect on the competitive structure of the market, the use of Big data and its underlying technology requires the involvement of competition regulators as well. There are some reasons why competition authorities should be concerned about abuse of personal data in digital markets. One relates to the economic value of personal data to undertakings. Data becomes a new currency and a strategic asset. Despite forming part of data protection law, an undertaking can be condemned for abusing its dominant position by exploiting data about consumer preferences and their private life.[49]

Big data can create information asymmetry with negative implications on specific sectors and society as a whole. We have intellectual, consumer, and protection of privacy regulations that are fit for a particular purpose. Data alone is not the problem. What is important is the way undertakings use it. A large amount of data boosts companies' position but it is not enough just to possess a huge amount of data, it all depends on the undertaking's capability in analysing and using it.

Another problem might result from the access to data. We are confident that current competition tools are adequate and ready to deal with possible denial of data. With the classic essential facility doctrine and the introduction of the new Regulation those situations should be diminished. If we have designated gatekeepers there is no need to go into an economic benefit analysis.

There is a difference in the application of the essential facility doctrine and the Regulation, but we believe that those mechanisms can co-exist perfectly. We are facing a shift of focus from *ex post* to *ex-ante* assessment. The Regulation is seen as a regulatory tool that tackles new practices that may be too complex for a traditional competition investigation. The idea to tailor rules to specific practices is welcome but with the caveat that there always has to be place for general principles. We must not forget that the criteria set by the courts under the essential facility doctrine will still be applicable in situations where we do not have designated gatekeepers.

We believe that we need all the instruments to ensure consumer welfare, economic freedom, fairness of the market, and privacy. It is important to insist on mutual collaboration and coordination of competition and data protection regulators. The Regulation is part of the Commission's endeavour to equip Europe for digital age and to be an active actor centring on data, technology, and innovation.

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[49] CHIRITA, *c. d.*, pp. 157 and 158.

RELATIONSHIPS BETWEEN PLATFORMS AND RETAILERS (ON THE EXAMPLE OF AMAZON)

RASTISLAV FUNTA[1]

Abstract: In e-commerce, data has long played a special role as a factor in competition between different players, and its importance continues to grow. A review of the current legal situation is a basic prerequisite for any legal policy proposals to improve market access conditions and thus competition in a platform economy. As a result, the current article attempts to discuss the legal framework that governs the relevant legal relationships between platforms and retailers on the example of Amazon. The emphasis is on the scope of retailers' antitrust claims against online platforms, as well as the extent of platforms' obligations. Participation and access claims relating to data or information, as well as certain marketing services, are particularly relevant in this regard.

Keywords: antitrust; data sharing; essential facilities

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INTRODUCTION

Digitization makes a fundamental change in society that is continuously taking effect over a long period of time. Digitization triggers numerous other developments that also have an impact on the economy and society, such as the smartphone, the sharing economy, and digital platforms. Data[2] is thus a competitive factor. The concentration of data thus has the potential to monopolize markets, to solidify market structures, and to disrupt the functioning of competition. With increasing market concentration, there is a growing need to make data usable for a larger group of addressees. The special role of data in the digital transformation is supported and in some cases reinforced by its economic properties. From an economic perspective, data has the following characteristics:

- non-rivalry in consumption: data is not rival in consumption. That is, they cannot be used for only one purpose and then be consumed, but the same data set can be used at the same time by different actors for different purposes.

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[2] ANDRAŠKO, J. – MESARČÍK, M. Quo Vadis Open data? *Masaryk University Journal of Law and Technology*. 2018, No. 2, pp. 179–219.

- Excludability: The owner of a data record, who exercises actual control over it, can exclude other users from consumption by denying access to data. In this way, data can be monetized on the one hand. On the other hand, collecting data becomes economically attractive.[3]

While the non-rivalry of data in consumption indicates that data is not a scarce resource, excludability works in the opposite direction. The distinction between syntactic and semantic data is critical in this context. The data syntactic level only refers to the stringing together of zeros and ones. The semantic level, on the other hand, focuses on the data's concrete meaning, or the information that can be extracted from it. On a semantic level, intellectual property rights can certainly exist and be enforced. While no one can thus be excluded from collecting data, exclusion is possible in the case of information or databases generated from it.[4] The latter are understood to be data arranged systematically or methodically, where individual elements of the database can be accessed as needed. Even in the case of databases, it is precisely not the individual elements (data points) that are protected, but only the database as a whole and thus the effort required to create it.

Data can be used positively in a variety of ways by several users at the same time. However, access to the pertinent data is first required in order for this to actually occur. Digital platforms are crucial for data collection: A digital platform has access to the corresponding data of all its user groups because it serves as an intermediary between various user groups.[5] This typically means that they can use the data for their own commercial success in addition to processing transactions between users on the platform and third-party retailers. This is especially true for vertically integrated platforms like Amazon that, in addition to brokering transactions between parties, also act as retailers or service providers.[6]

Potential market-dominant platform practices in this context initially relate, for instance, to the fact that the platform determines presumably successful products, including a corresponding price, through the evaluation of data, then offers them on its own, and excludes retailers with similar products altogether or only after a delay. Additionally, it allows for the selective transfer of data and information to specific providers, giving them a competitive edge over rivals who lack the necessary resources. Additionally, a retailer's commercial success is also influenced by how prominently its products are presented to customers who conduct product searches. The platform can effectively affect its own sales by choosing which data is displayed to consumers as well as which data is included in the ranking. The platform may be able to influence competition in this way.

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[3] FUNTA, R. – KLIMEK, L. Data and e-commerce: an economic relationship. *Danube*. 2021, Vol. 12, No. 1, pp. 33–44.

[4] KARÁCSONY, G. Managing personal data in a digital environment – did GDPR's concept of informed consent really give us control? In: FUNTA, R. (ed.). *Computer law, AI, data protection & the biggest tech trends*. Brno: MSD, 2019, pp. 39–50; ŽÁRSKÁ, P. Databases consisting of personal data: promising financial opportunity for member states? *The Lawyer Quarterly*. 2022, Vol. 12, No. 2, pp. 159–172.

[5] FUNTA, R. Economic and Legal Features of Digital Markets. *Danube*. 2019, Vol. 10, No. 2, pp. 173–183.

[6] FUNTA, R. Amazon a presadzovanie antitrustového práva [Amazon and antitrust law enforcement]. *Justičná revue*. 2018, Vol. 70, No. 11, pp. 1215–1229.

The European Commission has started proceedings to determine whether Amazon abuses the information gathered on Amazon Marketplace to gain a competitive advantage.[7] In any case, it is claimed that even prior to the start of the legal proceedings, there were concerns about the rising costs for data access and advertising services. In the event of abuse of a dominant position, access claims for the data collected by a platform can in principle arise from national and European antitrust law.[8] According to Article 3(1) Regulation 1/2003, both legal regimes are to be applied alongside each other, whereby the Member States may enact and apply stricter national competition law[9] to prevent unilateral actions (Article 3(2) Sentence 2 Regulation 1/2003). If the facts of Article 102 TFEU are fulfilled, the European Commission can oblige the dominant company to put an end to the infringement. Both in the Member States and at the European level, data sets and their accessibility have already been the subject of official decisions and court rulings.[10] Another example concerns a decision by the European Commission, which recognized the sharing of data as a solution to an antitrust problem in the context of merger control.[11]

In the following we discuss the legal framework that governs the relevant relationships between platforms and retailers. In order to determine the antitrust potential for eliminating the competitive challenges, it is discussed below whether and to what extent Amazon has a dominant position in the market. The emphasis is on the breadth of retailers' antitrust claims against online platforms and the extent of platforms' obligations. In this regard, participation and access rights relating to data or information, as well as certain marketing services, are particularly relevant. At the end we also discuss approaches to dealing with the digital platform economy.

AMAZON AS DOMINANT MARKET PLAYER

To determine whether Amazon has an antitrust dominant position, the relevant criteria for determining such a position must first be identified. The assessment of whether Amazon meets these criteria will be based on the fact that Amazon is a platform for retailers, provides services to sellers on its marketplace, and acts as a retailer itself. This means that it must be determined whether and to what extent these markets must be considered separately or analyzed as a whole. A dominant market position entails a special responsibility for a company not to impair competition on the corresponding

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7 European Commission, AT.40462 Amazon Marketplace and AT.40703 Amazon – Buy Box.

8 MISKOLCZI-BODNÁR, P. Visszaélés gazdasági erőfölénnyel [Abuse of Economic Dominance]. In: TÓTH, A. – JUHÁSZ, M. – JUHÁSZ, D. (eds.). *Kommentár a tisztességtelen piaci magatartás és versenykorlátozás tilalmáról szóló 1996*. évi LVII. Törvényhez: Gazdasági Versenyhivatal, 2014, pp. 280–320.

9 MISKOLCZI-BODNÁR, P. Indemnification and harm caused by infringement of Antitrust rules from Private Law point of view. In: OSZTOVITS, A. (ed.). *Recent developments in European and Hungarian competition law*. Budapest: Károli Gáspár Református Egyetem Állam- és Jogtudományi Kar, 2012, pp. 26–40.

10 French Competition Authority, Decision No. 14-MC-02 of 9 Sep. 2014 relating to a request for interim measures presented by the company Direct Energie.

11 European Commission, decision of 02/19/2008, COMP/M.4726 – Thompson Corporation/Reuters Group.

or, if applicable, an adjacent market through its actions. Reduced to the essentials, it follows from the dominant position that this position must not be exploited to the detriment of others.

Any antitrust analysis must begin with a definition of the market because a dominant position can only be established by defining a market that is both substantively and geographically relevant in terms of antitrust law.[12] The market power concept states that the relevant action must have an impact on the market in question. The market's definition reflects the substitutability, or replaceability, of the related goods or services. Only when the corresponding economic goods can be sufficiently substituted does competitive pressure develop.

High market shares over a long period of time are often an indication of a dominant position. The ECJ and the General Court assume that a particularly high market share is more than 50 percent. From a market share of around 40 percent, a dominant position can be assumed if there are additional circumstances, e.g., a high market share gap to the next largest competitor.[13] However, a thorough examination of market conditions is also required. This includes an assessment of the market structure, market participant behavior, and actual market results, as well as costs of market entry for third parties and other barriers to market entry. There is a scarcity of data available to determine Amazon's precise market share. Nonetheless, legally relevant conclusions can be drawn from the available data, especially because the available data suggest reliable minimum market share values. With the digitalization of the economy and the emergence of platforms that collect user data on a large scale, the question of the significance of any "data power" for a company's dominant position has become the focus of antitrust debate. As a result, the combination of market shares and platform economy special conditions, particularly strong network effects and data potential, gives Amazon Marketplace a dominant market position.[14]

DATA COLLECTIONS AS ESSENTIAL FACILITIES

Access to data can be seen as the key to participation in the economy. In the context discussed here, the following categories of data are particularly relevant: Customer identification and contact data, data relating to individual transactions, data on business performance, user behavior, and analyses of market trends and development.

The availability of this data has a number of advantages, including the ability to precisely adjust pricing and supply as well as a detailed overview of specific click counts or

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[12] KINDL, J. – KUPČÍK, J. – MIKEŠ, S. – SVOBODA, P. *Soutěžní právo* [Competition Law]. Praha: C. H. Beck, 2021.

[13] WHISH, R. – BAILEY, D. *Competition Law*. Oxford: Oxford University Press, 2021.

[14] Amazon.com offers both one-sided and two-sided selling strategies. Amazon (essentially) buys at a wholesale price and sells at a retail price for some goods, such as books. This can be considered a one-sided model. For a variety of other products, Amazon provides a web portal allowing a manufacturer to determine the retail pricing that a consumer will see.

demand fluctuations. Therefore, the data collection could be considered as an essential facility to which there is a right of access under antitrust law.[15]

A dominant company acts abusively if it refuses to grant another company access to its own networks or other infrastructure facilities for a reasonable fee if the other company is not able to use the downstream market as a competitor of the dominant company. However, there is no abuse if the dominant company proves that shared use is "not possible or not reasonable". First of all, the existence of two markets is necessary: On the one hand, there must be a (hypothetical) market for the use of the infrastructure facility, and on the other hand, there must be upstream or downstream market. This may not be a single market, but the markets must be related to each other. In the case of Amazon, the market around the use of e-commerce data represents the infrastructure facility market, while the downstream market is the market for the commercial online sale of goods. On this, the Marketplace dealers are in competition with Amazon Retail.[16]

The prohibition of abuse is aimed at companies with a dominant market position. It seems convincing to assume that a dominant position on the market for shared use of the infrastructure is sufficient. So far, however, it has been completely unclear how a market delimitation of this kind could look on data markets. It would make sense to limit the market to data that is relevant for e-commerce. Companies like Google and Facebook also collect large amounts of data. Whether, from the point of view of data users, they are a substitute for the data collected by Amazon and should therefore be counted as part of the same market cannot be answered in the abstract. Although Amazon has diversified its offering, its business model suggests with a certain degree of probability that the proportion of data relevant to e-commerce in Amazon's data pool is significantly higher than in other companies with data-based business models that collect more heterogeneous data. At this point, it will also be necessary to differentiate between different categories of data. In the market for data that allows users to be divided into target groups or that relates to their interests, a dominant position is less likely than in the case of data that is related to specific purchases or that provides highly topical feedback on user behavior (e.g., viewing a specific article). Amazon's market share in the market for sales platform services provides an indication of a dominant position. Further clarification is also needed as to whether market shares and the usual thresholds are suitable criteria for determining market power in markets around the use of data.

The narrowest criterion of an essential facility is the requirement of non-substitutability. A facility is only non-substitutable if access to the neighboring market is impossible without access to the facility. In this context, it is not sufficient that market access is merely facilitated or accelerated through the use of the infrastructure compared to other access options. Rather, the use of the facility must be essential for market access. On the other hand, it is not necessary to prove that the refusal eliminates all competition;

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[15] FUNTA, R. Data, their relevance to competition and search engines. *Masaryk University Journal of Law and Technology*. 2021, Vol. 15, No. 1, pp. 119–138.

[16] Amazon Retail acts like another, albeit very large, retailer on the marketplace. Amazon Retail itself is not a platform. As a retailer, Amazon keeps the inventory of goods itself. The only user group in this case are the end customers. In principle, they can see whether they are buying from a retailer on Amazon Marketplace or from Amazon itself, but the two different branches of Amazon are fundamentally closely interlinked.

rather, the refusal must only be suitable for eliminating all effective competition. The existence of marginal activities by competitors in "market niches" does not refute this suitability.[17] Unlike products that depend on a specific informational input, such as software that is based on an operating system and must be compatible with it, data in e-commerce has a supplementary function. It is used in particular for marketing purposes or to optimize the range. However, just because data access improves the market position of external retailers does not make it mandatory for participation in the downstream market. However, things could be different if there was access to the market without data access, but the access tenant could not in fact act as an effective competitor. Without data access, Marketplace merchants may not be commercially viable competitors and may not exert effective competitive pressure on the dominant entity. With better access to data giving Amazon information about its competitors and their customers, the platform could gain a unique, uncatchable advantage that would make it impossible for Marketplace merchants to compete successfully.[18] The extraordinarily valuable real-time or near-real-time data (X has put product Y in the shopping cart at the moment) is of particular importance, as it allows the customer to be addressed effectively. This applies to a greater extent to real-time location data, insofar as these are permitted to be used. The value of the corresponding knowledge and information is time-related. However, as long as retailers are generally successful in the market, it seems questionable overall, despite some indications of significant disadvantages in market presence, whether authorities and courts would establish a substantial facility in Amazon's data inventory or part thereof on the basis of lack of substitutability. This does not mean that independent retailers would have an equal opportunity to compete, i.e., that there would be a "level playing field", but rather only that the narrow requirements of substantial facility with respect to are not likely to be fulfilled with regard to the data stock.

Article 102 TFEU does not expressly regulate the case of denial of access to an essential facility. However, the case law of the European courts as well as statements by the European Commission provide criteria for determining when an abuse of a dominant position by denial of access can be assumed. Here, too, two different markets must first be present,[19] whereby it is sufficient if only one potential market exists for the infrastructure facility, i.e., the owner has so far used it exclusively themselves.[20] The defendant must hold a dominant position on the market for the infrastructure facility. The term "necessary facility" is to be understood broadly and can include a wide variety of input goods, so that a database can also be a corresponding facility.

The further requirements for the application of the essential facilities doctrine in the context of Article 102 TFEU are the ability to eliminate competition on the downstream market, the absence of actual or potential substitutes for the facility, and the lack of

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[17] Judgment of the Court of First Instance (Grand Chamber) of 17 September 2007, T-201/04, *Microsoft Corp. v. Commission of the European Communities*, EU:T:2007:289, point 563.

[18] BELLEFLAMME, P. – MARTIN, P. Platform Competition: Who Benefits from Multihoming? *International Journal of Industrial Organization*. 2019, Vol. 64, No. 64, pp. 1–26.

[19] NIELS, G. – RALSTON, H. Two-sided market definition: some common misunderstandings. *European Competition Journal*. 2021, Vol. 17, No. 1, pp. 118–133.

[20] Judgment of the Court (Fifth Chamber) of 29 April 2004, C-418/01, *IMS Health GmbH & Co. OHG v. NDC Health GmbH & Co. KG*, EU:C:2004:257, point. 44.

objective justification for the refusal.[21] Alternatives that are clearly less advantageous to the competitor also remove the indispensability of access. Insofar as the general criteria should be fulfilled in specific segments due to special circumstances of the individual case, the additional question arises as to whether a claim for access requires the creation of a new product. The European courts have already ruled on this question several times in the context of the claim to use an intellectual property right. A license refusal as such is not an abuse of a dominant position. Exercising an exclusive right in a certain way can constitute abusive behavior.[22] Exceptional circumstances (and thus an abuse of market power) are justified by preventing the emergence of a new product for which there was a consumer demand.[23] A company's conduct is already abusive if three conditions are cumulatively met. One of these conditions is the prevention of "a new product" for which there is potential consumer demand.[24] The background to the discussion about preventing a new product is the balancing of interests between the protection of intellectual property and participation in competition. The latter, according to the logic, can only prevail if market development is prevented to the detriment of consumers. According to the corresponding idea, it should not be sufficient for an abusive refusal that the company requesting access limits itself to offering the same products that are already offered by the owner of the intellectual property right.[25] It is essential that the additional criterion was applied only in cases involving access to resources protected by intellectual property rights. The access claim should only need special justification because the right to exclude represents the "core substance" of these rights. All of this speaks in favor of not applying the requirement of the new product where data is concerned that are not subject to intellectual property rights.

However, the European Commission does not assume that a new product must necessarily be prevented, rather that the indispensability of an input for the exercise of the activity in question should be sufficient.[26] According to this, a new product is only one factor within the framework of a comprehensive weighing up of interests. Unlike in *Magill* and *Microsoft*, it is not about making specific information available as a raw material for a product of one's own, but about making data accessible as a starting point from which to derive one's own market opportunities. Unlike in the *Magill* case, moreover, no "information product" is offered by the retailers themselves, for which the relevant data form the raw material. The data and the information to be gained from

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21 Judgment of the Court (Sixth Chamber) of 26 November 1998, C-7/97, *Oscar Bronner GmbH & Co. KG v. Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG*, Mediaprint, EU:C:1998:569, point. 41.

22 Judgment of the Court (Sixth Chamber) of 26 November 1998, C-7/97, *Oscar Bronner GmbH & Co. KG v. Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG*, Mediaprint, EU:C:1998:569, point. 43.

23 Judgment of the Court of 6 April 1995, joined cases C-241/91 P and C-242/91 P, *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v. Commission of the European Communities*, EU:C:1995:98, points 50 and 54.

24 Judgment of the Court (Fifth Chamber) of 29 April 2004, C-418/01, *IMS Health GmbH & Co. OHG v. NDC Health GmbH & Co. KG*, EU:C:2004:257, point. 38.

25 PARKER, G. – PETROPOULOS, G. – VAN ALSTYNE, M. *Digital platforms and antitrust*. Working Paper 06/2020. Brussels: Bruegel, 2020, pp. 1–31.

26 Commission Decision of 3 July 2001 relating to a proceeding pursuant to Article 82 of the EC Treaty (Case COMP D3/38.044, NDC Health/IMS Health: Interim measures) (notified under document number C(2001) 1695).

it are not intended to be used to copy products from Amazon Marketplace or Amazon Retail or the platform as a whole, but rather to provide the basis for successfully offering one's own products. In the *Microsoft* case, the ECJ allowed precisely this statement to suffice.[27] Moreover, the mere and incidental collection of data by an e-commerce platform[28] does not appear to be a particularly innovation-driven or investment-requiring activity. Accordingly, it is not to be expected that granting access would remove significant incentives for innovation. The requirement of a new product should therefore not be invoked if the data set represents a barrier to market entry for other companies. Overall, it can be said that the assumption of an essential facility in the form of data collection by Amazon appears theoretically possible in accordance with the provisions of European antitrust law, but is unlikely to be enforceable in practice, primarily due to the strict requirements regarding the lack of substitutability. In its current form, the essential facilities doctrine in European antitrust law is therefore not a sufficient basis for enabling third-party dealers to participate fairly in competition.

PLATFORMS AS ESSENTIAL FACILITIES

Instead of access to data, the focus could be on retailers' access to platforms as essential facilities. The reasoning behind this is that if access to platforms is denied to retailers, they may not be able to compete in the downstream e-commerce market because they may be so fundamentally dependent on platforms to sell their goods. Platforms play a special role in facilitating economic activity in e-commerce because self-distribution does not provide a financially viable alternative, particularly for SMEs. However, our investigations show that the narrow antitrust criteria[29] for the existence of an essential facility are unlikely to be regarded as fulfilled. In the case of e-commerce platforms, non-duplicability can be justified in particular on the grounds of economic impossibility. In most cases, an objective standard is assumed, so that it should not be possible for a third company to enter the market. This is the case if the establishment of a further facility is absolutely unreasonable from a commercial point of view. However, positive network effects must also be taken into account in the assessment, which in turn lowers the take-up threshold somewhat. There are indications that network effects can be so strong that a facility cannot be duplicated even by a similarly strong competitor. This is indicated by the case of the social network Google+, which was unable to establish itself alongside Facebook despite being part of the Google Group. The same can be assumed for Amazon in the meantime. In addition, the facility must not be substitutable. First of all, selling via Amazon Marketplace is of course not the only way to sell goods (online). Other platforms or online shops also allow access to customers, but online

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[27] Judgment of the Court of First Instance (Grand Chamber) of 17 September 2007, T-201/04, *Microsoft Corp. v. Commission of the European Communities*, EU:T:2007:289, point. 656.

[28] PERÁČEK, T. E-commerce and its limits in the context of the consumer protection: the case of the Slovak Republic. *Juridical Tribune*. 2022, No, 1. pp. 35–50.

[29] ŠMEJKAL, V. Výzvy pro evropský antitrust ve světě vícestranných online platforem [Challenges for European antitrust in a world of multilateral online platforms]. *Antitrust*. 2016, Vol. 8, No. 4, pp. 105–114.

platforms act as increasingly important intermediaries for transactions.[30] At the same time, there are strong indirect network effects on platform markets, so that companies are ultimately dependent on few or even one online platform when it comes to access to markets and consumers (gatekeeper function of intermediary platforms).

As a benchmark, it is worth taking a look at Google as a search engine: Although various search engines are available to the user, these alternatives are hardly relevant in practice. One particular provider was able to establish itself as the standard. This circumstance in turn characterizes the market for advertisers on search engines; they have in fact only one option, although in theory users could easily use another search engine. In this context, the understanding of materiality may need to be adjusted. With regard to Amazon, the question arises as to whether Marketplace has become the standard for end customers to a similar degree. Using other distribution channels involves losing the benefits offered by the dominant platform and may not represent an effective distribution alternative.[31] As a result, however, the position of the retailers is not so without alternatives that, applying the traditional criteria of antitrust law, it can be assumed that there is a substantial establishment with corresponding consequences for freedom of contract. If the trends of the past years continue, however, it is to be expected that the antitrust threshold will be reached in the next few years and that retailers will in fact no longer have any reasonable sales alternatives. Assuming that the Amazon Marketplace platform already embodies an essential facility today, this would mean in practice that Amazon would have to enable every independent retailer to sell products on fair terms via the platform and not refuse them the use of the platform without justifying reasons. However, this does not necessarily mean that Amazon is obliged to make all data or only parts of this data accessible, since this only affects access to the platform as such. The database is part of the facility and the basis for its functioning.[32]

MARKETING SERVICES AS AN ESSENTIAL FACILITY

Rather than relying on the data set or access to the marketplace in general, Amazon's marketing services could be viewed as an essential facility, i.e., those services that Amazon uses to better market products on the platform. This can include pricing algorithms, website placements, and purchase recommendations. In practice, Amazon runs merchandising and promotions for third-party products. Amazon also makes unilateral decisions on ad placement; for example, special positioning or ranking is not guaranteed, and ads can be changed or removed at its discretion. As a result, Amazon is no longer a "neutral" provider of marketing services over which retailers can exert decisive influence or purchase any services. Instead of a right to access, Amazon

[30] Judgment of the Court (Sixth Chamber) of 26 November 1998, C-7/97, *Oscar Bronner GmbH & Co. KG v. Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG, Mediaprint*, EU:C:1998:569, point. 43.

[31] FEDUSHKO, S. – MASTYKASH, O. – SYEROV, Y. – PERACEK, T. Model of user data analysis complex for the management of diverse web projects during crises. *Applied Sciences*. 2020, Vol. 10, No. 24, pp. 1–12.

[32] PLAVČAN, P. – FUNTA, R. Selected Legal Aspects of Protection of Undistorted Competition in the Digital Economy. *Studia Iuridica Lublinensia*. 2022, Vol. 31, No. 1. pp. 25–41.

Marketplace retailers could assert a right not to be discriminated against and thus disadvantaged in competition – including Amazon's own retail business.

DISCRIMINATION BY A DOMINANT COMPANY

It can be assumed that such a claim to equal treatment follows from Amazon's dominant position, as this entails the special responsibility not to impair competition. As a result, Amazon Marketplace must grant independent retailers all marketing and sales opportunities that Amazon Retail uses to sell its own products. In the present case, the dominant company has already voluntarily decided to open its facility and contract with other market participants. In the case of an essential facility, on the other hand, it is about a refusal to enter into contractual relationships in the first place, so that an obligation to do so represents a stronger intervention. In addition, the dominant company has the right to stop the discrimination by only using the facility exclusively. This fallback option is not open to the owner of an essential facility. In addition, a vertically integrated platform provider benefits from the competitors on the platform: the opening results in a more comprehensive product range, the possibility of evaluating the data in connection with transactions of third-party dealers to improve their own offer and the potential for new product ideas and innovations. The corresponding requirements for the behavior of the market dominator therefore also appear justified insofar as the requirements of an essential facility are not met.[33]

It follows first of all that a market-dominant platform such as Amazon Marketplace, which grants data access or certain marketing services, may not discriminate between individual contracting parties if this would result in a competitive disadvantage.[34] Of particular relevance is the question of whether and to what extent "self-advocacy" is equivalent to discrimination against various third-party companies. The decision in the *Google Shopping* case can be used as a comparison, in which a preferential presentation of one's own service is addressed. This preferential treatment was not specifically treated as discrimination or classified in another existing group of cases but was examined in general as an abuse of a dominant position.[35] At the starting point, there is also no general obligation not to favor oneself. However, an individual case analysis can certainly show that such behavior leads to impairments of competition and should ideally be addressed via the prohibition of discrimination. Article 102 (c) TFEU does not rule out applying the case group of discrimination even if a vertically integrated company is affected that treats trading partners and its own services differently.[36] The European

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[33] HALÁSOVÁ, Z. – GREGUŠOVÁ, D. – PERÁČEK, T. eIDAS Regulation and Its Impact on National Legislation: the Case of the Slovak Republic. *Administrative Sciences*. 2022, Vol. 12, No. 4, p. 187.

[34] FUNTA, R. Social Networks and Potential Competition Issues. *Krytyka Prawa*. 2020, Tom 12, pp. 193–205.

[35] European Commission, Decision of June 27, 2017, AT.39740 – *Google Shopping*.

[36] OSZTOVITS, A. Quantifying Harm in Action for Damages Based on Breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union – Some Remarks on the Draft Guidance Paper of the European Commission. In: OSZTOVITS, A. (ed.). *Recent developments in European and Hungarian competition law*. Budapest: Károli Gáspár Református Egyetem Állam- és Jogtudományi Kar, 2012, pp. 41–54.

Commission has already assumed that discrimination can also exist if a customer of the dominant company is at a competitive disadvantage compared to the dominant company itself.[37]

The European Commission referred to illegal competitive advantages for Google and did not examine whether Google constitutes an essential facility. In the *Google Shopping* case, the European Commission focused in particular on the prominent display of Google's own service compared to competing service providers. This, according to the decision, would have a detrimental effect on competition: There would be a potential for market foreclosure, competition on the merits would be disturbed, and Google would grant itself advantages resulting from a market-dominant position. All of this is transferable to the situation of Amazon Marketplace and suggests that self-advocacy can in any case in principle also be taken up as discrimination.[38] It should also be borne in mind that platforms have a regulatory function because, as intermediaries, they set rules for their users. Because of this function, it is their responsibility to ensure fair, unbiased, and user-friendly competition on their platforms. The respective rules must not be exclusionary or discriminatory in a way that impedes competition, and the dominant platform must not use its ability to set rules to determine competitive outcomes.[39] An antitrust assessment that rightly focuses on this rule-making function allows for a disentanglement from the criteria for the existence of an essential facility. Irrespective of the criteria for an essential facility, self-benefit can therefore also be abusive if there is no reason to promote competition behind it and a transfer of market power is possible. Positively formulated, the prohibition of discrimination thus results in a requirement of equal treatment: Amazon Marketplace must treat independent retailers in the same way as it treats its own retail division, regardless of whether access to data or marketing services is involved. Circumvention of these requirements must also be considered abusive.

CONCLUSIONS

European antitrust law offers the potential to stimulate competition on e-commerce platforms by granting platform participants a right to access certain data of the platform operator.[40] Thus, this potential must also be used by the authorities and courts. On the one hand, the agreements between Amazon and the Marketplace retailers that allow Amazon Retail to analyze and use data from external retailers were examined, and on the other hand, the significance of the data in the selection of products for the so-called "Buy Box". Recent European Commissions' legal actions resulted in some

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[37] European Commission, Decision of October 20, 2004 – *BdKEP*, point. 93.

[38] ŠMEJKAL, V. Concentrations in Digital Sector – A New EU Antitrust Standard for "Killer Acquisitions" Needed? *Intereulaweast*. 2020, Vol. 7, No. 2, pp. 1–16.

[39] CRÉMER, J. – DE MONTJOYE, Y.-A. – SCHWEITZER, H. *Competition Policy for the Digital Era*. Brussels: Directorate-General for Competition, 2019, p. 62.

[40] ŠRAMEL, B. – HORVÁTH, P. Internet as the communication medium of the 21st century: do we need a special legal regulation of freedom of expression on the internet? *The Lawyer Quarterly*. 2021, Vol. 11, No. 1, pp. 141–157.

changes.[41] E.g., in the Amazon Marketplace investigations Amazon has agreed not to exploit confidential third-party seller information in competition with those retailers. On the other hand, in Amazon – Buy Box investigations, the claim is that Amazon's own retail operation, as well as marketplace sellers who utilize Amazon's logistics and delivery services, are unfairly favored by the rules and criteria for the Buy Box and Prime. Amazon has six months to carry out the commitments. The commitments solely apply to the European Economic Area and have no influence on Amazon's activities anywhere else in the world. That implies that they will have been in operation for several months before they must comply with the requirements of Articles 5 and 6 of the Digital Markets Act (DMA). The importance of the commitments should not be exaggerated because they only apply to third-party sellers and constitute a compromise stance without creating a legal precedent. Anyway, it seems questionable whether Amazon Marketplace or its database would be recognized as an essential facility on the basis of traditional antitrust standards. The antitrust mechanisms should be strengthened, particularly in terms of law enforcement. This may be seen as an effective way to counteract the growing concentration of online markets.

Various options for action can be derived from the legal and economic explanations for Amazon, e.g., creation of data access for all retailers on Amazon Marketplace and/or separation of Amazon Retail from data access on Amazon Marketplace. The aim should always be to create a level playing field for retailers and Amazon Retail. This can be achieved by making access to the data on the Amazon platform correspondingly fair and/or uniform (e.g., through data standardization or splitting up of platform activity). Standardizing data is one way to improve its usability by those with whom it is shared. They can have a positive impact on the functioning of competition in particular, because uniform standards for goods and services reduce dependencies within value chains. Uniform data formats reduce the costs of data evaluation and generally stimulates data trading. Which standards are established, however, is determined in part by the market power of the companies involved. A company with significant market power may be able to set standards for its own benefit and thus influence the competition in its favor in this context. On the other hand, relying solely on the natural evolution of industry standards may not produce the desired result. Another alternative for dealing with market-dominating platforms is the splitting up of platform activity and trading activity. Especially in the European context, the advantages of a complete separation are that complex data protection constructions for data protection-compliant sharing of data can then be avoided. It can also be argued that such a measure represents a greater encroachment on the entrepreneurial freedom of the vertically integrated platform but embodies the more gentle variant in terms of data protection law.

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[41] European Commission, AT.40462 Amazon Marketplace and AT.40703 Amazon – Buy Box.

GOOGLE ANDROID: BEHAVIOURAL THEORIES OF HARM IN THE LIGHT OF NEW JUDGMENTS AND REGULATORY TOOLS

MIROSLAV JAKAB[1, 2]

Abstract: This contribution takes a look at the recent Google Android judgement of the General Court as a case study of antitrust informed by behavioural economics – the study of not fully rational economic agents. It contrasts the General Court's pragmatic approach to economic evidence to the U.S. Supreme Court's willingness to delve into economic theory, where the latter can prove more of an obstacle to the development of behavioural antitrust. It further concedes that cases relying on behavioural theories of harm can prove to be less predictable from a legal standpoint. This, nevertheless, does not obviate older legal tests, which might just need to be reformulated as requiring an analysis of effects, in line with the General Court's rhetoric on the necessity to avoid false convictions in such cases. Lastly, the contribution argues that the relevance of behavioural antitrust will not fade in its entirety with new regulatory tools addressing similar issues.

Keywords: competition law; antitrust; theory of harm; behavioural economics; behaviouralism; Google Android

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I. INTRODUCTION

In the basic models that could be encountered in introductory microeconomic courses, it is often assumed that the agents involved are rational. While the notion of rationality within these models may often be understood in a rather technical sense,[3] a rational agent should generally make decisions that are the most beneficial to them in

[1] Any views or opinions expressed in this contribution are mine alone and do not necessarily reflect the positions of people or institutions that I may be associated with in a professional or personal capacity. The manuscript was improved by the helpful insights of anonymous reviewers. Parts II and III of this contribution are based on my forthcoming dissertation. Any errors contained in this contribution are my own.

[2] This paper has been written as part of the 2023 Cooperatio/LAWS programme at the Faculty of Law, Charles University.

[3] See e.g., the definition by GRAVELLE, H. – REES, R. *Microeconomics*. 3rd ed. Harlow: Prentice Hall, 2004, p. 6, which is rather specific and seems to yield an understanding of rationality within the terms of a microeconomic model. Economic agents selecting the optimal outcome in terms of a specific objective function, like utility or profit, within the constraints of relevant restrictions seems to be the core of most understandings of the notion of rationality within economic theory.

terms of a given metric. Such an assumption is admittedly elegant. It is also sometimes not true. The economic discipline interested explicitly in imperfect and/or lacking rationality of economic agents (and drawing inspiration from psychological research to do so) is called behavioural economics. Being a well-established discipline for quite some time,[4] it has likewise influenced the study of law and economics, including the area of competition law.

The application of behavioural economics in competition law enforcement is not a new topic in academia. Indeed, especially scholars studying antitrust in the United States were interested in this question at least since the early 2000s.[5] The analysis of competition law through the lens of behavioural economics and the related question of applying behavioural economics as a tool of its enforcement have not remained confined to academic journals. On the contrary, practitioners take interest in the topic.[6] Theories of harm based in behavioural economics (behavioural theories of harm for short) are thus a phenomenon that is recognised and receives attention. It is worthwhile to ask about the distinguishing features of such theories of harm as well as their possible pitfalls. This is likely clear from the viewpoint of a competition authority that intends to enforce competition law notwithstanding the nature of the mechanism of harm to competition. Perhaps less intuitively, the legal aspects of behavioural theories of harm should be studied from the viewpoint of their legal repercussions, even though they are not a legal category *per se*. Should the shift in the underlying economic reasoning also translate into a legally relevant pattern, any increase in the number of behavioural theories of harm put forward will affect both the legal reasoning within the decisions relying on such theories of harm and the subsequent judicial review.

Thus, the General Court's decision of 14 September 2022 in Case T-604/18 *Google Android* provides for an interesting case study. The Commission's decision under scrutiny[7] relied in part on the effects of a "status quo bias" – a well-known concept in behavioural economics. The basic idea of status quo bias is a contradiction of the expectation of rational choice theory that rational agents should only base their decisions on factors relevant from the viewpoint of their preferences. On the contrary, the notion of "status quo bias" describes how factors like holding on to a previous decision or simply doing nothing rather than something can be influential in human decision making. In a famous paper by William Samuelson and Richard Zeckerhausen, a mere shift in framing of otherwise identical choices to design one as the *status quo* had a measurable

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4 Daniel Kahneman, one of the best-known scholars in this area, won the 2002 Nobel Prize for *"having integrated insights from psychological research into economic science, especially concerning human judgment and decision-making under uncertainty"*.

5 See the notable example of TOR, A. The Fable of Entry: Bounded Rationality, Market Discipline, and Legal Policy. *Michigan Law Review*. 2002, Vol. 101, No. 2, pp. 482–568.

6 For example, the OECD held a roundtable on this topic in June 2022 with plans to delve deeper into the problematic in the future. See the background note, OECD. *Integrating Consumer Behaviour Insights in Competition Enforcement: OECD Competition Policy Roundtable Background Note* [online]. OECD, 2022 [cit. 2023-01-31]. Available at: www.oecd.org/daf/competition/integrating-consumer-behaviour-insights-in-competition-enforcement-2022.pdf.

7 Commission Decision C(2018) 4761 final of 18 July 2018 relating to a proceeding under Article 102 TFEU and Article 54 of the EEA Agreement (Case AT.40099 – Google Android).

effect.[8] *Google Android* can then be seen as an application of the concept of "status quo bias" in competition law. Specifically, one of the pillars of the Commission decision was Google's requirement, according to which it was for original equipment manufacturers to pre-install the Google Search and Chrome apps in order to be able to also use its app store – Play Store. These pre-installation requirements were supposed to be a source of a competitive advantage for Google thanks to said "status quo bias". Many users would simply rely on the pre-installed apps without further exploring available competing apps with similar functionalities.

This contribution discusses the judgement and tests it against some of the predictions made in relation to behavioural theories of harm in earlier literature. It must be noted at the outset that the results of a single case study are not to be automatically generalized. Nevertheless, it can be a source of interesting insights into (so far largely theoretical) discussions on the legal repercussions of behavioural economics in competition law.

The second part of this contribution briefly compares the judgement to the *Kodak* decision by the U.S. Supreme Court and demonstrates the contrast between the General Court's pragmatic approach to economic evidence and the Supreme Court's willingness to delve into economic orthodoxy. The third part discusses the question of a possible drop in enforcement predictability and the ongoing applicability of older legal tests within behaviourally informed competition law, and the fourth part argues that the perspective of behavioural economics in competition law will remain relevant even in the background of new EU legislative acts. The conclusion contains a brief summary of this contribution and suggestions for further research.

II. A LACK OF EXPLICIT STATEMENTS ON ECONOMIC ORTHODOXY

This section deals with the General Court's bearing (or lack thereof) on the question of behavioural economics in competition law in possibly the most general, paradigmatic, sense. Even though the letter of the law may formally remain the same over time, the approach to its reasoning does not happen in an intellectual void. Instead, one can recognise shifts in paradigms applicable to the enforcement of competition law.[9]

The General Court's *Google Android* decision, though, does not contain as clear discussions of economic theory (further also referred to as "economic orthodoxy") as the ones one can find e.g., in the U.S. Supreme Court's *Kodak* decision[10] that was highlighted as a case relevant to the question of behavioural economics in competition law by Avishalom Tor.[11] In *Kodak*, the Supreme Court dealt with a case where Kodak,

[8] SAMUELSON, W. – ZECKHAUSER, R. Status Quo Bias in Decision Making. *Journal of Risk and Uncertainty*. 1988, Vol. 1, No. 1, pp. 7–59.

[9] ŠMEJKAL, V. Doktrinální souboj o evropský antitrust – odkud kam směřuje soutěžní politika a právo EU? [The doctrinal battle over European antitrust – where is EU competition policy and law going from here?]. *Právník*. 2014, Vol. 153, No. 2, p. 90.

[10] *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451 (1992).

[11] TOR, A. Understanding Behavioral Antitrust. *Texas Law Review*. 2014, Vol. 92, No. 3, p. 587.

a copying equipment manufacturer, took steps to limit the availability of replacement parts for its equipment, which negatively impacted the ability of independent service organisations to compete with it in the area of servicing its equipment. The issue dealt with in the judgment was the relevance of Kodak's market power in the service and parts market, when it lacked market power in the primary equipment market.[12] Avishalom Tor notes that *"the assumption of consumer rationality played a significant, if somewhat implicit, role in the disagreement between the opinions of the majority and the dissent"*.[13] I agree with the statement, I would even add that the problem of consumer rationality is visible rather plainly in the judgment, and especially so in the dissenting opinion by Justice Scalia. While Kodak contended that its lack of market power in the primary equipment market meant that it would be disciplined by the market forces in this primary equipment market, should it raise prices in the service and parts market. In its majority Opinion, the Supreme Court rejected this reasoning. It stated, among other things, that this logic would imply that a lowering of prices in the services and parts market should strengthen Kodak's position in the primary equipment market. Nevertheless, Kodak took steps to limit the independent service organisations' ability to compete with lower prices, thus increasing the prices in this market. Despite this, there was no evidence of Kodak's equipment sales dropping.[14] A rational consumer might have wanted to factor in this increase in maintenance costs when buying Kodak's equipment. I therefore argue that the reasoning in this point of the judgment is behavioural in its nature, even though the majority opinion might not use this terminology. Indeed, Justice Scalia, dissenting, criticised this implicit reliance on customer irrationality by noting that *"a rational consumer considering the purchase of Kodak equipment will inevitably factor into his purchasing decision the expected cost of aftermarket support"*.[15] While some consumers, admittedly, are not acting rationally, he contends that the Supreme Court "[has] *never before premised the application of antitrust doctrine on the lowest common denominator of consumer"*.[16] We can thus see an instance of the U.S. Supreme Court engaging directly in the underlying economic reasoning of the case at hand. Such explicit statements are perhaps not all that often seen in the decisions of the Court of Justice of the European Union.

The main takeaway from the *Google Android*, in terms of economic orthodoxy, may be that it largely upheld the Commission's decision, instead of objecting to its underlying economic reasoning. In relation to the existence (and effects) of a "status quo bias", the General Court first held admissible the evidence submitted to demonstrate a consensus as to the understood meaning of the term "status quo bias" (para. 97). It then accepted that the test for to tying practices used in the *Microsoft* judgement[17] was applicable to the case at hand as well (paras 284 to 295). In reviewing the condition

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12 504 U.S. 451 (1992), p. 455.
13 TOR, *c. d.*, p. 588.
14 504 U.S. 451 (1992), p. 472.
15 Ibid., p. 495.
16 Ibid., p. 496.
17 I.e., that (i) the tying and tied products are two separate products, (ii) the undertaking concerned is dominant in the market for the tying product, (iii) the undertaking concerned does not give customers a choice to obtain the tying product without the tied product, (iv) the practice in question "forecloses competition",

of competition foreclosure, the General Court examines the evidence put forward to substantiate the relevance of pre-installation[18] of Google's applications in the light of the purported "status quo bias" (paras 320 through 418). The General Court discusses here the existence of a significant competitive advantage conferred on Google by the pre-installation conditions in question, and while Google argued *inter alia* against the existence of a "status quo bias" (para. 323), the court concludes this part of the judgement by noting that Google failed to refute the Commission's findings regarding the advantage to Google conferred by said pre-installation conditions (para. 418). In this segment, the General Court does not discuss the point of principle regarding consumer rationality (or a lack thereof), as the U.S. Supreme Court dealt with at least indirectly in *Kodak*. Instead, among other things, the General Court looks at quantitative coverage of Google's pre-installation conditions within devices sold on the European and global market (paras 336 through 339) and analyses evidence submitted to confirm or to contradict the disputed advantage as such.

Thus, the *Google Android* decision shows that the General Court remains at least agnostic in relation to the economic reasoning underlying the theories of harm contained in the contested decision. Unlike the "behavioural" *Kodak* case decided by the U.S. Supreme Court, the more general questions of economic orthodoxy did not appear to be similarly important in the proceedings before the General Court in *Google Android*. Instead, tacitly accepting a not necessarily rational consumer as a benchmark, the General Court focused on the existence and magnitude of the effect of pre-installation conditions giving rise to the "status quo bias".

The difference in the described approaches can of course be attributed at least in part to the fact that the legal system within the United States is considered to rely on economic reasoning to a large extent,[19] while this is not necessarily the case in the legal tradition of continental Europe.[20] Furthermore, some of the elements of the case being similar to the older *Microsoft* judgement,[21] there might thus be even less need to tackle questions of principle in a judgment that follows a famous precedent, albeit not the newest one.

Nevertheless, even in the absence of an analysis based on law and economics, court cases are based on real life events that more likely than not entail an economic dimension. This holds even more so in the area of competition law. Courts can then, at best, choose not to engage with the economic dimension of the problem that is present.

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and that practice is not objectively justified. See Case T-201/04, *Microsoft v. Commission*, EU:T:2007:289, para. 869, and the test rephrased in its entirety by the General Court in *Google Android*, para. 284.

18 Understood here rather loosely, as discussed by the General Court in paras 327 through 335 of the judgement.

19 KENDALL, K. The Use of Economic Analysis in Court Judgments: a Comparison between the United States, Australia and New Zealand. *UCLA Pacific Basin Law Journal*. 2011, Vol. 28, No. 2, p. 115.

20 POSNER, R. A. The Future of the Law and Economics Movement in Europe. *International Review of Law and Economics*. 1997, Vol. 17, No. 1, p. 5. It has to be noted that judge Posner continues to argue why he believes this might change. Some developments in this sense can be discussed on the background of the "more economic approach" that is mentioned below, although these discussions often seem to be more closely linked to closer scrutiny of the actual effects of a conduct, in my opinion. This should be distinguished from judges and lawyers directly and explicitly engaging with questions of economic theory.

21 See Case T-201/04, *Microsoft v. Commission*, EU:T:2007:289.

A more charitable view, however, would be that of a court that does not engage in questions of economic orthodoxy if it does not find it necessary. Instead, it can focus on pragmatically reviewing the evidence put forward with the knowledge that it is simultaneously concurring to its theoretical underpinning.[22]

III. THE ROLE OF LEGAL TESTS AND PREDICTABILITY IN BEHAVIOURAL CASES

Some ten years ago, the Commissioner of the U.S. Federal Trade Commission Thomas Rosch noted that the usage of behavioural economics in competition law leads some to raise concerns in relation to the predictability of competition law and that painstaking empirical analysis of behavioural economics can reduce the usefulness of tidy neoclassical models.[23] I have myself argued in the past that behavioural economics can call into question the usage of established tests, possibly lower the predictability of enforcement and, generally, lead to more cases that are more complicated on the factual level.[24]

What can the *Google Android* decision tell us about these concerns and predictions? It is useful to begin with the question of the applicable test, which I consider related to Commissioner Rosch's note on the possibly reduced usefulness of neoclassical models. Already within the administrative proceedings, the Commission decided to examine the effects of Google's tying practice, although older case law of the EU's courts would suggest that this is not necessary. The Commission did so by referring to the General Court's *Microsoft* judgement.[25] The General Court then upheld this test by openly discussing the relevance of the exclusionary effect of a conduct that is in breach of Article 102 TFEU in the abstract (paras 280 through 282) and essentially reiterating a part of the *Microsoft* judgement's reasoning in relation to tying, where the General Court pointed to specific circumstances warranting an analysis of effects, notably that third party media players (that would compete with the tied product) were often distributed free of charge (paras 286 through 287 of the *Google Android judgement*). Thus, a *"close examination of actual effects* […] *was required"* (para. 295).

Although the case entailed tying, a presumptively anti-competitive conduct in principle, both the Commission and the General Court agreed that it had to be opened to

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[22] After all, courts might want to focus on the usage of economic evidence rather than using economic theory as a policy tool, as noted by HUFFMAN, M. A Look at Behavioral Antitrust from 2018. *CPI Antitrust Cronicle* [online]. 19.1.2019, p. 6 [cit. 2023-01-31]. Available at: https://papers.ssrn.com/abstract=3309341.

[23] ROSCH, T. Behavioral Economics: Observations Regarding Issues That Lie Ahead. In: *FTC.gov* [online]. 9.6.2010, p. 8–9 [cit. 2023-01-31]. Available at: https://www.ftc.gov/sites/default/files/documents/public_statements/behavioral-economics-observations-regarding-issues-lie-ahead/100609viennaremarks.pdf.

[24] JAKAB, M. Proč současný antitrust potřebuje psychologa? [Why does the current antitrust need a psychologist?]. In: GERLOCH, A. – ŽÁK KRZYŽANKOVÁ, K. (eds.). *Právo v měnícím se světě*. Praha: Vydavatelství a nakladatelství Aleš Čeněk, 2020, pp. 702–712.

[25] Case T-201/04, *Microsoft v. Commission*, EU:T:2007:289, para. 867. See recital 749 of the Commission's Decision.

a more thorough analysis of effects in this situation. This is in line with the notion that behavioural theories of harm might test the confines of some of the older tests based on some form of economic reasoning (be it correct or not)[26] or even evade them altogether. I consider this a necessary corollary to the fact that behavioural economics has to rely on empirically observed realities which replace what would simply be assumptions in some of the classical models. Once again, the General Court was following an already existing precedent. At the same time, it added grounding to the rationale for delving into an analysis of effects and called it "required". The rationale presented the General Court is twofold: an examination of effects should minimise risks of a type I error, i.e., a penalisation of a conduct that is not actually anti-competitive, and the determination of the conduct's gravity for the purposes of a potential fine (para. 295). This is not without significance. In one of the early reactions, academic competition lawyer Pablo Colomo noted that he would be hesitant to call tying a presumptively unlawful practice in the future.[27] And while one could not say that this for and only for behavioural theories of harm. I nevertheless argue that this is going to be a common trait of behavioural theories of harm because of the empirical nature of required evidence.

At the same time, this might not necessarily be an end for tests rather than a limited usefulness of presumptively unlawfulness of certain types of conduct in an enforcement landscape that focuses more heavily on behavioural theories of harm. In *Google Android*, the General Court still applied a modified test for tying which, at least in the given case, also required the Commission to show the effects of the conduct. The applicable tests are, in fact, a part of the typology of anti-competitive conducts used by lawyers, courts and competition authorities. It can be expected that they will continue to play an important role in the framing of problems. Perhaps, this does not only apply from the viewpoint of enforcement, but also from the viewpoint of the management of undertakings that engage in anti-competitive conduct. I would assume after all, that the sequence of decisions that lead to the engagement in an anti-competitive conduct will also often follow some structured rationale. Behavioural economics might still be a factor encouraging competition authorities to build cases relying on more novel theories of harm, as happened for example in *Google Shopping*.[28] At the same time, in situations that fit into older notions of anti-competitive behaviour, their influence might rather be a shift towards an analysis of effects.

It should be noted that this shift is not taking place in a vacuum. There are ongoing discussions of the so-called "more economic approach" within EU competition law. While the understanding of this notion by different authors might vary, crucially, it is

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[26] When it comes to tying, doubts have been raised about its presumptive unlawfulness, and especially so in connection to the digital economy. See e.g., PADILLA, A. J. – POLO, M. Tying in Platform Software: Reasons for a Rule-of-Reason Standard in European Competition Law. *World Competition*. 2002, Vol. 25, No. 4, pp. 509–514.

[27] COLOMO, P. The notion of abuse after the Android judgment (Case T-604/18): what is clearer and what remains to be clarified (I). In: *Chillin'Competition* [online]. 28.9.2022 [cit. 2023-01-31]. Available at: https://chillingcompetition.com/2022/09/28/the-notion-of-abuse-after-the-android-judgment-case-t%e2%80%91604-18-what-is-clearer-and-what-remains-to-be-clarified-i/.

[28] Commission Decision C(2017) 4444 final of 27 June 2017. See also the judgement of the General Court of 10 November 2021 in Case T-612/17 *Google and Alphabet v. Commission (Google Shopping)*. I previously discussed the behavioural nature of this case in JAKAB, *c. d.*, fn. 24.

likewise often linked to the call for the Commission (and the courts) to scrutinise the pro- and anti-competitive effects of a certain conduct in more detail, rather than focusing on fitting the conduct in question into a formal test.[29] I argue that this phenomenon is separate from that discussed above, although both may coincide in certain areas. While the "more economic approach" is a general shift in the approach to and reasoning underlying the enforcement of competition law, behavioural theories of harm necessitate a closer engagement with the effects of a conduct by virtue of stepping outside of most established analytical frameworks. They essentially require authorities and claimants to present evidence showing that the behaviour of a group of agents will systematically differ from what would be expected on the basis of conventional analysis.

This leads directly to the other criticism cited by Thomas Rosch: the lack of legal certainty. As he himself countered, though, pre-Chicagoan U.S. antitrust law could be considered quite clear and predictable in terms of its outcomes thanks to its reliance on *per se* rules. Finding it contradictory to use the same reasoning to now argue against the behavioural approach on the basis of its unpredictability, he argues that behavioural economics can reveal situations where antitrust law acts predictably at the cost of aggressive enforcement.[30] I can agree with this. Indeed, the commonly accepted roles of competition law are to protect either competition itself or the consumer welfare achieved through competition. In this context, economic theory is a tool, not a goal itself. Economic models can act as a useful simplification of real-world scenarios, but they should not stand in the way of reality.

The above line of reasoning could be summarised as an attempt to minimise type II errors, or a failure to take action against a conduct that is anti-competitive. It is perhaps a large part of the motivation behind opening inquiries into conduct entailing novel theories of harm, atypical markets, etc. On the other hand, it does not appear that the General Court would place much emphasis on this other type of error in enforcement. This is not surprising. Within the EU's system of enforcement of competition law by public authorities, it is the Commission who opens investigations and thus can play a pro-active role in determining the aggressiveness of enforcement. The EU's courts are in a position to decelerate such initiatives through strict scrutiny or allow for them by being accepting to the shifts in the Commission's administrative practice.

Thus, from a viewpoint of judicial oversight, I find it reasonable that the General Court instead explicitly mentioned the issue of type I errors in connection with the analysis required for establishing a breach in the case at hand. The case before it, while relying on an older precedent, showed anomalies that might distinguish it from typical tying cases on which the EU courts' case law developed. Furthermore, a focus on a proper analysis of a conduct's harmfulness and severity may counteract the lowered predictability of the law. The tension between attempts to minimise type I and type II

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[29] WITT, A. The European Court of Justice and the More Economic Approach to EU Competition Law – Is the Tide Turning? *The Antitrust Bulletin*. 2019, Vol. 64, No. 2, p. 210. See also COLANGELO, G. – MAGGIOLINO, M. Intel and the Rebirth of the Economic Approach to EU Competition Law. *IIC. International Review of Intellectual Property and Competition Law* [online]. 2018, Vol. 49, No. 6, p. 697 [cit. 2023-01-31]. Available at: https://link.springer.com/article/10.1007/s40319-018-0723-1.

[30] ROSH, *c. d.*, p. 9.

errors cannot be done away with. Nevertheless, when it might not be *prima facie* clear if a certain undertaking's conduct is unlawful or not, extra energy invested into ascertaining that it is indeed harmful and achieves a certain degree of seriousness is also energy invested into legitimising such an intervention.

To conclude, the *Google Android* decision is compatible with the notion that behavioural theories of harm could lead to enforcement that is somewhat less predictable. This can be illustrated with the fact that the General Court explicitly confirmed the necessity to show exclusionary effects of conduct like the one prohibited by the Commission's decision. At the same time, it shows that the older tests applied to scrutinize potentially anti-competitive conducts may be modified, but this does not necessarily deprive them of their meaning. Of course, new methods of analysing potentially anti-competitive conduct can still give rise to novel theories of harm.

IV. WHAT WILL BE THE INFLUENCE OF NEW REGULATORY FRAMEWORKS

Going beyond the general implications of the usage of behavioural theories of harm within competition law, it is useful to place this discussion within the broader context of the legal order. As I mentioned in the introduction, "behavioural law and economics" does not extend exclusively to competition law. As a matter of fact, some regulatory instruments on the EU level attempt to counter issues linked to so-called "behavioural exploitation", the precondition of which could be described as a conduct that *"is trying to exploit a predictable irrationality in* [consumers'] *transactional decision-making*[.]"[31] One of the relatively recent regulatory attempts to address such behaviour can be seen in the new *Digital Services Act* (DSA),[32] which attempts to address so-called "dark patterns", which will presumably coincide with cases of behavioural exploitation (see recital 67 of the DSA, Article 25 DSA then lays down binding rules). Researcher Frédéric Marty discusses this overlap between the subject-matter of the *Google Android* judgement and the regulatory efforts described above (among other instruments, both binding and soft-law in nature).[33]

This parallel is not a coincidental one. After all, the proposals of the DSA and the Digital Markets Act (DMA)[34] were adopted by the Commission in order to address is-

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[31] LAUX, J. – WACHTER, S. – MITTELSTADT, B. Neutralizing online behavioural advertising: algorithmic targeting with market power as an unfair commercial practice. *Common Market Law Review*. 2021, Vol. 58, No. 3, p. 735.

[32] Regulation (EU) 2022/2065 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act).

[33] MARTY, F. Pré-installations, biais de statu quo et consolidation de la dominance: Les enseignements de l'arrêt du Tribunal de l'U.E. dans l'affaire Google Android. *CIRANO – Cahier scientifique*. 2022, No. 29, p. 9.

[34] Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act).

sues, that the contemporary legal framework (including competition law) did not seem to be able to address satisfactorily.[35]

Nevertheless, these new rulebooks are *ex ante* regulatory instruments in nature. Moreover, the more market-oriented DMA states explicitly that it will apply in parallel to EU competition law (see Article 1(6) DMA), while the stated purpose of the DSA pursues more general societal goals of ensuring a *"safe, predictable and trusted online environment"* (see Article 1(1) DSA). With these new tools that are *ex ante* in nature, regulators can undertake quicker intervention in comparison to competition law.[36] Does it make sense to continue in developing a behaviourally informed competition enforcement framework under these conditions?

I believe it does. Besides the fact that the relevant regulatory frameworks can pursue goals differing from the values protected by competition law, I am not aware of a case where sector-specific regulation would render competition enforcement redundant. On the contrary, the fairly high number of the Commission's Article 102 TFEU prohibition decisions aimed against telecommunication undertakings[37] after 2000 can show that even regulation does not necessarily obviate the use of competition law.

Admittedly, the decisions cited above were adopted before the recent clarifications of the *ne bis in idem* principle under Article 50 of the Charter of Fundamental Rights of the European Union made by the Grand Chamber of the Court of Justice. These might be considered as a restriction of the authorities' ability to intervene on the basis of both competition law and regulation, as the *bpost* judgment clarified that the *ne bis in idem* principle should follow the *idem factum* approach (i.e., two proceedings regarding the same facts) in the area of competition law.[38] Although the fact that restrictions of the *ne bis in idem* principle that do not encroach upon its essence[39] are generally considered to be proportionate when fulfilling certain requirements led some commentators to question the efficacy of such protection,[40] there is a broader point to be made. While the precise interplay between the new rulebooks and established competition law will certainly need to be clarified in the future, competition law will remain useful at least in cases of any conduct that is problematic for competition but possibly legal or hard to address under the new regulatory frameworks.

Competition law can serve as a tool addressing issues that are hard to tackle through regulation. While its *ex post* intervention may take many years and can thus seem

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35 European Commission. *Shaping Europe's Digital Future*. 2020, COM(2020) 67 final, p. 9.

36 To stay with the Commission's *Google Android* decision, the origin of the proceedings was a complaint filed in March 2013, while the Commission's decision comes from July 2018. The judicial scrutiny is still ongoing. While the General Court's judgement was issued in September 2022, the appeals proceedings can change the outcome of the case are currently pending (see case C-738/22 P – *Google and Alphabet v. Commission*), ten years after the initial complaint.

37 See e.g., AT.37451 Deutsche Telekom, AT.37451 Wanadoo, AT.38784 Telefonica S.A. (broadband), AT.39523 Slovak Telekom, and other decisions (see Commission Art. 82 EC / Art. 102 TFEU prohibition decisions in sector J.61 – Telecommunications).

38 Case C-117/20 *bpost*, EU:C:2022:202, paras 33 through 35.

39 Meaning that the two proceedings should not be regarding the same offense or pursue the same objective. See para 43 of the *bpost* judgment.

40 See VAN CLEYNENBREUGEL, P. BPost and Nordzucker: Searching for the Essence of Ne Bis in Idem in European Union Law. *European Constitutional Law Review*. 2022, Vol. 18, No. 2, p. 374.

unwieldy, its strength lies in its versatility. As mentioned above, the Commission can build cases on novel theories of harm and thus identify issues in conduct that might be hard to capture by a more specific set of rules. At the same time, its response has the potential to be tailored to the specific case. Understandably, this comes at the cost of time and a good deal of resources invested into the analysis of the problem at hand, as well as subsequent judicial scrutiny. Behaviourally informed competition law then seems to exacerbate this issue. In order to achieve a fast reaction to a perceived issue, competition law (or antitrust to say the least) might not be the best-suited tool. Yet, it can still inform the behaviour of undertakings in the long run, thus setting a standard of what practices can be deemed problematic. I have argued previously that behaviourally informed antitrust can fulfil its deterrent role, although there is no clear agreement on the subject.[41] Even in the most pessimistic scenario, though, experience from antitrust enforcement both on the EU and national level was an important factor that fed into preparatory works for the DMA proposal,[42] leading to an innovative regulatory framework to tackle issues uncovered by these earlier attempts.

IV. CONCLUSION

In the most recent occurrence of judicial scrutiny of a behavioural theory of harm, the General Court mostly upheld the Commission's analysis of the issue at hand. At the same time, while discussing the importance of examining the effects of conduct in a case like *Google Android*, it did not delve into many questions of principle regarding the underlying economic theory. Pragmatically speaking, this means that the General Court will likely not stand in the way of similar theories of harm as a matter of principle. The decision also shows the potential usefulness of older legal tests which, while not necessarily bringing the same degree of legal certainty as in the "classical" cases on which they were developed, still serve as a useful tool to structure the reasoning underlying the decision.

Furthermore, although some legislative acts on the EU level are also attempting to deal with the issue of behavioural exploitation, this does not obviate behaviourally informed competition law. There is experience with competition law being applied in highly regulated markets. Furthermore, the relatively abstract nature of Articles 101 and 102 TFEU allows competition law to be a very versatile tool. Although its enforcement can take years, I believe it nevertheless proves useful in the long run.

As this contribution deals with a single judgement, attempts at generalisations should be made with caution. This being said, the General Court's *Google Android* judgement might indicate that to study behaviourally informed competition law, one has to delve into the Commission's decision making itself. At least as far as the

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[41] JAKAB, M. Benefits and Limitations of a Behaviourally Informed Regulatory Framework for Digital Market. *Prague Law Working Papers* [online]. 2022, No. 3, pp. 7–8 [cit. 2023-01-31]. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4275031.

[42] See the Impact Assessment Report accompanying the DMA proposal, SWD(2020) 363 final, especially its Section 5.2.2 and Annex 5.6.

relevance of behavioural economics goes, the General Court remained agnostic to the niceties of economic theory and looked at economic evidence instead of using economics as a policy tool.[43] If this shows to be a trend, in the Commission's decision-making practice then lie the answers to questions regarding both the prevalence and qualitative features of behavioural theories of harm. Further research may be needed to answer these questions.

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[43] As noted by HUFFMAN, *c. d.*, p. 6.

STRENGTHENING THE EUROPEAN UNION BY REGULATING THE DIGITAL SINGLE MARKET[1]

JAROSLAV DENEMARK

Abstract: Polarization of the society is nowadays easier than ever due to the strong influence of social media. Opaque algorithms personalize news feed of users through massive data processing and thus creating effects that are fueling extremization of opinions. Negative effects of social media can be used by third parties to influence society to achieve their goals, however antidemocratic. Digital Markets Act and Digital Services Act aim to regulate Digital Single Market through fair competition and consumer protection regulation. This regulation can have significant impact on the democratic deficit of the European Union as it has potential to eradicate analyzed negative effects of social media on the polarization of society.

Keywords: Digital Single Market; Digital Services Act; Digital Markets Act; Democratic Deficit; Fake News; Public Spheres; European Union Identity

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1. INTRODUCTION

Ever since there have been strengthening tendencies towards the executive powers of the European Union, the debate on the democratic deficit has flourished significantly.[2] The decision-making process on the European Union level has shifted from the national arenas and from the "politics" that would reflect the ideas of its citizens.[3]

Many academic papers about the democratic deficit of the European Union are highlighting the legitimacy on the institutional level, focusing primarily on the necessity to reform the internal mechanism of the European Union[4]. But if we look at the ultimate

[1] This paper has been written as part of the 2023 Cooperatio/LAWS project of the Faculty of Law, Charles University.

[2] LONGO, M. No ode to joy?: reflections on the European Union's legitimacy. *International Politics* [online]. 2011, Vol. 48, pp. 667–690 [cit. 2023-02-18]. Available at: https://link.springer.com/article/10.1057/ip.2011.29.

[3] HABERMAS, J. Democracy in Europe: Why the Development of the EU into a Transnational Democracy Is Necessary and How It Is Possible. *European Law Journal*. 2015, Vol. 21, No. 4, p. 547.

[4] Such as, for example, FOLLESDAL, A. – HIX, S. Why There is a Democratic Deficit in the EU: a Response to Majone and Moravcsik. *Journal of Common Markets Studies*. 2006, Vol. 44, No. 3, pp. 533–562.

goals or the purpose of the European Union reflected in the Agreements, we must necessarily conclude that institutional reform is not the solution we need to seek.[5]

In my opinion, the issue of the democratic deficit should be more focused on the union identity of the European Union's citizens, how to support its development, how to strengthen it and, in some cases, how to prevent citizens from rejecting the politics of the European Union, or even the basic idea behind the organization.[6]

In this regard it is very important to acknowledge that significant amount of time is spent in the digital world. Digitalization of the everyday tasks and tendencies to spend more time online than in the real world raise questions not only about how to successfully regulate the digital space, but also how to protect democracy. The cyber space might be a threat to democracy for its vast boundless possibilities of influencing the lives of others. Privacy is becoming only illusory, and the amount of information is overwhelming. Even though the cyberspace has the potential to support democratic deliberation,[7] it can also be used either by the populists or even other global players such as Russia or China to destabilize democracy.[8, 9]

The intrusion of privacy and the influence of *malae fidei* third parties can be multiplied by now more than ever operating artificial intelligence mechanisms. Big Data and machine learning are included in more and more processes online, from simple search of pictures and information on the search engines, to complex algorithms sorting news feeds and other points of interest on social media. Artificial intelligence is deciding what we perceive, in what intensity, and even the context of it. Artificial Intelligence can therefore be easily used to mingle reality and lie to manipulate democratic processes and undermine the legitimacy of the democratic institutions.[10, 11]

In connection with the abovementioned, the hypothesis is that the union identity can be strengthened, or at least that its weakening can be prevented,[12] by efficient regulation of privacy (specifically regarding the social media).

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5 More on this topic in MORAVCSIK, A. The Myth of Europe's Democratic Deficit. *Intereconomics*. 2008, Vol. 43, No. 6, p. 334.

6 MCNAMARA, K. R. When the Banal Becomes Political: the European Union in the Age of Populism. *Polity*. 2019, Vol. 51, No. 4, p. 5.

7 SCHWARTZ, P. M. Privacy and Democracy in Cyberspace. *Vanderbilt Law Review*. 1999, Vol. 52, No. 6, p. 1648.

8 RADU, G. Russian Influence in European Policies. *Research and Science Today*. 2018, Vol. 16, No. 2, pp. 53–54.

9 KERMER, J. E. – NIJMEIJER, R. A. Identity and European Public Spheres in the Context of Social Media and Information Disorder. *Media and Communication*. 2020, Vol. 8, No. 4, p. 34.

10 MANHEIM, K. – KAPLAN, L. Artificial Intelligence: Risks to Privacy and Democracy. *Yale Journal of Law and Technology*. 2019, Vol. 21, p. 108.

11 BRKAN, M. Artificial Intelligence and Democracy: the Impact of Disinformation, Social Bots and Political Targeting. *Delphi Interdisciplinary Review of Emerging Technologies*. 2019, Vol. 2, No. 2, p. 68.

12 Because the destabilization of democracy is a process that is, especially in case of Russia, done through its citizens by manipulating the facts, spreading fake news on social media etc. Citizens are more vulnerable to the populists' polity, supporting them and trying to replace the governing elites by the populists. More on this topic in MCNAMARA, K. R. When the Banal Becomes Political: the European Union in the Age of Populism. *Polity*. 2019, Vol. 51, No. 4, pp. 5–6; and in HARRISON, S. – BRUTER, M. Media and identity: the paradox of legitimacy and the making of European citizens. In: RISSE, T. (ed.). *European Public Spheres* [online]. Cambridge: Cambridge University Press, 2014, p. 181 [cit. 2023-02-18]. Available at: https://doi-org.ezproxy.is.cuni.cz/10.1017/CBO9781139963343.

Therefore, digital autonomy should be one of the priorities of the European Union to succeed in the world controlled by global superpowers. This is very closely connected to the regulations regarding Digital Single Market.

In this article, my goal is to analyze social media that can pose either an imminent danger or a tremendous opportunity for the European Union's democracy and I will try to answer the question, whether the regulation on the European Union's level is eligible to reduce (eliminate) the danger that threatens to deepen the psychological democratic deficit of the European Union.[13]

The analysis of the regulations should be specifically focused on the Digital Markets Act[14] and Digital Services Act[15] as these regulations focus on creating rules for the Digital Single Market, which is a virtual space where most Europeans meet every day.[16]

2. SOCIAL MEDIA AND DEMOCRACY

2.1 PUBLIC SPHERES AND THEIR POSSIBLE ROLE IN (RE)BUILDING THE EU IDENTITY

Many authors believe that to form the union identity, it is crucial to develop the so-called European public sphere, or at least to develop "Europeanization" of existing national public spheres.[17] Public spheres can be defined as important arenas of common public deliberation based on the opinions of informed citizens. To provide meaningful arena for democratic discourse, allowing the citizens to *"monitor and critically evaluate governance, inform citizens about the political process"*,[18] the public spheres must bear some minimum level of quality and satisfy some normative criteria.[19]

For example, Habermas brings to the forefront civil society which, as he hopes, can pinpoint new agendas to politics by including new groups of citizens into the political

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[13] More about the psychological democratic deficit in DENEMARK, J. Psychologický demokratický deficit Evropské unie a možná role právníků [Psychological Democratic Deficit and Possible Role of the Lawyers]. *Právník*. 2022, Vol. 161, No. 11, pp. 1063–1083.

[14] Proposal for a regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act), 15 December 2020, COM(2020) 842 final, 2020/0374 (COD) (DMA).

[15] Proposal for a regulation of the European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC, 15 December 2020, COM(2020) 825 final, 2020/0361 (COD) (DSA).

[16] SCHWARTZ, *c. d*., p. 1652.

[17] KOOPMANS, R. How advanced is the Europeanization of public spheres: Comparing German and European structures of political communication. In: RISSE, T. (ed.). *European Public Spheres* [online]. Cambridge: Cambridge University Press, 2014, p. 59 [cit. 2023-02-18]. Available at: https://doi-org.ezproxy.is.cuni.cz/10.1017/CBO9781139963343.

[18] MCNAIR, B. *Journalism and Democracy: an Evaluation of the Political Public Sphere*. London and New York: Routledge, 2000. Cited from: RISSE, T. (ed.). *European Public Spheres* [online]. Cambridge: Cambridge University Press, 2014, p. 5 [cit. 2023-02-18]. Available at: https://doi-org.ezproxy.is.cuni.cz/10.1017/CBO9781139963343.

[19] Ibid., p. 4.

debate.[20] According to Habermas, these civic societies should be meeting in coffee-houses, restaurants, and other meeting points appropriate to face-to-face democratic deliberation, as they used to meet in such places in times where civil political debate constituted opinion-formation processes.[21]

However idealistic this approach might sound, it cannot be successful in the times of best standard of life in history and in countries with fully democratic systems. Arenas of erudite deliberation are nowadays reserved solely for well-informed elites that are barely a representative sample of society.[22]

To be successful, Habermas' concept requires people from all social classes, with various education and political attitudes, to be present in the same arena (arenas) and deliberate based on objectively truthful information and observations.

2.2 ARE SOCIAL MEDIA A SOLUTION OR A DEAD END?

However, other academics, retrieved from Habermas' theory, were depending on the internet to increase the coverage of EU topics and thus create necessary mycelium for creating the Europeanized public sphere.[23] Social media might have the potential to provide necessary space for arenas of social deliberation for people from all of the nations across the European union. However, there are many other aspects that need to be considered such as algorithms creating the "newsfeed," excluded social stratification, posts containing fake news etc. that could have the opposite effect on the union identity than the ideal model of public spheres.

The social media and generally internet are providing access to an infinite amount of information, thus creating chaos in some cases. Most of the academics agree that identity is shaped, reformed, and even transformed through "media communication".[24] Media give narrative to the topics, they choose what news they are going to inform the society about, how they will inform and what context they will give to that information. By creating this information momentum, the media are eventually shaping the world around us; topics of discussion on all levels of social spheres.[25] Media can inform truthfully on the European events, however most of the "mainstream" media are not often covering events happening on the European union level, simply because those events

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[20] HABERMAS, J. *Between Facts and Normss: Contributions to a Discourse Theory of Law and Democracy*. Cambridge: MIT Press, 1996. Cited from: LANCE, B. – W. – LANG, S. – SEGERBERG, A. European issue public online: the cases of climate change and fair trade. In: RISSE, T. (ed.). *European Public Spheres* [online]. Cambridge: Cambridge University Press, 2014, p. 108 [cit. 2023-02-18]. Available at: https://doi-org.ezproxy.is.cuni.cz/10.1017/CBO9781139963343.

[21] HABERMAS, J. *Strukturwandel der Öffentlichkeit: Untersuchungen zu einer Kategorie der bürgerlichen Gesellschaft*. Darmstadt, Neuwied: Luchterhand, 1980. Cited from: RISSE, T. (ed.). *European Public Spheres* [online]. Cambridge: Cambridge University Press, 2014, p. 6 [cit. 2023-02-18]. Available at: https://doi-org.ezproxy.is.cuni.cz/10.1017/CBO9781139963343.

[22] HOUSKA, O. in: DENEMARK, J. (ed.). Vztah Čechů k Evropské unii an existence demokratického deficitu [The Relationship of Czech citizens to the European union and existence of democratic deficit] [epizoda podcastu]. In: *zEvropy* [online]. [cit. 2023-02-20]. Available at: https://open.spotify.com/episode/70FIONKyJ1DQtNvSsAbmSw.

[23] KERMER – NIJMEIJER, *c. d.*, p. 28.

[24] Ibid., p. 30.

[25] Ibid.

are not interesting enough for the targeted audience,[26] or in other words, because most European politics are *boring*.[27]

On the other hand, the media on the other spectrum from "mainstream", whose target audience is the same target audience as for the populists, are mentioning European Union in many connotations, mostly as the source of most of the problems in the society, whether it being up-to-date problems such as energetic crisis or long-lasting problems such as generally bad social situation of the lower social class citizens.[28]

The European Union works for the populist simply as the scapegoat, the one that is *responsible* for most (or even all) of the problems even on the national level. Moreover, the same narrative is used by media or "trolls" of foreign global powers that are trying to destabilize the political system of the European Union, such as Russia, because fragmented Europe is more vulnerable than Europe unified through the European Union.[29]

Through empirical experiment conducted by Sarah Harrison and Michael Bruter,[30] important results were shown on how the news about the European Union is affecting (and whether they are affecting) the European identity. In the research, the identities are divided into three categories, namely civic identity, cultural identity, and general identity. Civic identity consists of the "citizenship" feeling and our belonging to the political system. Cultural identity represents bigger closeness to people belonging to the same polity in comparison to those who do not.[31] General identity represents identity as is usually described by other authors ("the" identity).

The experiment revealed that when citizens are exposed to news about the European Union, this has, indeed, an impact on the European identity, mostly on the civic identity and on the general identity.[32] Very interesting is the effect which the authors call the "time-bomb". Even though some of the recipients were increasingly sophisticated or cynical while being exposed to the biased news about the European Union and, thus, were realizing that the news is biased, the subjects showed increasing subconscious influence over the time. In other words, even though the recipients were aware that the presented news is biased, for which reason they could critically confront it with reality, the subjects still showed great subconscious influence by the kind of bias the news had.[33]

More importantly, it has been proven that exposing citizens to the bad news about the European Union has a great influence on the identity in a way that is described by the authors as "identity killer".[34] On the other hand, if citizens are regularly exposed to the good news about the European Union, the European identity is developing positively.

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26 HARRISON – BRUTER, *c. d.*, p. 167.
27 MORAVCSIK, A. The Myth of Europe's "Democratic Deficit". *Intereconomics* [online]. 2008, Vol. 43, No. 6, p. 339 [cit. 2023-02-18]. Available at: https://www.academia.edu/2829768The_myth_of_Europes_democratic_deficit.
28 KERMER – NIJMEIJER, *c. d.*, p. 34.
29 RADU, *c. d.*, pp. 53–54.
30 HARRISON – BRUTER, *c. d.*
31 Ibid., p. 175.
32 Ibid., p. 179.
33 Ibid., p. 184.
34 Ibid., p. 185.

It is, nonetheless, obvious from the experiment that the negative, bad news has a bigger effect on the identity than good, positive news.[35]

In conclusion, this experiment is extremely important in realizing that the negative, bad news (while the strongest source of the bad news about the European Union being the fake news media) has a greater immediate effect on the European identity than good news. Even if the recipients of the fake news are aware of the untruthfulness of the information contained in the news, they can be, thanks to the so-called "time-bomb" effect, affected by this negative news in a way that their identity, either civic or general, is being decreased. Cultural identity is not as strongly affected by the news about the European union as other categories of identity.

Regarding social media, it is necessary to connect the above mentioned experiment to the so-called "information disorder". Information disorder contains three aspects of harmful informing – disinformation, misinformation and malinformation, where disinformation represents *"the deliberate intent to spread false information"*,[36] misinformation represents *"the accidental spreading of false information"*,[37] and malinformation represents *"true information spreading with the intent to cause harm"*.[38]

For the European identity, it is crucial that the citizens acquire, process and store new information in the coveted manner.[39] Although social media have the potential to strengthen the transnational deliberation, thus empowering the "unionship" as the identity milestone, they are also the perfect space to spread false information about the European Union, influencing the minds and hearts of European citizens.[40] Social media are highly dangerous in the Europeanized discourse, because their algorithms prefer visibility and potentially sharing of the content with the biggest auditory potential, thus preferring "virality over factuality".[41] Furthermore, social media provide the perfect space for the "simplified narrative"[42] (some of the social media even require simplified language due to the limited number of characters per post, such as Twitter) and emotive language,[43] nourished by the possibility of anonymity and detachment from reality. Simplification of such complex topics as policies of the European Union can lead to belittling and eventually to dangerous "information disorder" caused by the misunderstanding by the end user.[44]

Information disorder can only be efficiently used by the Eurosceptics, populists and world powers trying to destabilize the European Union, because methods described above have no place in the democratic debate.[45] Social media provide perfect arenas for these subjects, as they allow these subjects to reach the audience the "old-fashioned" media would never allow. Fact-checking agencies and mechanisms are not efficient

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35 Ibid., p. 186.
36 KERMER – NIJMEIJER, *c. d.*, p. 33.
37 Ibid.
38 Ibid.
39 Ibid., p. 34.
40 Ibid.
41 Ibid.
42 Ibid.
43 Ibid.
44 DENEMARK, *c. d.*, p. 1069.
45 Although there might be some exceptions, such as using fake news as counter-propaganda in the war.

enough as the algorithms of the social media prioritize to show to users such posts that are most likely to arouse emotions.[46, 47]

It is important to emphasize that the issue of information disorder and its impact is not limited on the topic of European Union identity, or even democracy as a whole. Information disorder is a problem potentially affecting all aspects of life including politics, but also e.g. environmental issues, tabloids, and even e-commerce.[48]

Social media allow people to communicate more easily, to pinpoint problems that would be otherwise hidden to the rest of the society and consequently to the politicians.[49] Even though social media are used by so many people from different socio-economic backgrounds, thanks to the algorithms people with similar interests are usually confronted only by people with the same or similar opinions on various topics. When these people talk to each other, they usually end up having even more extreme opinions than they had before.[50]

Cass Sunstein, the former administrator of the White House Office in Information and Regulatory Affairs and currently a professor at Harvard University, argues that the goal of the company Meta, Inc., which is the most personalized news feed possible while stating that *"something that one person finds informative or interesting may be different from what another person finds informative or interesting"*[51] is rather dangerous for democracy.[52] Sunstein on the contrary says that for the democracy and deliberation immanent to democratic pluralism is crucial that the citizens are constantly being exposed to the topics that are outside their comfort zone or even irritating. Furthermore, citizens should have a common experience that is able to bind them emotionally. And lastly, efficient processes that help people when other *"people are knowingly spreading lies, and if nations are attempting to disrupt other nations"*[53] should be implemented.[54]

In other words, people should not be forced only into topics that are evaluated by an algorithm as most like-minded, as well as debating only with groups of people with the same or similar opinion. This approach is dangerous not only for the European Union's identity but also for the democracy itself. People should be confronted with other topics than the ones they would have chosen in advance, they should be interconnected by

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46 MOSSERI, A. Building a Better News Feed for You. In: *Facebook Newsroom* [online]. 29.6.2016 [cit. 2023-02-20]. Available at: https://about.fb.com/news/2016/06/building-a-better-news-feed-for-you/. Cited from: SUNSTEIN, C. R. Is Social Media Good or Bad for Democracy? *Sur – International Journal on Human Rights*. 2018, Vol. 15, No. 27, p. 85.

47 As was also proved by the leaked documentation of company Meta Platforms by whistleblower Frances Haugen; The Facebook Files or Facebook Papers, Meta uses those algorithms to artificially arouse more negative emotions (such as anger) that force people to follow certain pages and comment on certain post more, hence creating more activity and, consequently, bigger profit. More on this topic in MERRILL, J. B. – OREMUS, W. Five points for anger, one for "like": How Facebook's formula fostered rage and misinformation. *The Washington Post* [online]. 26.10.2021 [cit. 2023-02-20]. Available at: https://www.washingtonpost.com/technology/2021/10/26/facebook-angry-emoji-algorithm/.

48 KERMER – NIJMEIJER, *c. d.*, p. 34.

49 SUNSTEIN, *c. d.*, p. 84.

50 Ibid.

51 MOSSERI, *c. d.*, p. 85.

52 SUNSTEIN, *c. d.*, p. 85.

53 Ibid.

54 Ibid.

common emotional experience, and they should be able to recognize the difference between fake news and truthful information. I find it very important to stress that none of the precautions are linked to censorship. Preventing dissemination of deliberate and purposeful lies that can disrupt democratic systems, regardless of whether it is for the purpose of political points or for the purpose of hybrid war led by Russia, is a crucial tool of defense for modern society.

Sunstein has conducted experiments in Colorado to analyze the polarization of groups of people with the same or similar opinions. During the experiment, many groups, each of them consisting of six people with the same political orientation (liberals or conservatives), were created and were presented with three topics that they would be discussing. The first topic was same-sex marriages, the second topic was implementation of affirmative action by private employees, and the third topic was whether the United States should sign an international treaty to combat global warming.[55] The group members were obliged to write their opinion on the presented topic anonymously 15 minutes before the group discussion, and again right after the discussion.

The results were concerning and can be fully applied to what was discussed earlier in this article. The discussion on the topics by like-minded people showed that all opinions expressed before the discussion were tremendously amplified by the deliberation. Not only were the opinions of the groups after the experiment more radical, but the groups were more ideologically homogeneous.[56] This consequently leads to expansion of an empty space between the two groups, even though some liberals and some conservatives were opinion-wise very close before the experiment. This effect is called "echo chambers".

Sunstein aptly notes that the problem of polarization of the same opined groups of citizens was here as far back as the history of mankind.[57] However, the difference between today and the beginning of time is that polarization is nowadays much easier than ever, thanks to social media. Sunstein specifically stresses that *"*[…] *targeting people who are especially likely to believe specific falsehood, and on-click echo chambers,* [is] *something new"*.[58]

Hojun Choi in his analysis of social media identifies key criteria that need to be analyzed to assess the quality of coveted space for the democratic deliberation provided by social media. First, how social media create a space where individuals can freely voice their political opinions. Second, as Sunstein also stressed, whether and how people are exposed to a variety of opinions. Lastly, whether the individuals are engaging in political debates in a way of criticizing the ideologies without using *argumentum ad hominem* and what mechanism the social media have implemented to support it.[59]

As for the freedom of speech, the debate regarding the balance between freedom of speech and moderating the content by fact-checking, hiding, or erasing posts and even

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55 Ibid., p. 86.
56 Ibid.
57 Ibid, p. 87.
58 Ibid.
59 CHOI, H. The Modern Online Democracy: an Evaluation of Social Media's Ability to Facilitate Political Discourse. *Technium Social Sciences Journals*. 2020, Vol. 12, No. 1, p. 278.

deleting accounts became even more vociferous during and shortly after the U.S. presidency of Donald Trump.[60] Trump was, through his frequent tweets and posts without any context whatsoever, spurring racism, civil disobedience, hatred, and thus expanding the trenches between liberal and conservative citizens, and even trying to destabilize democratic system of political pluralism by questioning the results of presidential elections, which consequently led to the United States Capitol attack on 6 January 2021, one of the most tragic events in the modern U.S. history, leading to five deaths.

Twitter finally decided to delete Trump's account and Facebook suspended it after the Capitol attack happened.[61, 62] The approach towards Trump's posts prior to the attack was nonetheless different by Twitter and Facebook. Twitter was actively labeling Trump's claims as being false, fact-checking his statements, and was actively involved in demystifying them.[63] Facebook, on the other hand, had chosen a more "neutral" approach without any such interference into Trump's activity on the social platform.[64]

However, the approaches of both these social media platforms were criticized: Twitter for creating dangerous precedent for restricting freedom of speech – one of the pillars of democracy, and Facebook, on the other hand, for allowing any individual to spread lies and thus manipulate the public, which can consequently lead to the disruption of the democratic pluralism. Ultimately, nonetheless, it is necessary to find the balance between moderating malicious content and freedom of speech. However, as Choi notes and I agree, absolute freedom to disseminate fake news can be more harmful than moderating the content.

Another dangerous aspect of social media is the so-called "spiral of silence".[65] This phenomenon means that people are subconsciously less willing to speak up about controversial issues in fear of the social backlash. In other words, people would rather pretend to agree or not talk about controversial issues in the social group they belong to in order not to jeopardize their position in such a group.[66] This closely relates to the effect the social media have on the polarization discussed earlier in this article.

The spiral of silence alongside how social media operate is strengthening the effect of "echo-chambers" (already described by the experiment conducted by Sunstein) and is the basic cause of polarization of society. Some social media, as for example Facebook, even allow creating closed groups, where usually polarization thrives even more because like-minded people are more intensively exposed to negative phenomena.[67]

An experiment to analyze the real effect social media are having on polarization was conducted in 2020 and confirmed the results of Sunstein's experiment, even though

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60 Ibid., p. 281.

61 CULLIFORD, E. – SHEPARDSON, D. – PAUL, K. Twitter permanently suspends Trump's account, cites "incitement of violence" risk. In: *Reuters* [online]. 9.1.2021 [cit. 2023-02-20]. Available at: https://www.reuters.com/article/us-usa-election-trump-twitter-idUSKBN29D355.

62 However, the new owner of Twitter – Elon Musk – recently restored the account of Donald Trump – https://time.com/6235372/musk-trump-twitter-account/.

63 CHOI, *c. d.*, p. 278. Ibid., p. 280.

64 Ibid.

65 Ibid., p. 281.

66 Ibid.

67 Ibid.

Sunstein conducted his experiment offline (in the "real world"; outside of social media interface).[68]

The experiment, however, showed another issue confirming the hypothesis already noted in this article. Both Twitter and Facebook (or Twitter and Meta, Inc.) are implementing such mechanisms that limit *"the extent to which users could be exposed to others' opinions"*.[69] It is important to know what is actually meant by "others' opinions". Not only is it the posts of other users with different opinions, but also posts of legal persons, targeted commercials, political posts etc. A study of Twitter in 2016 revealed that in the 2016 U.S. presidential elections the like-minded voters have seen significantly more like-minded information in their news feed than any other.[70]

The last issue of social media is the potential to allow users to hold productive political discussion through supporting "civility".[71] Social media allow information to flow freely, in a constant stream, overwhelming the recipients constantly, creating the so-called "state of flow" in which the recipients are not actively encouraged to get involved in the political debate, but rather consume the information passively.[72]

In conclusion, social media are not yet suitable for creating the arenas for ideal democratic deliberation. Though there is undoubtedly the potential, a reform of their functioning is inevitable. Among the biggest issues that the social media show nowadays is the paradox of information disorder, where the triad of disinformation, misinformation and malinformation is best used by populists, Eurosceptics and foreign powers pursuing the destabilization of the European Union.

The effect of information disorder is even multiplied by "echo-chambers", where like-minded people affirm each other's opinions and these opinions are at the same time extremized thanks to the "state of flow" effect, where people consume information passively. These effects can, when used properly, destabilize democratic systems even more on the European level, where citizens usually do not have common emotional experience or strong cultural identity with the EU as a political hegemon.

In this regard, it is up to the social media to modify the algorithms that personalize news feeds and to develop mechanisms that will effectively fight against fake news, hate speech, "trolls",[73] while protecting freedom of speech at the same time.

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68 CINELLI, M. et al. The echo chamber on social media: a comparative analysis. *Proceedings of the National Academy of Sciences* [online]. 2021, Vol. 118, No. 9 [cit. 2022-02-27]. Available at: https://www.pnas.org/doi/10.1073/pnas.2023301118. Cited from: CHOI, *c. d.*, p. 282.

69 Ibid.

70 HALBERSTAM, Y. – KNIGHT, B. Homophily, group size, and the diffusion of political information in social networks: Evidence from Twitter. *Journal of public economics*. 2016, Vol. 143, pp. 73–88. Cited from: CHOI, *c. d.*, p. 282.

71 CHOI, *c. d.*, p. 283.

72 Ibid.

73 *"A 'troll farm' is an organized group that has come together for the specific purpose of affecting public opinion through the generation of misinformation and/or disinformation on the Internet. An individual engaged in such activity is referred to as a troll or Internet troll."* Cited from: MCCOMBIE, S. – UHLMANN, A. J. – MORRISON. S. The US 2016 presidential election & Russia's troll farms, Intelligence and National Security. *Intelligence and National Security*. 2020, Vol. 35, No. 1, p. 3.

2.3 CAN THE DIGITAL MARKETS ACT AND THE DIGITAL SERVICES ACT BRING LIGHT TO THE DARK WATERS OF SOCIAL MEDIA?

The fast-paced development of new technologies brings along new challenges for the regulatory framework. Not only is there a market with rules and characteristics different from the "old fashioned" perception which brings new challenges for the competition law, but there are also new threats faced by the consumers.

As for the competition law, the dynamics of the digital market, multihoming and specifics of defining the relevant market call for *ex ante* regulation. Regarding consumer protection, the existing regulation needs to be amended so that consumers are protected against usually rather opaque mechanisms of social media and profiling algorithms. Therefore, both the DMA and the DSA have been adopted as a solution for the upcoming digital age with the potential to regulate digital market in respect of fair competition and consumer protection.[74]

Moreover, both the regulations have the potential to tackle the already described issues regarding the social media, mostly by forcing the social media providers to implement more transparent mechanisms for assessing harmful or malicious content, to explain and reveal how the algorithms work, to allow the users optimize whether their newsfeed will work based on the profiling or other criteria, and other rules in a similar manner.

Although, to some extent, those regulations constrain the freedom of business in order to tackle the issues raised above in their own way, and even the freedom of consumers to choose information channels, it is important to regulate the online environment as it has been overlooked for too long now. As any other business or consumer's rights are regulated in many aspects in the "physical reality", it is only natural that the online reality is subject to regulations as well. These regulations then need to be tailored to the specifics of the online world.

2.3.1 DMA

Even though the DMA is a complementary regulation to the already existing fair competition laws,[75] some obligations laid upon the gatekeepers[76] will directly affect the safety of social media especially regarding personal data protection.

First, DMA forbids the gatekeepers to combine personal data from various sources and core platforms that are controlled by the same gatekeeper and to combine personal data from core services of the gatekeeper and from third-party services, unless the data subject has been presented with the choice and even after that specifically agreed with such data processing.[77]

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[74] DI PORTO, F. – GROTE, T. – VOLPI, G. – INVERNIZZI, R. "I See Something You Don't See": a Computational Analysis of the Digital Services Act and the Digital Markets Act. *Stanford Computational Antitrust*. 2021, Vol. I, pp. 90–92.

[75] Point 9 of the reasoning of DMA.

[76] A business that meets the criteria set in Article 3 of the DMA. Basically, every large technological company on the European market, including Meta, Inc.

[77] Article 5, let. (a) of DMA.

This obligation prevents extensive personalization of commerce or generally personalization of news feed based on the detailed profiling of the data subject, usually connected with the processing of special categories of personal data.[78]

Such detailed profiling cannot only be used as a commercial tool, but also for political propaganda or as a psychographic micro-targeting tool with the goal of spreading false information to politically manipulated individuals.[79]

This behavior is not unusual, as the company Meta, Inc. is combining personal data of the users from Facebook, WhatsApp, and Instagram with personal data collected from third-party web sites, thus creating a complete picture of one's life. This behavior is currently being scrutinized by the European Court of Justice in the preliminary ruling.[80]

Furthermore, DMA makes it mandatory for the gatekeepers to provide access and use personal data *"only where directly connected with the use effectuated by end user in respect of the products or services offered by the relevant business user through the relevant core platform service, and when the end user opts in to such sharing with a consent in the sense of the Regulation (EU) 2016/679"*.[81]

This means that the gatekeeper is restricted from using or giving access to data processed originally with the connection of a specific product or service for another purpose, without prior explicit opt-in action from the user. This obligation systematically follows the Regulation (EU) 2016/679 (GDPR). In theory, such a provision may prevent, for example, Meta, Inc. from processing users' personal data for the purpose of personalized advertising. The primary purpose of Meta, Inc.'s use of its services is the very nature of a social network – communication with a group of people, self-presentation, etc., whereas profiling for the purpose of personalized advertising is an economic interest of Meta, Inc., which generates profit – and the more successful the shared advertising is the bigger the profit there is. Hence, the profiling for personalized advertising might not be *"directly connected with the use effectuated by the end user in respect of the products or service* […]*"*.[82]

The above mentioned correlates with the reasoning of DMA, where the necessity of transparent profiling mechanisms is stressed.[83] Furthermore, DMA requires for every gatekeeper to, within 6 months of being designated as a gatekeeper, submit to the European Commission an independent audit with the description of *"any techniques for profiling of consumers"*.[84]

DMA introduces even more protective measures regarding the data use within the competition that can ultimately benefit the data subjects, such as prohibition to use

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78 Point 46 of the opinion of advocate general Rantos, C-252/21, *Meta Platforms Inc. et al. v. Bundeskartellamt et al.*, ECLI:EU:C:2022:704.

79 BRKAN, M. Artificial Intelligence and Democracy: the Impact of Disinformation, Social Bots and Political Targeting. *Delphi Interdisciplinary Review of Emerging Technologies*. 2019, Vol. 2, No. 2, p. 68.

80 C-252/21, *Meta Platforms Inc. et al. v. Bundeskartellamt et al.*, ECLI:EU:C:2022:704. The question is whether the National Office for the Protection of Fair Competition may determine that the business is abusing its dominant position by describing processing.

81 Article 6, let. (i), 2nd *alinea* of DMA.

82 Ibid.

83 Point 61 of the reasoning of DMA.

84 Article 13 of DMA.

non-public data generated by business users while competing with them on their own platform (including data of end users)[85] and allow data portability of *inter alia* end users[86]. Even though those measures are focused mainly on the competition regulation, they are very likely going to affect the overall processes with regard to data protection and, thus, help to eradicate negative effects of misuse of such data.

2.3.2 DSA

One of the key roles of DSA is to fight against *"coordinated operations aimed at amplifying information, including disinformation, such as the use of bots or fake accounts for the creation of fake or misleading information, sometimes with a purpose of obtaining economic gain* […]*"*.[87]

DSA sets rules regulating responsibilities and accountability of *inter alia* social media platforms such as *"notice-and-action procedure for illegal content"*, *"possibility to challenge the platforms' content moderation decision"* and rules that regulate transparency and accountability on advertising and on algorithmic processes.[88]

The provider of intermediary services (e.g., social media services provider) will have the obligation to include information in terms and conditions about content moderating mechanisms, including the information regarding the use of AI or another sophisticated software (algorithmic decision-making) and the use of a human review (in which case either of them are used). This information shall be clear and easily accessible.[89]

An important obligation set by DSA is the so-called "notice and action mechanism" pursuant to Article 14 of DSA. The service providers are obliged to implement mechanisms that allow any user to notify the provider of content that is perceived by them as illegal. This mechanism must be *"easy to access, user-friendly, and allow for the submission of notices exclusively by electronic means"*.[90] Furthermore, the mechanism shall allow the users to submit a notice that is *"sufficiently precise and adequately substantiated"* so that the suspected content can be closely assessed.[91] In other words, the user must be allowed to explain in their own words why the content is illegal according to them.

If the service provider concludes that the content needs to be removed or the access to that content needs to be disabled (either for illegality of the content, not being compatible with the terms and conditions, or for other legally allowed reasons), the recipient of the service (originator of the content) must be informed about such a decision pursuant to Article 15, para. 1 of DSA. The decision of removing or disabling access to a content shall contain a minimum amount of information, such as facts and circumstances that led the provider to make the decision and whether (where relevant)

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85 Article 6, let. (a) of DMA.
86 Ibid., let. (h) of DMA.
87 Point 68 of the reasoning of DSA.
88 Explanatory memorandum of the Commission on the Proposal for DSA, COM(2020) 825 final, 2020/0361 (COD), p. 2.
89 Article 12, para. 1 of DSA.
90 Article 14, para. 1 of DSA.
91 Ibid., para. 2 of DSA.

the decision-making process was triggered by the notice of another user.[92] I find this part quite controversial, as the information whether the content was removed (or the access to the content was disabled) upon the notice of another user can deepen the polarization of society, invoking unfounded suspicion or even paranoia among users (despite the fact that the user who notified about the content remains anonymous).

Nonetheless, the information shall also include at least the information regarding why exactly the content was found to be illegal[93] or why it is incompatible with the terms and conditions[94] and, also importantly, information on the processes an appeal against the decision.[95]

The above mentioned mechanisms are crucial for nourishing the democratic deliberation, while at the same time protecting freedom of speech. Nowadays, it is not common that the notice of harmful content can be precisely reasoned. Instead, "premade" choices are usually offered to the user submitting a notice about the harmful content, which might not be sufficient. Social situations are not "black and white" and usually a detailed description of the issue is necessary. This will now be allowed thanks to DSA.

Moreover, every decision on the removal of content will need to be reasoned in a comprehensive and clear manner so it is clear why exactly is the content harmful for the community. This transparent approach, along with the information on the implemented mechanisms, can help to create a forum free of information disorder.

Pursuant to Article 19 of DSA, each Member State can appoint so-called "trusted flaggers" which are persons (either legal or natural) meeting criteria such as expertise for detecting and identifying illegal content,[96] representing collective interest while being independent from online platform,[97] and *"carrying out its activities for the purpose of submitting notices in a timely, diligent and objective manner"*.[98]

The notice submitted by appointed trusted flaggers shall be handled by the service provider without undue delay and with priority.[99] I think that this mechanism can be helpful in detecting illegal fake news that may meet the definition of criminal offense, even with the potential to destabilize democracy. For example, in the Czech Republic, there are various groups that are trying to demystify fake news and bring them to the attention of the public.[100] These groups that have vast experience in detecting and demystifying fake news are, in my opinion, capable of the role of trusted flaggers.

However, one might object that the position of a trusted flagger can be abused. For example, a government made of populists, far-right of far-left extremists, authoritarians (e.g., the Hungarian government) might avoid appointing trustworthy trusteed flaggers, or might even appoint trusted flaggers with the task to notify any content that might

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92 Ibid., para. 2, let. (b) of DSA.
93 Ibid., let. (d).
94 Ibid., let. (e).
95 Ibid., let. (f).
96 Article 19, para. 2, let. (a).
97 Ibid., let. (b).
98 Ibid., let. (c).
99 Article 19, para. 2 of DSA.
100 For example "Czech elves" (available at: https://cesti-elfove.cz/), or "Manipulators" (available at: https://manipulatori.cz/).

be harmful for the governing political power. DSA, however, sets measures that might (theoretically) prevent such a misuse pursuant to Article 20, para. 2 of DSA.

Under the above mentioned provision, the service provider can suspend *"for a reasonable period of time"* the ability of a person to submit notices if the person is frequently submitting "manifestly" unfounded notices or complaints.[101]

Article 24 of DSA was especially stressed by the Commission as necessary for protecting the democracy in the digital age[102]. Pursuant to this provision, every advertisement shall clearly inform the recipient that the displayed information is advertisement, inform on the natural or legal person on whose behalf the advertisement is displayed and provide meaningful information about the main parameters used to determine the recipient to whom the advertisement is displayed.[103] By these transparency measures, hidden advertisements shall be prevented and even political advertisements shall be more transparent. Moreover, this provision and its goal shall be complemented by proposed regulation on the transparency and targeting of political advertising[104] which is currently in the first reading conducted by the Council.

The Commission in its European action plan acknowledges the threat that the technologies can have on citizens and potentially on democracy, stating that: *"New techniques used by intermediaries/service providers to target advertising on the basis of users' personal information enable political adverts to be amplified and tailored to an individual's or a group's specific profiles, often without their knowledge. Micro-targeting and behavioural profiling techniques can rely on data improperly obtained, and be misused to direct divisive and polarising narratives. This process makes it much harder to hold politicians to account for the messaging and opens new way for attempts to manipulate the electorate. Other concerns are the concealment and/or misrepresentation of key information such as the origin, intent, sources and funding of political messages."*[105]

In this regard it is crucial that the political advertisement is transparent, not only is it important to know who the source of the advertisement is, but also why the recipient is targeted by such advertisement to better maintain personal data privacy.

The above mentioned provisions are applicable to all enterprises, regardless of other criteria such as size or revenue. However, realizing the increased risks of the biggest online players, DSA introduces special rules for the so-called "very large online platforms". According to Article 25, para. 1 of DSA, an online platform is designated as very large when its provided service has an average of at least 45 million active

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[101] Article 20, para. 2 of DSA.

[102] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the European democracy action plan, 2020, COM(2020) 790 final, pp. 4–5.

[103] Article 24, let. (a), (b) and (c) of DSA.

[104] Proposal for a regulation of the European Parliament and of the Council on the transparency and targeting of political advertising, 2021, COM(2021) 731 final, 2021/0381 (COD).

[105] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the European democracy action plan, 2020, COM(2020) 790 final, p. 4.

recipients in the Union per month. Needless to say that most of the "mainstream" social media fall within this category.

These platforms are pursuant to Article 26 of DSA obliged to annually identify, analyze, and assess risks stemming from using their services. It is mandatory for the platform to reflect *inter alia* the risk of dissemination of illegal content[106] and intentional manipulation of the service, including by means of inauthentic use of automated exploitation of the service, with an actual or foreseeable negative effect on the civic discourse or related to electoral processes[107].

The very large online platforms shall especially assess whether the implemented above-described mechanisms are efficient enough to prevent the analyzed risks.

Based on the conclusions in risk assessment and pursuant to Article 27 of DSA, the very large online platforms shall implement such measures that are tailored to each of the identified systematic risks. The measures are basically amplified measures already described (such as transparency, advertisement measures, cooperation with trusted flaggers etc.)

To independently assess, whether the very large online platform is implementing and complying with the measures to prevent and mitigate risks, and to confirm that the analysis of the very large platforms is truthful and not misleading in any way, the very large platforms are pursuant to Article 28 of DSA obliged to, at their own expense and at least once a year, be subject to an independent audit. The auditor must be independent from the very large online platform, show sufficient level of expertise, objectivity, and professional ethics.[108]

DSA introduces more additional obligations for very large online platforms to strengthen protection measures against risk immanent to the functioning of such platforms such as obligation of advertising repository, where advertisements published on the platforms are stored one year after being displayed to public, with information about the advertisement including the total number of recipients,[109] and appointing a compliance officer for monitoring compliance with DSA.[110]

Each Member State shall appoint a Digital Service Coordinator – an organ designated for enforcing DSA.[111] These Digital Service Coordinators will be quasi-supervised (rather advised) by the European Board for Digital Services established by DSA (an institution of the European Union).[112] The cooperation between Digital Service Coordinators and possibly even between Digital Service Coordinators and the European Board for Digital Services is described very similarly as in GDPR.

The obligations in DMA and DSA can help fight against the mechanisms threatening to harm union identity. Either the rules on transparency of algorithms and advertising, actual possibility to choose privacy over personalization, accurate moderating system of the harmful content, and accountability of social media for the false or misleading

[106] Article 26, para. 1, let. (a) of DSA.
[107] Ibid., let. (c).
[108] Article 28, para. 2, let. (a) – (c) of DSA.
[109] Article 30 of DSA.
[110] Article 32 of DSA.
[111] Article 38 of DSA.
[112] Article 47.

content in case that they are unable to implement mandatory protective measures or assess the risks to prevent them is a huge step forward. If those obligations would be strictly followed by the platforms (especially by the very large platforms), the political debate could be at least more resilient to what was described as information disorder.

4. CONCLUSION

The current state of social media cannot help to establish the forum necessary for the creation of Europeanized public spheres. However generally utopist the idea behind the public spheres as an almost miraculous solution for the union identity crisis can be, I believe that forum for democratic deliberation can at least help to strengthen the union identity by providing the channel for dissemination of truthful information.

Social media are nowadays one of the main reasons why the trench between groups of people with different opinions is exponentially growing. Information disorder plays a significant role in spreading fake news and thus is one of the main factors responsible for the polarization. It is necessary for social media to be more transparent, especially focusing on the transparency of the news feed algorithms and on the mechanisms preventing further dissemination of harmful content.

In this regard, DSA and DMA play significant role as they introduce regulation partially (in case of DMA) or mainly (in case of DSA) focused on the opaque processes of social media. This regulation has, in my opinion, the potential to decrease negative effects of social media such as information disorder, echo chambers and state of flow, and to help create a less biased environment that can be eventually more resilient to the fake news.

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VARIA

SPECIFIC PERFORMANCE – AND THE INTERNATIONAL UNIFICATION OF SALES LAW

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Abstract: Over the past decades, several approaches have been tried in the process of the unification of contract law to regulate the entitlement to performance in kind, but there is still no generally accepted solution. The Vienna Sales Convention, like its predecessors, resolves the question by a quasi-conflict of laws rule, essentially making the award of specific performance dependent upon the law of the forum, thereby undermining the results of unification. Other sources, such as the UNIDROIT Principles, provide autonomous rules that specify in detail the conditions under which it may be claimed. The Draft Common European Sales Law, continues to attach primary importance to the provision of performance in kind, obviously also bearing in mind the interests of consumers.

Keywords: unification of contract law; international sales; specific performance; CISG; Common European Sales Law; UNIDROIT Principles

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INTRODUCTION

In normal economic circumstances – namely where there is free trade and sufficient supply of products – the significance of specific performance (performance in kind) is relatively modest, because, in international trade relations, the buyer rarely tries to force a reluctant, defaulting seller to fulfil his original obligations, but rather resorts to the often simpler and more sensible repurchasing of goods in the market[1] and claiming damages. However, it has been the fight against the COVID-19 pandemic that has shown that, in some cases, the performance in kind regarding certain contracts, whether for the purchase of limited supplies of protective equipment, medicines or vaccines, can be literally a matter of life and death, even in the 21st century[2] and paying damages

[1] BRIDGE, M. *The International Sales of Goods*. 4th ed. Oxford: Oxford University Press, 2017, pp. 704–705; RABEL, E. *Das Recht des Warenkaufs Eine Rechtsvergleichende Darstellung*. *Band 1*. Berlin: Walter de Gruyter, 1936, pp. 375–377; SCHWENZER, I. (ed.). *SCHLECHTRIEM & SCHWENZER: Commentary on the UN Convention on the International Sale of Goods (CISG)*. 4th ed. Oxford: Oxford University Press, 2016, pp. 483–484.

[2] See Advance Purchase Agreement ("APA") for the Production, Purchase and Supply of a COVID-19 Vaccine in the European Union. In: *European Commission* [online]. 2020 [cit. 2022-04-08]. Available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_21_302.

for non-performance is hardly an adequate remedy. The risk of similar situation has emerged more recently, for example in case of the supply of semiconductor chips or certain raw materials, especially gas and oil. The difficulties of supply chains and disrupted deliveries have periodically reminded us of the importance of performance in kind and its legal regulation.

The legal systems of different states regulate performance in kind in diverse ways, and even the instruments aimed at unifying international sales law may contain different rules. This paper reviews these different regulatory models, analysing the following sources of uniform law: the 1935 and 1939 UNIDROIT Drafts,[3] the 1964 Hague Convention (ULIS),[4] the Vienna Sales Convention (CISG),[5] the UNIDROIT Principles (UPICC)[6] and the Draft Common European Sales Law (CESL).[7] It refers to the provisions of Principles of European Contract Law (PECL)[8] and DCFR[9] only as a supplement, since these latter instruments, for all their excellence, are not formal initiatives or results of the work of an international or regional organisation or institution. By analysing the different regulatory patterns of the past decades, this comparative-historical approach provides a better understanding of the evolution of the law as it stands today. Furthermore, it may contribute to the successful development of future solutions.

At the root of the regulatory challenge lies a difference in approach between continental and Anglo-Saxon law, as to whether and to what extent performance in kind can be claimed and decided by the courts.[10] While in the *civil law* world, it is gener-

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3 International Institute for the Unification of Private Law – League of Nations. *Draft of an International Law of the Sales of Goods*. Rome, La Libreria Dello Stato, 1935. (1935 UNIDROIT Draft); also "Projet D'Une Loi Uniforme sur la Vente Internationale Des Objets Mobiliers Corporels" and "Draft Uniform Law on International Sales of Goods (Corporeal Movables)". In: *L'Unification du Droit = Unification of Law: a general survey of work for the unification of private law (Drafts and Conventions)*. UNIDROIT, 1948 (1939 UNIDROIT Draft), pp. 103–159.

4 Convention relating to a Uniform Law on the International Sale of Goods (ULIS).

5 United Nations Convention on Contracts for the International Sale of Goods, signed at Vienna on 11 April 1980.

6 Latest edition: *UNIDROIT Principles of International Commercial Contracts*. Rome: UNIDROIT, 2016 (hereafter: UPICC). On the impact on domestic laws: GARRO, A. – RODRÍGUEZ, J. A. M. (eds.). *Use of the UNIDROIT Principles to interpret and supplement domestic contract law*. Cham: Springer International Publishing, 2021. Furthermore PAUKNEROVÁ, M. The UNIDROIT Principles and Czech Law. In: UNIDROIT (ed.) *Eppur si muove: the Age of Uniform Law: essays in honour of Michael Joachim Bonell to celebrate his 70th birthday*. *Vol. 2*. Rome: UNIDROIT, 2016, pp. 1583–1592.

7 CESL. Common European Sales Law: Proposal for a Regulation of the European Parliament and of the Council on Common European Sales Law, COM(2011)0635 final – 2011/0284 (COD).

8 LANDO, O. – BEALE, H. (eds.). *Principles of European Contract Law. Parts I and II*. Hague: Kluwer Law International, 2000; LANDO, O. – CLIVE, E. – PRÜM, A. – ZIMMERMAN, R. (eds). *Principles of European Contract Law. Part III*. Hague: Kluwer Law International, 2003.

9 VON BAR, CH. – CLIVE, E. – SCHULTE-NÖLKE, H. (eds.). *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR)*. München: Sellier. European Law Publishers, 2009. The complete results of the Study Group on European Civil Code and the Research Group on EC Private Law were published by VON BAR, CH. – CLIVE, E. – SCHULTE-NÖLKE, H. (eds.). *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR). Volumes I–VI*. Full edition. München: Sellier. European Law Publishers, 2009.

10 BRIDGE, *c. d.*, pp. 704–705; GARRO, A. M. Reconciliation of Legal Traditions in the U.N. Convention on Contracts for the International Sale of Goods. *The International Lawyer*. 1989, Vol. 23, pp. 443–483, especially p. 458.

ally accepted,[11] and indeed the right of the buyer to enforce performance is a corollary of the principle of *pacta sunt servanda*,[12] the basic effect of the obligation,[13] in England, performance in kind, as it is called by English law *"specific performance"*, is an extraordinary equitable remedy, the granting of which is left to the discretion of the courts.[14] Traditionally, it is awarded where damages are not an appropriate remedy because, for example, the subject of the sale is a particularly rare or valuable thing or piece of land.[15] In addition, even English judicial practice is not well-established; it fluctuates between a narrower or broader use of this option,[16] although there are examples of its use. Under §52(1) of the *Sale of Goods Act* 1979, the court may, on the application of the plaintiff, order specific performance in respect of goods specified by the parties in or after the contract if it considers it appropriate.[17] According to § 2–716 of the *Uniform Commercial Code* (UCC), adopted separately by the US member states,[18] performance in kind may be required if the subject matter of the contract is a specific good or if

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[11] See, for example, German BGB § 241, Austrian ABGB § 918–919, Italian *Codice Civile* Article 1453 (1), also Articles 2930–2933, Dutch Civil Code 3:296 (1), French *Code civil* – old provisions on contracts – Article 1184 (2), and interpretation of old Articles 1142–1143. Among the new provisions of the French *Civil Code* governing contracts, Articles 1217 and 1222 should be mentioned. See VON BAR – CLIVE – SCHULTE-NÖLKE, *c. d.*, Notes to Article III-3:302, pp. 855–856; SARTORI, F. in: ANTONIOLLI, L. – VENEZIANO, A. (eds.). *Principles of European Contract Law and Italian Law*. Hague: Kluwer Law International, 2005, pp. 395–400; New Hungarian Civil Code. § 6:138 [Right to claim performance] and § 6:159 [Subsidiary warranty rights].

[12] VOGENAUER, S. *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)*. 2nd ed. Oxford: Oxford University Press, 2015, p. 888.

[13] SCHWENZER, *c. d.*, p. 482.

[14] The differences between the legal systems in this respect are also clearly illustrated by RABEL, *Das Recht des Warenkaufs Eine Rechtsvergleichende Darstellung*, pp. 269–271, going back to the New York court reform of 1846 and the English court reform of 1873/75. Also, SZLADITS, CH. The Concept of Specific Performance in Civil Law. *The American Journal of Comparative Law*. 1955, Vol. 4, No. 1–4, pp. 208–234; HAY, P. *US-Amerikanischer Recht*. 7. überarbeitete und erweiterte Aufl. München: C. H. Beck, 2020, p. 2. The current understanding, practice and exceptions to *specific performance* are analysed in great detail in the notes to the DCFR, especially pp. 855–859.

[15] GARNER, B. A. *A Dictionary of Modern Legal Usage*. 2nd ed. Oxford: Oxford University Press, 1995, p. 821.

[16] MCKENDRICK, E. *Contract Law*. 10th ed. Basingstoke: Palgrave Macmillan, 2013, pp. 372–375. Also, *Société des Industries Métallurgiques v. The Bronx Engineering Co Ltd* [1975] 1 Lloyd's Rep. 465; and *Sky Petroleum Ltd v. VIP Petroleum Ltd* [1974], 1 WLR 576, cited in BEALE, H. – FAUVARQUE-COSSON, B. – RUTGERS, J. – TALLON, D. – VOGENAUER, S. *Cases, Materials and Text on Contract Law*. 2nd ed. Oxford: Oxford University Press, 2010, p. 853.

[17] Sale of Goods Act 52(1): *"In any action for breach of contract to deliver specific or ascertained goods the court may, if it thinks fit, on the plaintiff's application, by its judgment or decree direct that the contract shall be performed specifically, without giving the defendant the option of retaining the goods on payment of damages."* However, the provision applies only in a complementary manner to Scotland, which is closer to the continental tradition, showing the legal diversity that is also present within the United Kingdom: 52(4): *"The provisions of this section shall be deemed to be supplementary to, and not in derogation of, the right of specific performance in Scotland."* Analysed by ZHOU, Q. – DIMATTEO, L. A. *Three Sales Laws and the Common Law of Contracts*. Oxford: Oxford University Press, 2016, pp. 347–378, especially p. 349.

[18] The UCC was drafted by the National Conference of Commissioners of State Uniform Laws and the ALI and adopted by 50 states, DC and US Territories but not all states have implemented the entirety of the UCC.

special circumstances justify it;[19] the importance of this is growing,[20] but the literature suggests that this is also an exceptional solution.[21]

THE 1935 AND 1939 UNIDROIT DRAFTS

Already in the report on the UNIDROIT 1935 Draft, it was made clear that the Institute was looking for a two-way solution, with a view to bridging the gap between Anglo-Saxon and continental legal systems. On the one hand, Articles 23 to 25 and 51[22] allowed the demand for specific performance if the forum in question considered this possible and recognised it in its own law and, on the other hand, it tightened up this law with a number of exceptions, such as the different solutions of commercial usages,[23] probably in order to come closer to the Anglo-Saxon solution.[24]

Also worthy of mention is Article 71 of the 1935 UNIDROIT Draft, which, as a cognate of Article 24, is also entitled "specific performance", but deals with another aspect of when the seller may claim payment of the purchase price as "specific performance" from his point of view. The rule, rooted in international trade, is that *"the seller is only entitled to claim payment of the price if the sale is of goods which are such that there is no usage of the trade to effect a resale"*.[25] The rule is also an example of the acceptance of the prominent role of trade usages in the 1935 UNIDROIT Draft. As confirmed by the commentary to Article 71, where commercial usage requires resale, the seller is not entitled to the full purchase price but only to compensation for his loss resulting from the difference between the resale and the purchase price. The 1939 UNIDROIT

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19 UCC 2-716. §: *"Buyer's Right to Specific Performance or Replevin. (1) Specific performance may be decreed where the goods are unique or in other proper circumstances."* It should be noted that Louisiana is the only US state that has not adopted Article 2 of the UCC, although it has added some provisions to its civil code, which reflects the Spanish – French influence. ZHOU – DIMATTEO, *c. d.*, p. 348.

20 GARNER, *c. d.*, p. 821; OMLOR, S. in: MANKOWSKI, P. (ed.). *Commercial Law: Article by Article Commentary*. Baden-Baden, München, Oxford: Nomos, C. H. Beck, Hart Publishing, 2019, p. 151.

21 VOGENAUER, *c. d.*, p. 888, footnote 14.

22 1935 UNIDROIT Draft Article 23: *"In the event of total or partial failure to deliver or of delay in delivery the buyer may, subject to the provisions of Articles 24-25 require specific performance of the contract, provided that specific performance is possible and is recognised by the national law of the Court in which the action is brought. The buyer may, subject to the provisions of Articles 26 to 32, avoid the contract by a simple statement to that effect. He may also sue for damages as provided by Articles 33 to 40. In no event is the seller entitled to obtain a period of grace from the Court."*; Article 24: *"Notwithstanding that the national law of the Court recognizes his right to require delivery of the goods, the buyer shall not be entitled to require such delivery where it is in accordance with the usage of the trade to repurchase the goods or where he can repurchase them without appreciable inconvenience or expense."*; Article 25: *"If in circumstances other than those contemplated by Article 27, the buyer elects to demand specific performance of the contract, he must notify the seller to this effect without undue delay; otherwise, he will only be entitled to avoid the contract, as provided by the present law, without prejudice to his claim to damages."*

23 1935 UNIDROIT Draft, Article 24: *"Notwithstanding that the national law of the Court recognises his right to require delivery of the goods, the buyer shall not be entitled to require such delivery where it is in accordance with the usage of the trade to repurchase the goods or where he can repurchase them without appreciable inconvenience or delay."*

24 1935 UNIDROIT Draft, p. 39; RABEL, E. A Draft of an International Law of Sales. *The University of Chicago Law Review*. 1938, Vol. 5, No. 4, pp. 543–565, especially p. 560.

25 1935 UNIDROIT Draft, Article 71.

Draft also dealt with the question of the admissibility of specific performance and its conditions, again returning to the possibility of performance in kind.[26] First of all, in the case of non-compliance with the duty of delivery, the buyer could choose to claim specific performance under the first paragraph of Article 25, under the conditions set out in Articles 26–27, provided that specific performance was possible and recognised by the law of the court seized.[27] As we shall see, this solution, which has its roots in the 1935 UNIDROIT Draft, will continue to have an impact on the unification of the law, even decades later. Other sanctions included the right to rescind and to claim damages.

As to the detailed rules of specific performance in the 1939 UNIDROIT Draft, Article 26, irrespective of the permissive view of the law of the forum, did not give the buyer the right to specific performance in kind where it was in accordance with trade usage *to repurchase the goods* or where this could be done without considerable inconvenience or expense.[28] A further restriction appears in Article 27, according to which, if the buyer has chosen specific performance in connection with a contract for which the time of delivery is an essential element, he must notify the seller without delay[29] after the seller has established the delay in delivery, otherwise he will only be entitled to rescission under the draft uniform law.[30]

In the event of defective performance, the buyer had a choice of remedies, in particular avoiding the contract, claiming damages or price reduction, under the 1939 UNIDROIT Draft.[31] However, Article 48 of this Draft also opened up further possibilities for the buyer, such as *a)* to require the seller to deliver other goods, if the sale was for goods not previously unascertained and specific performance could be required, *as* well as *b)* to require the buyer to repair the seller's goods within a reasonable time, if the sale was for goods which the seller had to produce according to the buyer's specifications, provided that the defects could be repaired.[32] However, the quoted provision did not further specify the conditions for claiming specific performance.

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[26] The 1939 UNIDROIT Draft essentially developed the provisions of Articles 23–25 and 51 of the 1935 UNIDROIT Draft, without any conceptual change.

[27] 1939 UNIDROIT Draft, Article 25: *"Where the goods have not been regularly delivered, the buyer may, subject to the provisions of Articles 26 and 27 demand specific performance of the contract, provided, that specific performance is possible and is recognised by the municipal law of the Court in which the action is brought."*

[28] 1939 UNIDROIT Draft, Article 26: *"Notwithstanding that the municipal law of the Court in which the action is brought recognizes his right to demand specific performance, the buyer shall not be entitled to demand such performance where it is in accordance with the usage of the trade to repurchase the goods or where such repurchase can be made without appreciable inconvenience or expense."*

[29] 1939 UNIDROIT Draft, Article 27. In the original English text cited, it appears to have been mistakenly referred to a second time as *buyer*. See below.

[30] 1939 UNIDROIT Draft, Article 27: *"Where the buyer elects to demand specific performance of the contract for which the time of delivery is an essential condition, he must notify the buyer (sic) to that effect, without undue delay in delivery, otherwise he shall only be entitled to avoid the contract as provided by this law."*

[31] 1939 UNIDROIT Draft, Section II. The seller's undertaking against defects in the Goods, C) Sanctions in case of defects, Article 47.

[32] 1939 UNIDROIT Draft, Article 48: *"The buyer who has duly notified the existence of defects may also elect:*

a) to demand from the seller the delivery of other goods if the sale refers to unascertained goods and specific performance may be required;

THE 1964 HAGUE CONVENTION (ULIS)

A few decades later, under the relevant provisions of Article VII and Article 16 of the ULIS, as an exceptional remedy[33] the forum has made whether the court shall award specific performance or whether it is prepared to enforce such a performance subject to its own law. This was mitigated only to the extent that Article VII (2) stressed that this rule was without prejudice to obligations arising from Conventions concluded or to be concluded by Contracting States for the recognition and enforcement of judgments, arbitral awards and other similar enforceable instruments.[34] Article 16 of the ULIS, referring back to Article VII, confirmed the conditionality of awarding specific performance.[35]

On the whole, the rules were even stricter than those of the 1935 and 1939 UNIDROIT drafts, since they did not simply require that specific performance *was possible and is recognised by the municipal law,* as their predecessors did, but that the forum would actually do so in similar cases. As such, the ULIS court would only have to grant or enforce performance in kind if it *would do so* under its own law for similar contracts. At the same time, the reference to the fact that trade usage, where applicable, may also be an obstacle to the award of specific performance has disappeared from the ULIS.

VIENNA SALES CONVENTION (CISG)

In essence, this regulatory solution, which is a compromise between the legal systems of common law and civil law,[36] is adopted in the Vienna Sales Convention, some of the provisions of which contain rules explicitly referring to state laws that lead away from the uniform law approach.

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b) to demand that the defects be made good by the seller within a reasonable time if the seller refers to goods which the seller had to manufacture or produce in accordance with the special orders of the buyer, provided that the defects may be repaired."

33 EÖRSI, G. The Hague Conventions of 1964 and the International Sale of Goods. *Acta Juridica*. 1969, Vol. 11, No. 3–4, pp. 321–354, p. 340; DCFR notes p. 856.

34 ULIS VII. Article: *"1. Where under the provisions of the Uniform Law one party to a contract of sale is entitled to require performance of any obligation by the other party, a court shall not be bound to enter or enforce a judgment providing for specific performance except in the cases in which it would do so under its law in respect of similar contracts of sale not governed by the Uniform Law.*
2. *The provisions of paragraph 1 of this Article shall not affect the obligations of a Contracting State resulting from any Convention, concluded or to be concluded, concerning the recognition and enforcement of judgments, awards and other formal instruments which have like force."*

35 ULIS 16. Article: *"Where under the provisions of the present Law one party to a contract of sale is entitled to require performance of any obligation by the other party, a court shall not be bound to enter or enforce a judgment providing for specific performance except in accordance with the provisions of Article VII of the Convention dated the 1st day of July 1964 relating to a Uniform Law on the International Sale of Goods."*

36 OMLOR, S. in: MANKOWSKI, *c. d.*, p. 151.

Thus, Article 28 CISG,[37] which deals with specific performance, states that: *"If, in accordance with the provisions of this Convention, one party is entitled to require performance of any obligation by the other party, a court is not bound to enter a judgement for specific performance unless the court would do so under its own law in respect of similar contracts of sale not governed by this Convention."*

It is clear that this is a serious concession made at the expense of unification. The assessment of specific performance depends on the law of the forum,[38] but the court has in fact been given an *opt-out* from following the CISG system of accepting the claim and assessment of specific performance.[39]

A detailed examination of Article 28 reveals that it contains several conceptual stages. First of all, the question of performance in kind must be considered in the context of the Vienna Sales Convention, in particular Article 46 (1), which provides that *"*[t]*he buyer may require performance by the seller of his obligations unless the buyer has resorted to a remedy which is inconsistent with this requirement"* and Article 62, which states that *"*[t]*he seller may require the buyer to pay the price, take delivery or perform his other obligations, unless the seller has resorted to a remedy which is inconsistent with this requirement"*. The inadequacy of damages as a remedy is therefore not a condition for specific performance.[40] If the claim cannot give rise to performance in kind on the basis of the provisions cited above, the application of Article 28 CISG is clearly out of question. If it does, the court seized of the case has a challenging task: it must, in fact, model a similar situation, but one not covered by the CISG, such as a domestic sale, and consider the need for specific performance. If, under its own law, it would support such a claim, it would have to do the same in a case arising out of the application of the Vienna Sales Convention. Even so, that is the exception to the proposition in the article, because, before that, the main rule is that it is not obliged to adjudicate specific performance – and here is the fundamental *concession* to the common law concept[41] if it were to reject such a claim under its own law.

It is also worth recalling the English text of Article 28 of the CISG again, to unveil its exact message. In the earlier draft text of the Convention, the wording of the exception was *"unless the court could do so"*,[42] but the auxiliary *"could"* has been changed to *"would"* by the Vienna Conference, which drafted the final text of the CISG, reverting to the wording of Article VII of ULIS quoted above, namely the Anglo-US proposal. It is therefore not enough for the court to have the possibility to decide in favour of specific performance; more is needed, in fact certainty, as by referring to the decision in a similar case.[43] However, certainty is not easy to come by, if we look at English case

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37 FERRARI, F. What Sources of Law for Contracts for the International Sale of Goods? Why one has to look beyond the CISG? *International Review of Law and Economics*. 2005, Vol. 25, No. 3, p. 338.
38 BOOYSEN, H. The International Sale of Goods. *S. Afr. Y.B. Int'l L.* 17th (1991–1992), pp. 71–89, p. 84.
39 OMLOR, S. in: MANKOWSKI, *c. d.*, p. 151.
40 GARRO, *c. d.*, p. 458.
41 BRIDGE, *c. d.*, p. 706.
42 This wording of the possibility reflected the approach of the 1935 and 1939 UNIDROIT Drafts.
43 SCHWENZER, *c. d.*, p. 492.

law, for example. While some judgments seem to point in the direction of embracing and extending *specific performance*,[44] others seem to cast doubt on it.

It is particularly interesting that Article 28 CISG can be considered a rule of private international law in its essence,[45] since it contains a reference to the law of the forum. Although it does not directly order the application of the *lex fori*, it makes the application of the relevant rules of the CISG, the decision of the court, dependent on its position. Hence, the conflict which theoretically exists between an international convention and state law, and which the states which are party to the convention will, of course, resolve in favour of the convention, is here reversed: the *lex fori is* given primacy, a kind of control, waiving the advantages of effective unification of law by this compromise solution.[46] This direct reference to the court's own law is, however, understood in such a way that the private international law of the forum is no longer taken into account, so the problem of *renvoi* should not arise.[47] Thus, if a Hungarian buyer sues a US seller before a Swiss forum, if the Swiss forum establishes jurisdiction, Swiss substantive law will govern the claim for performance in kind, subject to other conditions, on the basis of Article 28 of the CISG. This solution, the role assigned to the *lex fori*, also increases the importance of the choice of forum.

Despite the interesting theoretical problem, the available case law on Article 28 is modest according to the UNCITRAL *Digest*. In any case, the judgments seem to follow the Vienna Sales Convention solution, making the assessment of specific performance dependent on the position of national law,[48] at most adding in a Russian arbitration award that a claim for specific performance must be brought within a reasonable time after the breach of contract is perceived.

THE UNIDROIT PRINCIPLES

After more than half a century, the UNIDROIT Principles broke with the above-described approach of ULIS, CISG and their predecessors, providing a fully-fledged, autonomous substantive law solution, in that they themselves define when in-kind performance, in other words, a non-monetary obligation, cannot be claimed. This solution, representing a kind of paradigm-shift, if widely applied, could lead to

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44 *Beswick v. Beswick* (1968) and *Co-operative Insurance Society Ltd v. Argyll Stores (Holdings) Ltd* (1998). See MCKENDRICK, *c. d.*, pp. 372–373; CARTWRIGHT, J. *Contract Law: an Introduction to the English Law of Contract for the Civil Lawyer*. 3rd ed. Oxford: Hart Publishing, 2016, pp. 277–278.

45 SCHWENZER, *c. d.*, p. 492.

46 GARRO, *c. d.*, p. 460.

47 SCHWENZER, *c. d.*, p. 487; OMLOR, S. in: MANKOWSKI, *c. d.*, pp. 152–153.

48 UNCITRAL. *Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods*. UNCITRAL Secretariat, Vienna International Centre, 2016, p. 122; *Zurich Arbitration*, Switzerland, 31 May 1996; CLOUT case No. 417 [*U.S. District Court, Northern District of Illinois*, United States, 7 December 1999]; *Obergericht des Kantons Bern*, Switzerland, 1 December 2004, CISG-online 1192; *Arbitration Court of the International Chamber of Commerce*, France, 2004 (Arbitral award No. 12173); *Yearbook of Commercial Arbitration*. 2009, 111; *International Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation*, Russian Federation, 30 January 2007 (Arbitral award No. 147/2005), Unilex: CLOUT case No. 636 (*Cámara Nacional de Apelaciones en lo Comercial de Buenos Aires*, Argentina, 21 July 2002).

greater foreseeability and harmony in decision-making at international level, since granting specific performance would not be dependent upon the law of the court seized.

According to Article 7.2.2 UPICC, "[w]*here a party who owes an obligation other than one to pay money does not perform, the other party may require performance, unless (a) performance is impossible in law or in fact; (b) performance or, where relevant, enforcement is unreasonably burdensome or expensive; (c) the party entitled to performance may reasonably obtain performance from another source; (d) performance is of an exclusively personal character; or (e) the party entitled to performance does not require performance within a reasonable time after it has, or ought to have, become aware of the non-performance"*.[49]

With the above rules, the UNIDROIT Principles have chosen a kind of middle way solution, on the one hand accepting performance in kind, giving a right to claim it, in line with continental legal systems, but on the other hand tempering the main rule with a number of exceptions, which still come close to the restrictive approach of *common law* systems.[50] However, there are also differences. The UNIDROIT Principles use a different terminology, instead of the Anglo-Saxon right of "specific performance", which refers to the admission of a specific claim, simply using the term *"right to performance"*, which is closer to continental legal systems and does not emphasise the extraordinary nature of this remedy.[51]

However, the decisive difference from its predecessors, such as the Vienna Sales Convention, is that Article 7.2.2, by listing the exceptions to the requirement of performance, itself provides an autonomous rule, closing the loophole of reference to the law of the court seized.[52] The same approach is also followed in Article 9:102 of the PECL and Article III.–3:302 of the DCFR, with some differences regarding the scope of the exceptions. It should be noted that the right to performance may also imply, in certain cases, compliance with a negative obligation, such as the obligation to keep trade secrets or confidential information.[53]

A detailed analysis of the exceptions to the performance in kind would go beyond the scope of this comparative paper, but it can be said that they offer considerable room for interpretation, as we encounter open-ended phrases such as "unreasonably burdensome or costly".[54] Moreover, the exception that specific performance cannot be claimed if *"the party entitled to claim performance can reasonably obtain it from another source"*[55] obviously excludes all commercially available ready-made goods from the general rule.[56]

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49 Article 7.2.2 of the UNIDROIT Principles 2016, on the performance of non-monetary obligation.
50 BRÖDERMANN, E. J. in: MANKOWSKI, *c. d.*, p. 647; VOGENAUER, *c. d.*, p. 888.
51 Others prefer to see this change as neutral terminology. VOGENAUER, *c. d.*, p. 889.
52 Ibid., p. 186.
53 Ibid., p. 890.
54 Cf. SARTORI, F. in: ANTONIOLLI – VENEZIANO, *c. d.*, p. 400, in connection with similar provisions of the PECL, stressing that *"reasonableness"* is an uncertain and completely unknown concept in Italian law.
55 UPICC Article 7.2.2 (*c*).
56 BRÖDERMANN, E. J. in: MANKOWSKI, *c. d.*, p. 649.

The main rule, which is fine-tuned with several exceptions, does not run counter to the tendency, as indicated in the legal literature, that the enforcement of performance in kind is in retreat, even in continental legal systems (Denmark, France or Germany).[57] As regards the burden of proof, these are exceptions, so that it is the non-performing party who has to prove that he is exempt from the obligation to perform.[58]

In addition to the quoted Article 7.2.2 of the UNIDROIT Principles, there are further significant provisions, such as Article 7.2.3, which extends the right to performance to the right of rectification and replacement, or Article 7.2.4, which reinforces the obligation to perform by the possibility of a fine imposed by a court.[59]

DRAFT COMMON EUROPEAN SALES LAW (CESL)

The CESL not only breaks with the previous regulatory approach referring to the law of the forum, but also shows a strong regulatory preference for performance in kind, by placing it first among the remedies and (as will be seen below) limiting the buyer's right to it only with very few exceptions in the case of a contract for pecuniary interest.[60] Thus, under Article 106 of the CESL, the buyer may require performance in the event of a breach of contract by the seller, which includes specific performance, repair or replacement of the goods or digital content. Article 155 CESL also allows the customer to claim performance in the event of a breach of contract by the service provider. An exception under Article 107 CESL is where the digital content has not been supplied for consideration, in which case the buyer can only claim damages for loss or damage to his property, including hardware, software and data, caused by the defect of the supplied digital content, except for any gain, of which the buyer has been deprived by the damage. A further safeguard is the reinforcement of the mandatory nature of the rules in Article 108: in a contract between a trader and a consumer, the parties may not exclude the application of this chapter to the detriment of the consumer, derogate from it or alter its effects before the consumer has brought the lack of conformity to the trader's attention.

The above-quoted provisions of the CESL are refined in Article 110 with regard to the claim for performance of the seller's obligations, setting certain general limits in paragraph (3). Performance may not be required if: *a)* performance would be impossible or become unlawful; or *b)* the burden or expense of performance would be disproportionate to the benefit to the buyer. In Article 132 of the ELI Statement considering the

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57 LANDO, H. – ROSE, C. On the enforcement of specific performance in Civil Law Countries. *International Review of Law and Economics*. 2004, Vol. 24, No. 4, pp. 473–487, cited in HALEY, J. O. *Comparative Contract Law*. Cheltenham: Edward Elgar Publishing, 2017, pp. 924–938, especially p. 925, pp. 929–931. However, there are counter currents too: JUKIER, R. The Emergence of Specific Performance as a Major Remedy. *Quebec Law, Revue du Barreau*. 1987, Vol. 47, No. 1, pp. 48–72.

58 VOGENAUER, *c. d.*, p. 891.

59 Ibid., pp. 888–889.

60 This approach is critically analysed from the point of view of German law by ALBERS, G. Die Erzwingung der Erfüllung nach dem CESL im Vergleich mit dem deutschen Recht. *ZEuP*. 2012, No. 4, pp. 687–704.

CESL proposal,[61] it is suggested that a further point *c)* be added, according to which performance would not be required even if it were of such a personal nature that it would be unreasonable to enforce it. This addition would also transpose the clarifying provision in PECL[62] and DCFR[63] into the CESL rules.

CONCLUSION

To sum up, it can be said that different regulatory models coexist or compete in the field of specific performance. This is well illustrated, for example, by the difference between the Vienna Sales Convention and the UNIDROIT Principles. It is time that will determine which solution will prevail in the future process of unification.

Recalling the challenges outlined in the introduction, it is reasonable to argue that, in an era of epidemics, wars and disrupted supply chains, the importance of specific performance is greater than ever. In this situation, the solution offered by the UNIDROIT Principles, providing autonomous rules that specify in detail the conditions under which performance can be claimed, is more advantageous than that of the Vienna Sales Convention. As the UNIDROIT Principles create a watertight set of rules, in that they do not refer to the law of the forum; they ensure a foreseeable outcome. By allowing only a limited number of exceptions, they tend to tip the balance in favour of performance in kind, although they are flexible enough to take truly exceptional circumstances into account.

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[61] Statement of the European Law Institute on the Proposal for a Regulation on a Common European Sales Law, COM(2011)635 final. Vienna: European Law Institute, 2012, amended by two supplements published in 2014 and 2015. Online available at: https://europeanlawinstitute.eu/projects-publications/completed-projects/proposed-cesl/.

[62] Article 9:102 of the PECL.

[63] Article III 03:302 of the DCFR.

THE LEGAL FRAMEWORK OF THE MANDATORY CAP ON MARKET REVENUES FOR ELECTRICITY PRODUCERS AND THE SOLIDARITY CONTRIBUTION IN THE CZECH REPUBLIC AND SLOVAKIA[1]

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Abstract: On 6 October 2022, the Council of the European Union adopted Regulation 2022/1854 on an emergency intervention to address high energy prices (Regulation 2022/1854). Regulation 2022/1854 establishes an emergency intervention to mitigate the effects of high energy prices through exceptional, targeted, and time-limited measures aiming to ensure the necessary solutions and respond to the current energy situation. For this purpose, three groups of measures are introduced: (i) measures aiming to reduce energy consumption, (ii) introducing a mandatory cap on market revenues for electricity producers, and (iii) introducing a solidarity contribution to be imposed on crude petroleum, natural gas, coal, and refinery companies. In this paper, the authors focus on the legal framework adopted in the Czech Republic and in Slovakia to introduce the mandatory cap on market revenues to electricity producers as well as the solidarity contribution.

Keywords: cap on market revenues; energy, financial law; solidarity contribution

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INTRODUCTION

The energy market in the European Union (EU) has faced significant external influences in the recent period, which resulted in turbulent developments in the wholesale energy markets. The extraordinary and sudden increase in electricity prices and the imminent risk of further increases required a solution to be taken at the EU level in order to prevent serious distortions of the internal market. In October 2022,

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the Council of the EU adopted Regulation 2022/1854 that establishes an emergency intervention to mitigate the effects of high energy prices through exceptional, targeted, and time-limited measures aiming to ensure the necessary solutions and respond to the current energy situation.

The primary goal of the paper is to define the legal framework of the mandatory cap on market revenues for electricity producers and the solidarity contribution in the Czech Republic and Slovakia, both introduced by Regulation 2022/1854. The secondary goal is a mutual comparison of the monitored national provisions.

In order to achieve these goals, standard scientific methods will be used, especially description, analysis, and synthesis. The description aims at the initial definition of the energy market in the EU, as well as at the definition of the background of Regulation 2022/1854. The analysis method will be used in the analysis of the conceptual features of the monitored legal provisions, and the subsequent synthesis will be used to define their characteristic elements. The paper will further use the comparative method when comparing the common and different features of the definition of the mandatory cap on market revenues for electricity producers and the solidarity contribution in the law of the Czech Republic and Slovakia. Regarding sources, literature on financial law, internet sources, and relevant legal regulations are used.

The electricity and gas markets in the EU are characterised by physically and commercially interconnected markets between Member States, so that price fluctuations in one market translate into price volatility in the markets of other Member States. This situation, which is how the gas and electricity markets are currently functioning, is the result of liberalisation tendencies that began in the late 1990s of the previous millennium.[4] A consequence of the liberalisation of the electricity and natural gas markets in 2007 was the emergence of a market for the supply of electricity and natural gas to all customers. The entry of electricity[5] and gas[6] consumers into the so-called free market was prepared and gradually implemented. The liberalisation of the electricity and gas markets has brought consumers a choice of energy supplier, transparency, and easier access for energy suppliers to the markets of other Member States. On the other hand, however, customers were also often exposed to unfair practices by energy suppliers, as well as to greater risk resulting from market volatility and their low level of awareness of the risks of entering the free market. In most countries, therefore, the price regulation of the end supply of electricity and natural gas has remained in force, especially for the household and small business sectors[7], or the free market and the regulated electricity

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4 See in particular Council Directive 90/547/EEC of 29 October 1990 concerning the transit of electricity through transmission networks; Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity; Directive 98/30/EC of the European Parliament and of the Council concerning common rules for the internal market in natural gas.

5 See Article 21 of Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity.

6 See Article 23 of Directive 98/30/EC of the European Parliament and of the Council concerning common rules for the internal market in natural gas.

7 Further see ACER/CEER. *Annual Report on the Results of Monitoring the Internal Electricity and Natural Gas Markets in 2021: Gas Wholesale Markets Volume* [online]. European Union Agency for the Cooperation of Energy Regulators, the Council of European Energy Regulators, 2022 [cit. 2023-02-24].

and natural gas price market[8] operated in parallel. For the purposes of this paper, it is also important to note that the supply side of the wholesale market consists of electricity producers and electricity suppliers,[9] both of which can trade electricity bilaterally or on a centralised multilateral platform.

In 2022, EU countries faced three previously unprecedented and interacting factors, namely (i) significant fluctuations and price increases in the wholesale electricity market, (ii) extreme climatic conditions in the form of warm and dry weather which increased the demand for electricity for cooling and at the same time caused low water levels in rivers, (iii) significantly lower gas supply levels and increasing gas supply interruptions from Russia, with Russian gas supplies covering around 40% of the EU gas consumption in 2021.[10]

The interaction of the above three factors has negatively affected the EU economy. As a consequence of the increase in the wholesale price of electricity and natural gas, customers who did not enjoy the protection of regulated end-use prices saw their energy costs rise significantly in 2022. The increase in the price of energy was subsequently reflected in an increase in the price of goods and services.[11]

The new situation required a response from Member States to mitigate the impact of rising energy prices on the economy.[12] The measures taken to protect energy consumers at the level of individual Member States did not prove to be sufficient, so the EU, respecting the principles of proportionality and subsidiarity,[13] decided to adopt a single set of temporary emergency measures. In October 2022, the Council of the EU (the Council) adopted Regulation 2022/1854 to ensure a rapid and coordinated response by Member States to the current energy crisis, with the measures put in place to be of a temporary nature only. For the sake of completeness, in addition to the above Regulation, on 5 August 2022, in the context of the ongoing energy crisis, the Council adopted Regulation 2022/1369 on coordinated measures to reduce gas demand,[14] which laid down rules to deal with situations of severe gas supply difficulties in order to ensure

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Available at: https://www.acer.europa.eu/sites/default/files/documents/Publications/ACER_Gas_Market_Monitoring_Report_2021.pdf.

8 Further see e.g., DELIA VASILICA, R. A Glance at the European Energy Market Liberalization. *CES Working Papers*. 2013, Vol. 5, No. 1, pp. 100–110.

9 The electricity supplier carries out the sale of electricity to customers, including its resale – see further Article 2(12) of Directive (EU) 2019/944 of the European Parliament and of the Council of 5 June 2019 concerning common rules for the internal market in electricity and amending Directive 2012/27/EU.

10 THOMSON, E. These charts show Europe's reliance on gas before the war in Ukraine. In: *World Economic Forum* [online]. 10.11.2022 [cit. 2023-01-10]. Available at: https://www.weforum.org/agenda/2022/11/europe-gas-shortage-russia/.

11 See further e.g., NAKHLE, C. Energy prices and inflation: Politics trump the economics. In: *GIS* [online]. 7.12.2022 [cit. 2023-01-20]. Available at: https://www.gisreportsonline.com/r/energy-prices/.

12 For example, see CARBONARO, G. – HUET, N. Energy bills are soaring in Europe. This is what countries are doing to help you pay them. In: *euronews.next* [online]. 11.10.2022 [cit. 2023-01-02]. Available at: https://www.euronews.com/next/2022/10/26/energy-bills-are-soaring-in-europe-what-are-countries-doing-to-help-you-pay-them.

13 See further Recital (72) of Regulation 2022/1854.

14 Council Regulation (EU) 2022/1369 of 5 August 2022 on coordinated demand-reduction measures for gas. ST/11568/2022/INIT. In: *EUR-Lex: Acces to European Union Law* [online]. 8.8.2022 [cit. 2023-01-02]. Available at: http://data.europa.eu/eli/reg/2022/1369/oj.

security of gas supply in the EU. However, our paper does not deal with this regulation in detail and will focus exclusively on Regulation 2022/1854 below.

I. EMERGENCY INTERVENTION UNDER REGULATION 2022/1854

Before discussing the actual nature of the emergency intervention introduced by Regulation 2022/1854, let us briefly review the process that preceded the adoption of the source of law in question. As for the process of adoption of Regulation 2022/1854 itself, it should be noted that its adoption was decided by the Council by qualified majority, without the adoption of the legal act being subject to the approval of the European Parliament. The adoption of the legislation by the extraordinary legislative procedure undoubtedly made it quicker and easier to pass. The Council's power to adopt Regulation 2022/1854 derives from Article 122(1) of the Treaty on the Functioning of the European Union, according to which the Council may *"*[…] *on a proposal from the Commission, in a spirit of solidarity between Member States, decide on appropriate measures in view of the economic situation, in particular where there are serious difficulties in the supply of certain products, particularly in the field of energy"*. The Preamble (7) of Regulation 2022/1854 refers to satisfaction of that condition: *"The current disruptions of gas supplies, reduced availability of certain power generating plants, and the resulting impacts on gas and electricity prices, constitute a severe difficulty in the supply of gas and electricity energy products within the meaning of Article 122(1) of the Treaty on the Functioning of the European Union ('TFEU')."*

The situation of crisis that indicated the need for the adoption of Regulation 2022/1854 was triggered by the reduction of gas supplies to the EU from Russia and the hybrid war.

Regulation 2022/1854 was not clearly agreed at Council level. The Slovak and Polish delegations opposed the adoption. The Slovak economy minister had the following to say on the topic: *"I was against what was approved. The proposal is inadequate from Slovakia's point of view, even though there have been modifications to it. But the measures do not primarily solve our problems."*[15] It should be noted that not every Member State that agreed to the adoption of Regulation 2022/1854 accepted the application of Article 122 TFEU. The delegations of Estonia, Latvia, Poland, Croatia, Slovenia, and Hungary presented differing views.[16, 17]

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[15] Hirman after negotiations in Brussels: I voted against, our problems have not been solved yet. In: *Pravda.sk* [online]. 1.10.2022 [cit. 2023-01-15]. Available at: https://ekonomika.pravda.sk/energetika/clanok/642210-hirman-po-stretnuti-v-bruseli/.

[16] Council of the European Union. Proposal for a Council Regulation an emergency intervention to address high energy prices, 2022/0289(NLE) of 6 October 2022 [online]. Brussels, 6.10.2022 [cit. 2023-01-10]. Available at: https://www.consilium.europa.eu/media/59404/cm04715-xx22.pdf.

[17] At the time of writing this paper, ExxonMobil Producing Netherlands BV (Breda, Netherlands), Mobil Erdgas-Erdöl GmbH (Hamburg, Germany) challenged Regulation 2022/1854 before the Court of Justice of the European Union. Further details online at: Case T-802/22: Action brought on 28 December 2022 – ExxonMobil Producing Netherlands and Mobil Erdgas-Erdöl v Council. In: *EUR-Lex: Acces to European*

Having introduced the legislative process for the adoption of Regulation 2022/1854, we will focus below on the actual wording of the approved emergency intervention. Regulation 2022/1854 introduces an emergency intervention to mitigate the effects of high energy prices through exceptional, targeted, and time-limited measures. The measures introduced by the Regulation are defined in Article 1 of Regulation 2022/1854 and can be divided into two categories in terms of sectoral focus:

i. Measures concerning the electricity market.
   - Reduction of the electricity consumption,
   - Introduction of mandatory cap on market revenues for the electricity producers.

ii. Measures concerning the crude petroleum, natural gas, coal, and refinery sectors.
   - Introduction of a mandatory temporary solidarity contribution for EU companies and permanent establishments with activities in the oil, gas, coal, and refinery sectors to contribute to the affordability of energy for households and businesses.

II. ELECTRICITY MARKET MEASURES

Two measures concern electricity market.

a) The first measure is a mandatory reduction of electricity consumption to be implemented in two aspects. The first is a reduction in gross electricity consumption, by reducing the total monthly gross electricity consumption by 10% compared to the average gross electricity consumption in the corresponding months of the reference period.[18] The second aspect of the electricity consumption reduction relates to electricity consumption in peak hours.[19] During peak hours, Member States are obliged to reduce their gross electricity consumption by at least 5% and 3% on average, respectively.[20]

b) The second measure concerning the electricity market is the capping on market revenues for electricity producers and the redistribution of surplus revenues and surplus congestion revenues to final electricity consumers. The market revenue cap is to be applied to electricity producers and, where relevant, to intermediaries.[21] According to the Article 8(1a) of Regulation 2022/1854 the Member States may also: *"maintain or introduce measures that further limit* […] *the market revenues of other market*

Union law [online]. 13.2.2023 [cit. 2023-04-03]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62022TN0802&qid=1680510916635.

18 Art. 3(1) of Regulation 2022/1854.

19 The peak hours is legally defined in Article 2(4) of Regulation 2022/1854 as *"individual hours of the day where, based on the forecasts of transmission system operators and, where applicable, nominated electricity market operators, day-ahead wholesale electricity prices are expected to be the highest, the gross electricity consumption is expected to be the highest or the gross consumption of electricity generated from sources other than renewable sources as referred to in Article 2(1) of Directive (EU) 2018/2001 of the European Parliament and of the Council (7) is expected to be the highest"*.

20 Art. 3(2, 3) of Regulation 2022/1854.

21 Intermediaries are legally defines in Art. 2(8) of the Regulation 2022/1854 like *"entities in wholesale electricity markets of Member States constituting an island not connected to other Member States with unit-based bidding where the regulatory authority has authorised those entities to participate in the market on behalf of the producer, excluding entities that transfer the surplus revenues directly to final electricity customers"*.

participants, including those active in electricity trading"; It is important to note that Regulation 2022/184 does not provide for an obligation at EU level to apply a price cap to electricity traders[22] where they are not part of a vertically integrated undertaking.[23] As this paper mentions in the introduction, the supply in the wholesale market is represented by both electricity producers and electricity traders. In our view, this aspect (the possibility of different settings at EU level) contradicts the principles of Regulation 2022/1854[24] and creates an unbalanced position of electricity producer and electricity trader on the electricity market.

Market revenues of producers obtained from the generation of electricity from the sources referred to in Article 7(1) shall be capped at a maximum of € 180 per MWh of the electricity produced.[25] The market cap shall apply to all forms of electricity generation including the renewable sources electricity generation, however, Regulation 2022/1854 also directly provides for an exemption for demonstration projects as selected electricity producers[26] at the same time allowing Member States to apply the exemption from the market revenue cap to other producers, in particular ancillary service providers.[27] Given that Regulation 2022/1854 sets cap on market revenues, Member States can be expected to set the cap on market revenues at different levels for different forms of electricity generation. For the sake of completeness, we add that, according to Article 8(1)(b) of Regulation 2022/1854, Member States may also set the cap on market revenues exceeding € 180 per MWh for a specific source of electricity production if the investments and operating costs of the generator exceed this amount. When applying the cap on market revenues, Member States may decide not to apply the cap on market revenues to the full 100% of the exceeding revenues, but to 90% only.[28]

The positive aspect of Regulation 2022/1854 is that it does not allow Member States to dispose freely of the proceeds generated by the application of the cap on market revenues but defines the underlying purpose of spending the allocated funds.[29] Member States are expected to ensure that all surplus revenues resulting from the application of the cap on market revenues are used to finance measures in support of final electricity customers that mitigate the impact of high electricity prices on those customers, in a targeted manner.[30] The Article 10(4) in Regulation 2022/1854 sets out examples of measures that Member States can finance from surplus revenue:

- Granting a financial compensation to final electricity customers for reducing their electricity consumption;

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22 For the purposes of this paper, we consider a trader to be an entity that is not affiliated with an electricity generator and actively enters the wholesale market (Ed.).
23 Art. 6(3)(s) of Regulation 2022/1854.
24 Compare with Art.8(2) of Regulation 2022/1854.
25 Art. 6(1) of Regulation 2022/1854.
26 Art. 7(2) of Regulation 2022/1854.
27 Art. 7(4) of the Regulation 2022/1854.
28 Art. 7(5) of the Regulation 2022/1854.
29 Compare, for example, the treatment of resources from the proceeds of greenhouse gas emission allowance trading under Directive 2009/29/EC of the European Parliament and of the Council of 23 April 2009 amending Directive 2003/87/EC so as to improve and extend the greenhouse gas emission allowance trading scheme of the Community.
30 Art. 10(1) of Regulation 2022/1854.

- Direct transfers to final electricity consumers;
- Compensation to suppliers who have to deliver electricity to customers below costs;
- Partial lowering the electricity purchase costs of final electricity customers;
- Promoting investments into decarbonisation technologies, renewables, and energy efficiency investments by final electricity customers.

With regard to the distribution of surplus revenues and in the spirit of solidarity, Regulation 2022/1854 also defines the procedure for the Member states whose net electricity imports equal or exceed 100%. In this case, the Member States concerned have the possibility to conclude agreements with the main exporting Member State on the sharing of the surplus revenue.

The temporary nature of the measure is established in Regulation 2022/1854 by limiting the time period within which the Articles 6, 7, and 8 in question should apply. The market revenue cap on electricity producers shall apply for the period from 1 December 2022 to 30 June 2023.[31]

III. MEASURE CONCERNING THE CRUDE PETROLEUM, NATURAL GAS, COAL, AND REFINERY SECTORS

In addition to the electricity market, Regulation 2022/1854 also targets the crude petroleum, natural gas, coal, and refinery sectors with a temporary measure in the form of a solidarity contribution. According to Article 14, Member States are obliged to introduce the obligation to pay a solidarity contribution on surplus profits generated by EU companies and permanent establishments with activities in the crude petroleum, natural gas, coal, and refinery sectors as of 1 December 2022. At the same time, Regulation 2022/1854 allows for an exemption from the application of the solidarity contribution if a Member State has already adopted equivalent national measures.[32]

Pursuant to Articles 15 and 16 of Regulation 2022/1854, the rate applicable for the calculation of the temporary solidarity contribution shall be at least 33% of the taxable profits, determined in accordance with national tax rules, in the financial year 2022 or the financial year 2023, and for their entire duration, which exceeded a 20% increase in the average of the taxable profits determined in accordance with national tax rules in the period of four financial years starting on/or after 1 January 2018. If the average of the taxable profits in those four fiscal years is negative, the average taxable profits shall be zero for the purpose of calculating the temporary solidarity contribution.

Regulation 2022/1854 stipulates that the temporary solidarity contribution shall apply in addition to the regular taxes and levies applicable according to the national law of a Member State.[33] Regulation 2022/1854 does not provide for the answer to the question if the solidarity contribution should be treated as tax expense.

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[31] Art. 22(2)(c) of Regulation 2022/1854.
[32] Art. 14(2) of Regulation 2022/1854.
[33] Art. 16(2) of Regulation 2022/1854.

The Member States shall use the proceeds allocated from the solidarity contribution to financial support measures which are defined as follows:[34]

- Financial support measures for final energy customers, and in particular vulnerable households;
- Financial support measures to help reducing the energy consumption;
- Financial support measures to support companies in energy intensive industries;
- Financial support measures to develop the energy autonomy;
- Member States may assign a share of the proceeds of the temporary solidarity contribution to the common financing of measures to reduce the harmful effects of the energy crisis.

The use of the proceeds for the purposes defined above reflects the exceptional and temporary nature of the solidarity contribution. It is clear that the purpose of the measures is to reduce and mitigate the harmful effects of the energy crisis on households and companies.

The temporary nature of the solidarity contribution at EU level is established in Regulation 2022/1854 by the limitation of the fiscal year (2022 or 2023) to which it is to apply.[35]

After an introduction of both institutes, the paper we will further focus on the financial standards that have been adopted in the Czech Republic and Slovakia for the introduction of the cap on market revenue and the solidarity contribution.

IV. NATIONAL LEGISLATION ON CAP ON MARKET REVENUES AND SOLIDARITY CONTRIBUTION IN THE CZECH REPUBLIC

For the purpose of introducing a cap on market revenues and the solidarity contribution, two national legal norms have been adopted in the Czech Republic, namely:

- Act 365/2022 Sb. of laws amending Act 458/2000 Sb. of laws on business conditions and the exercise of state administration in the energy sectors and on amendments to certain acts (Energy Act), as amended (Act 365/2022 Sb. of laws),
- Act 366/2022 Sb. of laws, amending Act 235/2004 Sb. of laws, on Value Added Tax, as amended, Act 586/1992 Sb. of laws, on Income Tax, as amended, and certain other acts (Act 366/2022 Sb. of laws).

First we will present the legislative framework on the cap on market revenues which is introduced by Act 365/2022 Sb. of laws as of 1 December. In the context of the Czech legislation, the cap on market revenue was introduced in the form of a levy on surplus revenue. According to Article 93(2) of the Energy Act, as amended by Act 365/2022 Sb. of laws, the surplus revenue is the positive difference between the market revenue and the cap on market revenue for the levy period. The method of determining the surplus revenue

[34] See further Art. 17(1) of Regulation 2022/1854.
[35] Art. 15 of Regulation 2022/1854.

was established by the Czech government by Decree 407/2022 Sb. Of laws on the method of determining the amount of surplus revenues from the sale of generated electricity.

It is noteworthy that the lawmaker applied the levy on surplus revenue at the lower limit allowed by Regulation 2022/1854. Act 365/2022 Sb. of laws stipulates that the levy on surplus revenue is levied on 90% of the surplus revenues.[36] The levy on surplus revenues shall be collected for December 2022 for the first time. It is important to note that the last levy period is 2023, and pursuant to Article 95(c) of the Energy Act, as amended by Act 365/2022 Sb. of laws, the provisions of Regulation 2022/1854 relating to the levy on surplus revenue will also apply after 30 June 2023. Thus, we are of the opinion that the application of a cap on market revenues for electricity producers after 30 June 2023 in the Czech Republic, assuming that other Member States do not do the same, may put the electricity producers at a disadvantage in the EU market.

In the context of the Czech legislation, it is important to note two specificities in relation to the cap on market revenues. The first peculiarity is that the cap on the market revenue is defined directly in Act 365/2022 Sb. Of laws and ranges from € 70–240 per MWh, depending on the type of source of generated electricity.[37] We consider that setting the cap on market revenue at the level of a law increases its transparency as well as the predictability of its level if compared to setting it, for example, in the form of a sub-legislative norm.[38] The second peculiarity is that in the case of electricity generation from gaseous biomass fuel, solid biomass fuel, and lignite in an electricity generation facility with an installed capacity of the largest generating source up to 140 MW the cap is set at an amount exceeding € 180 per MWh.[39] The Czech Ministry of Industry and Trade commented on the method of setting the individual cap on market revenue as follows: *"The caps on market revenue for producers are set to cover in principle normal operating costs and potential investments. The specific caps on market revenue were set by an interministerial working group on the basis of an analysis of data from selected producer."*[40]

Energy Regulatory Authority (Energetický regulační úřad) administers the levy from surplus revenues and the proceeds of the surplus revenue contribution itself are an income of the national budget of the Czech Republic.

The second financial legal instrument defined by Regulation 2022/1854 is the solidarity contribution. It was introduced into Czech legislation by Act 366/2022 Sb. of laws, in the form of a tax on windfall gains. The basic structural elements of any tax (including windfall tax – Edit.) include the subject of the tax, the object of the tax, the tax base and tax rate, the calculation of the tax, and the taxable period.[41] The windfall

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[36] § 95(a) of the Energy Act as enacted by Act 365/2022 Sb. of law.

[37] § 95(b)(1) of the Energy Act as enacted by Act 365/2022 Sb. of laws.

[38] Compare with Slovak national rules.

[39] Ibid.

[40] Ministry of Industry and Trade of the Czech Republic. The government approved a levy on excess income for electricity producers. In: *Ministry of Industry and Trade of the Czech Republic* [online]. 9.11.2022 [cit. 2023-01-15] Available at: https://www.mpo.cz/cz/rozcestnik/pro-media/tiskove-zpravy/vlada-schvalila-odvod-z-nadmernych-prijmu-pro-vyrobce-elektriny--270897/.

[41] KARFÍKOVÁ, M. – BOHÁČ, R. Daňové právo [Tax law]. In: KARFÍKOVÁ, M. a kol. *Teorie finančního práva a finační vědy* [Theory of Financial Law and Financial Science]. Praha: Wolters Kluwer ČR, 2018, p. 158.

gains tax, effective from 1 January 2023, is to be applied to a wider range of entities than provided for in Regulation 2022/1854. Pursuant to § 17(c)(1) in conjunction with § (6) of Act 586/1992 Sb. of laws on Income Tax, as amended by Act 366/2022 Sb. of laws, the relevant activities for the windfall gain tax are, in addition to the crude petroleum, natural gas, coal, and refinery sectors, the following:

- Production, transmission and distribution of electricity with the exception of combined production of electricity and heat in a ratio of electricity produced and useful heat supply of less than 4.4;
- Financial intermediation, except for the exceptions referred to in the quoted paragraph.

Inclusion of the electricity producers in particular among the entities liable to pay tax on windfall gains was highly criticized. Electricity producers are also obliged anyway to pay the aforementioned surplus revenue contribution. The former Czech minister of the industry and trade also criticised in this context: *"It is contrary to the EU Regulation (Regulation 2022/1854 – Edit.), contrary to the case law of the Constitutional Court and contrary to the constitutional order."*[42] However, the current government and legislature is of a different view according to them the extension of the tax liability to electricity producers, despite their contemporaneous obligation to tolerate a cap on market revenues, is not inconsistent with Regulation 2022/1854.[43]

In addition to its name, the essence and character of each tax is captured in particular by the subject of the tax.[44] The subject of the windfall gains tax is defined positively [45] as excess profits, which is defined as the difference between the 2023-2025 tax base and the average of the tax base over the last four years (2018–2021) plus 20%.[46] The tax on windfall gains is applied for the period of 2023–2025. The windfall gains tax rate is set at 60% (the minimum rate under Regulation 2022/1854 is 33% – Edit.) and applies in addition to the applicable income tax. In effect, the surplus revenues of the entities concerned are thus subject to a tax rate equal to the sum of the windfall gains tax and the income tax. It should be noted that the above state of affairs is not contrary to the spirit of the Regulation 2022/1854, which states in Article 16(2) that *"The temporary solidarity contribution shall apply in addition to the current taxes and levies applicable under the national law of the Member State."*

In the Czech Republic, the windfall gains tax itself is an income tax, the Specialized Financial Office is its administrator.[47] The tax in question is a sub-category of corporate income tax and applies to a defined range of entities.[48] For the sake of completeness,

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[42] KLÍMOVÁ. J. OTÁZKY A ODPOVĚDI: Windfall tax a zastropování tržeb. Je Česko nejpřísnější v Evropě? [Q&A: Windfall tax and revenue capping. Is the Czech Republic the strictest in Europe?]. In: *iRozhlas* [online]. 24.11.2022 [cit. 2023-02-24]. Available at: https://www.irozhlas.cz/ekonomika/windfall-tax-co-je-2022-cr-odvody-z-nadmernych-trznich-prijmu_2211241144_ako.

[43] Ibid.

[44] BOHÁČ, R. Labutí píseň daně z nabytí nemovitých věcí [The Swan Song of the Real Estate Acquisition Tax]. *Acta Universitatis Carolinae Iuridica* [online]. 2022, Vol. LXVIII, No. 4, p. 8. [cit. 2023-01-17] Available at: https://karolinum.cz/data/clanek/10821/Iurid_68_4_0007.pdf.

[45] KARFÍKOVÁ – BOHÁČ, *c. d.*, p. 159.

[46] § 20(ba) of Act 586/1992 Sb. of laws on income tax as amended.

[47] § 21(5) of Act 586/1992 Sb. of laws on income tax as amended.

[48] § 17 of Act 586/1992 Sb. of laws on income tax as amended.

we would like to point out that the windfall gains tax is not subject to the obligation to file a windfall gains tax registration.[49]

Summarizing the adopted national legal norms in the Czech Republic regulating the cap on market revenues and the solidarity contribution under Regulation 2022/1854, we can mention the following conclusions:

- Both institutes are, *de lege lata*, temporary, but the cap on market revenues is to be applied, beyond the period defined in Regulation 2022/1854, also for the second half of 2023;
- In case of the levy on the surplus revenue established, in the case of electricity production from gaseous biomass fuel, from solid biomass fuel, and from lignite in electricity production facilities with an installed capacity of the largest production source up to 140 MW, the legislature took advantage of the possibility to set a cap on market revenues above € 180 per MWh;
- Windfall gains tax is applied to a wider range of entities than those defined by Regulation 2022/1854. In the Czech Republic, banks and selected companies in the electricity and financial intermediation sectors are also affected by the tax in question.

V. NATIONAL LEGISLATION ON CAP ON MARKET REVENUES AND SOLIDARITY CONTRIBUTION IN SLOVAKIA

In Slovakia, in order to introduce a cap on market revenues and the solidarity contribution, two national legal norms have been adopted, namely:

- Act 433/2022 Sb. of laws amending Act 51/2012 Sb. of laws on energy as amended and amending and supplementing certain acts (Act 433/2022 Sb.of laws);
- Act 519/2022 Sb. of laws on solidarity contribution from activities in crude petroleum, natural gas and refinery sector supplementing certain laws (Act 519/2022 Sb. of laws).

Similarly, to the Czech Republic the cap on market revenues in Slovakia was introduced by an amendment to the energy legislation, namely Act 251/2012 Sb. of laws on energy on amendment and supplementation of certain laws as amended and amending certain laws (New Energy Act). The legal institution that introduces the cap on market revenue is the surplus revenue levy. The subject of the levy, which is terminologically denoted as the payer, is defined by reference to the directly applicable EU Regulation. It is worth noting that the Slovak national legislation does not consider an electricity trader as a payer of the surplus revenue, but it is part of an vertically integrated entity.[50] In the context of the subject of the levy, we further note that, on an extensive interpretation, it is possible to draw a partial conclusion that the legislature included certain hydroelectric

[49] See further draft decree amending decree 525/2020 Sb. of laws on income tax forms as amended [online]. [cit. 2023-01-16]. Available at: https://www.komora.cz/legislation/3-23-novela-vyhlasky-c-525-2020-sb-o-formularovych-podanich-pro-dane-z-prijmut17-1-2023/.

[50] See § 25(a) of the New Energy Act.

power plants with a reservoir among the payers of the levy in question,[51] for example the "Váh Cascade"[52] while Regulation 2022/1854 states that in case of hydro power plant the cap on market revenues shall be applied on hydropower without reservoir.[53]

Surplus revenue itself is legally defined in § 25(b)(2) of the New Energy Act as *"the positive difference between the market revenues and the cap on market revenues"*. It should be noted that the cap on market revenues is not directly determined in the cited law, but is determined by the Decree of the Government n. 38/2023 Sb. of laws which establishes the method of determining the amount of additional income from the sale of produced electricity, the cap on market revenues, costs of deviation, the scope of information necessary for monitoring and reporting to the European Commission, and the fixed electricity prices for determining the cap on market revenues of electricity produced from biogas, biomass, or highly efficient combined production (Decree 38/2023 Sb. of laws).[54]

According to Article 25(f) of the New Energy Act, the cap on market revenues obtained from the sale of 1MWh of electricity will be set between € 50 and € 250 depending on the type of source. The government can only increase the cap on market revenues once it has been determined.[55] It is worth noting that the Slovak legislation also allows for a market revenue cap above the threshold set by Regulation 2022/1854, i.e., the government may set a market income cap even above € 180 per MWh in accordance with Article 8(1)(b) of Regulation 2022/1854. In our opinion, setting the cap on market revenues by a government decree, compared to its setting via primary legislation, creates the opportunity for its easier and faster modification, which on the other hand decreases the level of certainty for market participants.

The method of determining the surplus revenue is determined by Decree 38/2023 Sb. of laws.[56]

The surplus revenue levy is to be applied in the levy period from 1 December 2022 to 31 December 2024. It should be noted that also in Slovakia the legislature exceeded the period that was directly required by Regulation 2022/1854. We are of the opinion that if other Member States do not apply the cap on market revenue to their electricity producers after the date specified in Regulation 2022/1854 (30 June 2023 – Edit.), the application of the cap on market revenue to electricity producers in Slovakia after 30 June 2023 may put them at a disadvantage vis-à-vis the EU market competition.

In Slovakia, the levy on surplus revenue is applied to 90% of it, i.e., the legislature did not use the possibility to charge the entire surplus revenue of obliged entities. According to the explanatory memorandum to the New Energy Act, the argument for applying the 90% share is to maintain incentives for the market and to ensure the availability of electricity producers in situations of high demand.[57]

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[51] The aforementioned refer to so-called the Váh Cascade in the Slovak energy sector. Compare with Art. 7(1)(d) of Regulation 2022/1854.

[52] Vážska kaskáda. In: *javys: Informačný servis: Energetický slovník* [online]. [cit. 2022-02-24]. Available at: https://www.javys.sk/sk/informacny-servis/energeticky-slovnik/V/vazska-kaskada.

[53] Art. 7(1)(d) of Regulation 2022/1854.

[54] See § 2 of the Decree 38/2023 Sb. of laws.

[55] § 25(f)(5) of the New Energy Act.

[56] See § 1 of the Decree 38/2023 Sb. of laws.

[57] Online available at: https://www.nrsr.sk/web/Dynamic/DocumentPreview.aspx?DocID=521531.

The tax office competent for the administration of the income tax of the payer of the levy on excessive income pursuant to Act 563/2009 Sb. of laws on tax administration (Tax Code) and on amendments and supplements to certain acts administers the levy on surplus revenue. The explanatory memorandum to the New Energy Act says that the designation of the competent tax authority is justified by the fact that it is the authority which is the most competent from a procedural point of view.[58]

We consider it necessary to point out also that the levy on surplus revenue is not the first specific financial obligation for electricity producers in Slovakia. Since 2012, electricity producers in Slovakia have been obliged to pay a special levy on business in regulated sectors, which was introduced by Act 235/2012 Sb. of laws on a special levy on business in regulated sectors and on amendments and supplements to certain acts, as amended. It is worth noting that this levy was also intended originally to be temporary in nature,[59] yet it is still applied today. It is worth noting, that the primary aim of the legislature in the case of this levy was also to share the burden of the effects of the global financial and economic crisis more fairly and economically.[60]

The second measure under consideration is the national regulation of the solidarity contribution under Regulation 2022/1854. In terms of the Slovak legislation, the solidarity contribution was introduced by special Act 519/2022 Sb. of laws, terminologically referred to as the solidarity contribution in line with Regulation 2022/1854. In terms of Slovak legislation, the solidarity contribution was introduced by special Act 519/2022 Sb. of laws, while terminologically it is designated in accordance with Regulation 2022/1854 as a solidarity contribution.[61] For better comparability of the Czech and Slovak national legislations, also in the case of the solidarity contribution, we will focus on its basic structural elements.

The obligation to pay the solidarity contribution applies to legal entities and permanent establishments of foreigners, provided that they generate at least 75% of their turnover from economic activities in the crude petroleum, natural gas, coal, and refinery sectors. The Slovak legislation does not extend the sectors subject to the solidarity contribution beyond the scope of Regulation 2022/1854.

Article 15 of Regulation 2022/1854, in combination with the provisions of § 3, 4, and 6 of Act 519/2022 Sb. of laws, shall be used to calculate the amount of the contribution. The amount of the solidarity contribution shall be determined as the product of the basis for the calculation of the solidarity contribution[62] and the rate of the solidarity contribution specified in § 4 of Act 519/2022 Sb., at the rate of 55%.[63]

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58 Ibid.

59 Online available at: https://www.nrsr.sk/web/Dynamic/DocumentPreview.aspx?DocID=368848.

60 Ibid.

61 We would like to draw your attention to the fact that in Slovakia the national legislation sticks to the term "solidarity contribution", whereas in the Czech Republic the financial law institute in question is referred to as a windfall gains tax. (Edit.)

62 The basis for calculating the solidarity contribution is based on the income tax base less the tax loss deduction and after claiming the income tax base reduction for each income tax year of the contributor beginning in calendar year 2022 – for more details see § 3 of Act 519/2022 Sb. of laws.

63 At the time of writing this paper, National Council of Slovakia received a proposal for change of the solidarity contribution rate to 70%. See the wording of the draft act – online available at: https://www.nrsr.sk/web/Default.aspx?sid=zakony/zakon&MasterID=9069.

The legislation on the application of the solidarity contribution in the Slovak Republic explicitly provides that the solidarity contribution is treated as a tax expense in the tax period in which the taxpayer will bring it to book as costs.[64]

Summarising the adopted national legal norms in Slovakia regulating the cap on market revenue and the solidarity contribution under Regulation 2022/1854, the following conclusions can be drawn:

- Both institutes are, *de lege lata*, of temporary nature, but the levy on the surplus revenue (cap on market revenue) is to be applied, going beyond Regulation 2022/1854, also for the second half of 2023;
- The cap on market revenues unlike in the Czech Republic, is not regulated in the rule establishing the legal framework of the cap on market income but will be regulated by a government decree. At the same time, it should be noted that the legislation in Slovakia also allows for the establishment of the cap on market revenues above the level set by Regulation 2022/1854;
- In the context of the solidarity contribution, the Slovak legislation does not deviate from the provisions of Regulation 2022/1854 in defining the sectors that are financially obliged by the introduction of the solidarity contribution. Furthermore, it is important to note that the legislation explicitly states that the solidarity contribution will be treated as a tax expense in the tax year in which the taxpayer books it as expense.

CONCLUSION

The aim of the article was to define the legal framework of the mandatory cap on market revenues for electricity producers and the solidarity contribution in the Czech Republic and Slovakia and to provide their comparison. We believe that the goal of the contribution has been successfully achieved. Below is a summary of our key findings.

In both the Czech Republic and Slovakia, the relevant national legislation was approved at the end of 2022, establishing the legal framework for the cap on market revenue for electricity producers as well as the legal framework for the solidarity contribution, with the basic legal framework for both institutes being regulated at EU level by Regulation 2022/1854.

The cap on market revenues for electricity producers has been reflected in the introduction of a surplus revenues levy in both countries. In the context of the cap on market revenues, both countries have introduced different levels of the cap on market revenue for electricity producers according to the form or source of electricity production, with the Czech Republic having caps regulated at the level of primary legislation and Slovakia having caps to be regulated by government decree, to the extent determined in the relevant primary legislation.

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[64] § 19(3)(j) of Act 595/2003 Sb. of laws on income tax as amended by Act 519/2022 Sb. of laws.

The legislation of both countries also allows for caps on market revenue exceeding € 180 per MWh. Both countries apply a surplus revenue levy on 90% of the surplus revenue, i.e., neither country has used the option to levy the full amount of the surplus revenues of obligated entities. The legislation of both countries foresees the application of the surplus revenues levy also after 30 June 2023. In our view, application of the surplus revenue levy in the Czech Republic and in Slovakia after the period set by Regulation 2022/1854, in case that other Member States do not apply the cap on market revenue to their electricity producers after the date specified in Regulation 2022/1854 (30 June 2023 – Edit.), this may put electricity producers in the Czech Republic and Slovakia at a disadvantage vis-à-vis the EU market competition. Furthermore, the application of the surplus revenue levy on electricity producers in the Czech Republic and Slovakia beyond the period set by Regulation 2022/1854 will also decrease their disposable capital on new investments and hence put them at a disadvantage vis-à-vis the EU market competition. Generally, in our opinion this prolongation of the period of application of the surplus levy in both countries exceeds the primary goal of the Regulation 2022/1854.

With regards to the surplus levy, the difference between the countries can be identified in the determination of the administrator of the proceeds from the surplus revenue levy: it is administered by the Energy Regulatory Office in the Czech Republic or the competent tax office in Slovakia.

More significant differences between the national legislations under consideration can be observed in the definition of the solidarity contribution. Most significant differences include wider range of sectors subject to the solidarity contribution obligation in the Czech Republic, whereas the legislation on obliged entities in Slovakia does not deviate from Regulation 2022/1854. The second important difference is that the legislation in Slovakia explicitly governs that the solidarity contribution will be treated as a tax expense in the tax year in which the taxpayer books it as expense. Finally with regards to the solidarity contribution, one needs to note that at the time of writing this paper the part of Regulation 2022/1854 concerning the solidarity contribution is challenged in the Court of Justice of the European Union.[65]

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[65] See Case T-802/22: Action brought on 28 December 2022 – *ExxonMobil Producing Netherlands and Mobil Erdgas-Erdöl v Council*. *OJ C 54*. In: *EUR-Lex: Acces to European Union Law* [online]. 13.2.2023 [cit. 2023-02-24]. Available at: https://eur-lex.europa.eu/legal-content/SK/TXT/?uri=CELEX:62022TN0802.

AN ETHICALLY INDIFFERENT CODE OF ETHICS? ANALYSIS OF THE CHARACTER OF THE CZECH BAR ASSOCIATION'S CODE OF ETHICS[1]

TOMÁŠ FRIEDEL

Abstract: The Czech Bar Association published a text which has the words "code of ethics" in its title. The aim of this paper is to determine whether the norms contained in the code are actually related to ethics or whether they concern different fields. The paper first explains the *raison d'être* of codes of ethics in general and briefly introduces the Czech Bar Association and the origin of its code of ethics.

The principal section of the paper is dedicated to a detailed analysis of the text of the Czech Bar Association's code of ethics applying a method used in England for similar purposes by Donald Nicolson.

The analysis shows that the Czech Bar Association's code of ethics deals with ethical issues only to a lesser extent and that it contains numerous provisions which do not deal with ethics at all. The paper proposes to remedy this unsuitable state by creating two separate codes. The first would primarily regulate ethically relevant situations in legal practice. The other code would contain "other" rules of the profession.

Keywords: code of ethics; ethical code; rules of professional conduct; lawyer; legal ethics; Czech Republic; Czech Bar Association

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A popular Czech proverb says *appearances are deceptive*. Some may dislike it because of a shadow of misanthropy. It is more useful, however, to take it as an appeal to be vigilant and as a warning: (first) impressions or feelings do not always match reality.

The proverb foreshadows the main purpose or aim of this text. The Czech Bar Association has published a text entitled *Code of Ethics*. The title makes it appear that the document is concerned with ethics. The aim of this text is to either confirm this "appearance" or to show that it is deceptive. And because the text is based on a hypothesis, that the Code of Ethics of the Czech Bar Association is rather loosely related to ethics,

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a more precisely stated question is to what extent are ethical issues covered in the Code of Ethics.

To answer both questions the reader is first introduced to the *raison d'être* of codes of ethics in general. Then Czech Bar Association is briefly presented as well as the origin and content of its Code of Ethics. The next part of the paper deals with the method used to analyse the Code of Ethics. The main part of the text is dedicated to an analysis of the text, while the last part evaluates the results of the analysis.

After reading the text, the reader will not only have an improved awareness of the regulation of Czech attorneys-at-law by means of the Code of Ethics of the Czech Bar Association but will also be able to state responsibly whether the "appearance" made by the title of the Code of Ethics of Czech Bar Association actually matches reality or not, and to what extent.

1. INTRODUCTION – ON LAWYERS' CODES OF ETHICS IN GENERAL

For the purposes of this text, we deem a code of ethics to be *"the formal statement of standards which the professional consults to guide his or her behaviour. It represents a statement of the roles professionals ought to assume in specific situations. To that extent, a code is a formalized statement of role morality, a unitary professional 'conscience'."*[2] We therefore base our consideration on the substance of the code rather than the name. We do not consider a text to be a code of ethics solely because it is entitled a 'code of ethics' or something similar (such as *ethical code, rules of professional conduct*, etc.). The distinction between the substantive and formal concept of a code of ethics will be used below in the analytical part of the text.[3]

The original need to formally record the moral aspirations of legal professionals can be found in legal rules or more typically the oaths or promises with varying wording.[4] But the modern day has brought, among other things, a boom in the use of codes of ethics in the legal profession. In the USA, for example, the first comprehensive code dates back to 1887 when it was adopted by the Alabama State Bar.[5] Why did many other countries and professional organisations decide to follow Alabama's example? And what are the risks of adopting codes of ethics? Let us mention at least the key benefits and risks.

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[2] LODER, R. E. Tighter Rules of Professional Conduct: Saltwater for Thirst. *The Georgetown Journal of Ethics*. 1987, Vol. 1, No. 2, p. 318.

[3] It is worth noting that *morality* and *ethics* are used interchangeably in the text, see COPP, D. Introduction: Metaethics and normative ethics. In: COPP, D. (ed.). *The Oxford Handbook of Ethical Theory*. New York: Oxford University Press, 2006, p. 4; or similarly NICOLSON, D. – WEBB, J. *Professional Legal Ethics*. New York: Oxford University Press, 1999, pp. 4–5.

[4] CHAFFE, E. C. Death and Rebirth of Codes of Legal Ethics: How Neuroscientific Evidence of Intuition and Emotion in Moral Decision Making Should Impact the Regulation of the Practice of Law. *The Georgetown Journal of Legal Ethics*. 2015, Vol. 28, No. 2, p. 328.

[5] Ibid., p. 330.

Codes of ethics may serve as a useful source of information; ideally, they record the norms, values, and ideas of a given profession. Such a source is appreciated not only by the candidates of the profession but also by those who educate them.[6] It may be valuable also for lay people who are in contact with these professionals. A commitment by a profession to follow certain values and ideas creates high expectations of professional performance.[7] The public may use the code to supervise the profession and as a source for criticising the profession's practice.[8]

It is also possible to acknowledge the fact that the mere existence of a code of ethics means that valuable attention will be focused on (selected) moral topics,[9] which benefits ethics as a whole. The wording of the code of ethics (even if formally unenforceable) serves as an internal regulation of conduct within the profession,[10] and public as well as academic debates may rely on the code.[11] A code of ethics may also serve as a point of reference for forming an idea of what makes a good attorney-at-law. It may offer an important point of stability in the complexity of attitudes in the postmodern world.[12]

Codes of ethics can, however, be subject to justified criticism. The most compelling criticism focuses on existence of the codes as such. Actual moral decision-making is based on an assumption of the freedom of the decision maker.[13] From this perspective codes of ethics represent a completely useless set of externally prescribed rules, because adherence to an external rule does not constitute moral acting.[14] Similarly we could say that the essence of morality is so difficult to express that morality in fact escapes codification, i.e., any formalised expression. By reducing the open spirit of a moral norm to a fixed formalised expression the moral norm becomes unacceptably shallow.[15]

Leaving behind the essential criticism, which is abstract in nature, we may turn to the criticism of forms of codes of ethics. The primary warning may be that the code of ethics will be a *bad* code of ethics. Despite the goodwill of the authors, if the text of the code went through a process similar to legislative procedure, the end product may resemble a work of moral compromises rather than moral aspirations.[16] From a similar point of view, the language used by codes could be criticised. Should ethical norms be formulated in as much detail as possible, or should they use general language? General

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6 NICOLSON, D. Mapping Professional Legal Ethics. *Legal Ethics*. 1998, Vol. 1, No. 1, pp. 52–53.

7 At the same time, it may attenuate unreasonable expectations of the public. KRSKOVÁ, A. *Etika právnického povolania* [Ethics of the Legal Profession]. Bratislava: Vydavateľské oddelenie Právnickej fakulty Univerzity Komenského, 1994, p. 31.

8 NICOLSON, *c. d.*, pp. 52–53.

9 JOHNSON, V. R. The Virtues and Limits of Codes in Legal Ethics. *Notre Dame Journal of Law, Ethics & Public Policy*. 2000, Vol. 14, No. 1, pp. 36–37.

10 MOORE, N. J. Lawyer Ethics Code Drafting in the Twenty-first Century. *Hofstra Law Review*. 2002, Vol. 30, No. 3, p. 924.

11 NICOLSON, *c. d.*, p. 53. This text is a proof of it.

12 For a more detailed description of the fragmentation of traditional notions of legal practice see BARON, P. – CORBIN, L. The Unprofessional Professional: Do Lawyers Need Rules? *Legal Ethics*. 2017, Vol. 20, No. 2, p. 167.

13 Cf. FISCHER, J. H. Free will and moral responsibility. In: COPP, D. (ed.). *The Oxford Handbook of Ethical Theory*. New York: Oxford University Press, 2006, pp. 321–354.

14 WILKINSON, M. A. – WALKER, C. – MERCES, P. Do Codes of Ethics Actually Shape Legal Practice? *McGill Law Journal*. 2000, Vol. 45, No. 3, pp. 648–649.

15 SKUCZYŃSKI, P. *The Status of Legal Ethics*. Frankfurt am Main: Peter Lang GmbH, 2013, pp. 100–101.

16 JOHNSON, *c. d.*, pp. 45–46.

language is more likely to capture the complexity of life situations, while too much specificity threatens to create an unsystematic casebook full of loopholes.[17] Yet, more detailed norm offers the actor deeper certainty that s/he is acting in accordance with the norm. General language does give the actor more freedom to act, nevertheless such freedom could by easily interpreted as undesirable ambiguity. A useful code of ethics must thus strike an appropriate balance between the two positions.

A bad code of ethics may also be created due to a reason other than the effort of various stakeholders to reach a compromise or clumsily chosen language. When the profession tries to regulate itself, it is in a clear conflict of interest – should the profession protect itself (its members) or should it impose high standards on itself? Additionally, the lack of willingness for ethical self-restraint may lead to a more subtle result. It is possible to adopt an apparently good quality code which is not reflected in reality, i.e., it is not effectively enforced. We could take the criticism even one step further. Empirical research shows that codes not only fail to promote moral decision making, but they even deteriorate it, because they prevent the moral development of an individual. Instead of deliberation and acceptance of personal responsibility, the actor mechanically applies the text of the code.[18]

For the sake of completeness let us briefly evaluate the above-stated arguments and counter-arguments. It is clear that the benefit of codes of ethics can be disputed meaningfully. I believe that the arguments in favour of the existence of the codes prevail as more convincing – but with one important, though somewhat banal, postscript. To be able to claim that a code of ethics is beneficial to the moral thinking and conduct of professionals, we must first examine its form more vigorously. Then it is possible to proceed with the next step, that is the examination of the practical application of the code. A code of ethics may certainly inhibit the way an individual thinks of her/his acts, if the individual's attitude to the text is buck-passing, or if the text of the code is enforced by unreasonable penalties or not enforced at all, or enforced only to a limited extent. The code may, however, (and it certainly should) be a useful source for assessment of a potentially morally significant situation. Free decision made by the individual may confirm the text of the code and therefore increase its importance. It may also rebut it, and thus lead the actor to deeper thoughts on the findings. Acceptance of the plurality of moral opinions is a common component of moral thinking. Meeting a different finding represents an opportunity to hold a clarifying discourse.

It is also possible to agree with the criticism that professional explorations of morals cannot be reduced to a professional code. However, if we consider the individual's conscience as the primary source of moral decision-making, a code of ethics represents only one of the resources taken into account. The code thus creates the information basis for moral decision-making together with tradition, professional customs, consultations with colleagues, or other resources.[19]

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[17] BARON, *c. d.*, pp. 160–161; cf. HERRING, J. *Legal Ethics*. Oxford: Oxford University Press, 2017, p. 41.
[18] WILKINSON – WALKER – MERCES, *c. d.*, pp. 649–651.
[19] This is in some cases confirmed in the codes themselves. Japanese, Canadian, and American codes of ethics remind the lawyers that in their work they should also take into account the wider context in the form of

The concern that codes may be misused is also appropriate. However, I am of the opinion that the simple possibility of misuse should not automatically disqualify a tool. Conversely, a warning against possible misuse should induce increased vigilance and attention in using such tool and monitoring its benefits. The tool should be abandoned only if it turns out that misuse prevails over the intended effects.

It seems that to assess the role of a specific code of ethics it is necessary to examine more closely the code and its functioning. We have indicated a number of criteria which can be used in the assessment of codes of ethics: the content (wording) of the code, how it originated, the extent and manner of regeneration of the code in practice (professional bodies and the public), and so forth.

It is beyond the scope of this text to cover all the listed criteria, therefore in the first step we will focus only on the analysis of the content of the code of ethics of the Czech Bar Association. Before we do so, let us briefly describe the status of the Czech Bar Association and its code of ethics for the sake of completeness.

2. CZECH BAR ASSOCIATION AND ITS CODE OF ETHICS

The Czech Bar Association (the CBA) is a public corporation associating Czech attorneys-at-law and trainee attorneys. It was established by the Act on the Legal Profession of 1996 and became a joint successor of the Chamber of Commercial Lawyers and the Czech Bar Chamber (both of which were established by an act in 1990, i.e., in the year following the collapse of the communist regime).[20] The CBA exercises public administration in the Bar and is vested with numerous powers over its members (e.g., it decides on the admission to the Bar, holds disciplinary proceedings). With respect to the self-governing character of the organisation, the activities of the CBA are funded by membership fees and not by the state.

Unlike voluntary professional organisations, the membership of attorneys and trainee attorneys in the Czech Bar Association is required by law, and registration in the register of attorneys maintained by the CBA is required to practise as an attorney. The number of practising attorneys is around 12,000, the number of active trainee attorneys is approximately 3,000.

The creation of the CBA's code is assumed by the law which authorises the CBA to adopt the code.[21] It was adopted on 31 October 1996 by a resolution of the Board of Directors of CBA No. 1/1997 of the Journal under the title *The Rules of Professional Ethics and Rules of Competition among Attorneys-at-Law of the Czech Republic (Code of Ethics)*. The father of the wording of the code was Karel Čermák, who also wrote an extensive commentary on it.[22] The purpose of the code is presented as fourfold:

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general (rather than role-based) morality or social justice. Cf. EVANS, A. *The Good Lawyer*. Australia: Cambridge University Press, 2014, p. 203.

[20] Act No. 85/1996 Sb., on the Legal Profession.

[21] S. 17 of Act No. 85/1996 Sb., on the Legal Profession.

[22] ČERMÁK, K. *Pravidla profesionální etiky a pravidla soutěže advokátů České republiky: text s komentářem JUDr. Karla Čermáka* [The Rules of Professional Ethics and Rules of Competition among Attorneys-at-Law of the Czech Republic: text with commentary by JUDr. Karel Čermák]. Praha: Česká

protection of the consumer, the Bar as a profession, protection of attorneys-at-law as competitors on the market of legal services, and protection of third parties in contact with attorneys-at-law.[23] (If these are the declared goals of the code of ethics, an attentive reader begins at this point to wonder about all the groups that are supposed to be protected by the code and how is it related to ethics?) The CBA's Code of Ethics consists of four parts (applicability of the rules of professional ethics and competition rules of Czech attorneys-at-law; rules of professional ethics; competition rules of attorneys-at-law; and final provisions).[24]

3. THE CBA'S CODE OF ETHICS – ETHICS OR MERE REGULATION?

The following section of the paper is of key importance. It briefly focuses on the method used and follows with detailed evaluation of the results of the analysis of CBA's Code of Ethics.

3.1 A FEW WORDS ON THE METHOD

In the introduction we stated that this text uses the substantive concept of the code of ethics. The substantive approach focuses on *texts actually dealing with the topics related to morals* (irrespective of their title). On the other hand, the formal approach deals with *documents whose title relates to ethics*. In other words, substantive codes of ethics are (true) codes of ethics whereas formal codes of ethics are "codes of ethics". The below lines are looking for an answer to the question whether the CBA's code is a code of ethics or a "code of ethics".

We will apply the method used by Donald Nicolson to evaluate the *Code of Conduct of the Bar of England and Wales* and the *Guide to the Professional Conduct of Solicitors*. Nicolson distinguishes between *ethical norms* and *conduct norms*. The latter include norms of etiquette or organisational and administrative norms which he refers to as *mere regulation*. He compares the *mere regulation* norms to traffic rules, it is necessary to know them and to implement them, but they do not require any deep thinking or understanding. In the professional environment these are generally the rules regulating

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advokátní komora [Czech Bar Association], 1996. The text is available also online at: http://www.cak.cz/assets/files/180/BA_00_Z1.pdf.

[23] ČERMÁK, K. – VYCHOPEŇ, M. Komentář etického kodexu [Commentary on the Code of Ethics]. In: SVEJKOVSKÝ, J. – VYCHOPEŇ, M. – KRYM, L. et al. *Zákon o advokacii: komentář* [The Act on the Legal Profession: Commentary]. Praha: C. H. Beck, 2012, pp. 439–440. The quoted text seems to be identical to the text contained in ČERMÁK, *c. d.*, pp. 18–19. Cf. KOVÁŘOVÁ, D. – SOKOL, T. *Etický kodex advokáta: komentář* [Code of Ethics of an Attorney-at-Law: Commentary]. Praha: Wolters Kluwer ČR, 2019, p. XXII states, that the code certainly does not deal only with ethics and that it is a multifunctional code. (However, the statement is followed by a criticism of excessiveness, verbatim, and the case-based approach of the code.)

[24] On the importance of code of ethics in civil proceedings see the recently published SEDLÁČEK, M. Lawyers' Ethics before a Civil Court. *Acta Universitatis Carolinae Iuridica*. 2021, Vol. LXVII, No. 3, pp. 57–69.

the internal organisation of the profession and they may also regulate the *self-interest* or *self-image* of the profession. This is why they are sometimes referred to as *guild rules* or *trade association rules*. Conversely, ethical norms are such norms which transcend to contemplation on what is morally sound. We must add that Nicolson is aware that the definition is unsatisfactory at first glance because it is circular. He deals with this in an addendum referring to the general consensus on what is and what is not an ethical topic. Ethical are such norms which generally concern our conduct and its influence on other persons, animals, or the environment, however they could be concerned also with the moral soundness of our acts irrespective of the consequences (e.g., the issue of moral acceptability of a lie).[25] Admittedly, the definition could be more convincing. At the same time, it should be added that applying the definition to the CBA's Code of Ethics will clearly show that it does not present any serious issues, which is why we can consider it appropriate for our purposes.

Another criterion used by Nicolson is whether the norms focus on the internal interests of the profession (*private face norms*) or the interests of persons more distant from the profession (*public face norms*). *Private face norms* concern the interests of attorneys-at-law in the broad sense (i.e., the attorney, their clients, their colleague attorneys, and the profession as a whole). *Public face norms* focus primarily on the public, third parties, the environment, future generations, or abstract "fairness".[26]

A combination of both criteria yields four analytical categories: *private face conduct norms*, *public face conduct norms*, *private face ethical norms*, and *public face ethical norms*. We will use these categories to analyse the text of the CBA's Code of Ethics. For greater precision, the analysis categorises individual paragraphs rather than entire articles of CBA's Code of Ethics. Although it is true that the paragraphs within one article usually fall within the same category, it is not always the case.[27]

We will analyse only the two main parts of the CBA's Code of Ethics, i.e., part two (the rules of professional ethics) and part three (the competition rules of attorneys-at-law), and not the whole text. Part one (the applicability of the rules of professional ethics and the competition rules of attorneys-at-law of the Czech Republic) and part four (final provisions) contain purely technical norms concerning applicability of the regulation. Therefore, they are norms which are typically found in all legal regulations, and they do not add anything to the unique character of the CBA's Code of Ethics. Additionally, Article 15a(4) was excluded from the analysis,[28] because it refers to a provision which was repealed, or rather transferred to another part of the code.[29] Article 15a(4) therefore does not have any meaning, unless we interpret it creatively. Article 12(4) was also excluded. Article 16(2)[30] suffers from a similar defect because its last sentence refers to a passage in the Code of Ethics which no longer exists. However,

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25 NICOLSON, *c. d.*, p. 54.

26 Ibid.

27 Taking Article 4, the first article analysed, as an example, the first three paragraphs fall within private face ethical norms and the remaining paragraphs fall within private face conduct norms.

28 *"The provision of Art. 15(8) applies to an employed attorney-at-law by analogy."*

29 Art. 15(6) of the CBA's Code of Ethics.

30 *"Attorney-at-law manages the office in a manner which does not adversely affect the dignity of the profession. The attorney assigns office work only to persons having the required qualification, responsibility, and*

in case of this paragraph it is possible to understand the meaning from the preceding sentences which remain valid normative text. This is why Article 16(2) was analysed. Overall, 105 paragraphs of the CBA's Code of Ethics were analysed.

It is fair to state that some paragraphs can be meaningfully classified under several categories because of their mixed nature. In such cases the paragraphs were classified depending on the prevailing meaning. For example, Article 17(3) provides that: *"An attorney is obliged to act in proceedings honestly, respect the legal rights of other parties, and behave towards them as well as to other persons participating in the proceedings in such a manner that does not reduce their dignity nor the dignity of the profession of attorneys. Unless procedural legislation so allows, in such matters the attorney must not deal with persons performing the tasks of the courts or other bodies, nor hand over to them written documents unless the attorney-at-law of the other party is present or aware of it, or the unrepresented party is present or aware of it."* The paragraph contains elements falling under private face ethical norms (honesty of the attorney already pointed out in Article 4(1)). However, the prevailing meaning of the paragraph clearly focusses on the protection of third parties. This is also confirmed by a systematic interpretation of the paragraph text because it forms part of a passage dealing with contacts between attorneys-at-law and authorities and courts or the attorney's *pro bono* activities. This is why the paragraph is classified under public face ethical norms. A similar ambiguity occurs relatively rarely (approximately in 5% of paragraphs), and a possible change in classification of an ambiguous paragraph would not significantly affect the overall result of the analysis.

3.2 ANALYSIS RESULTS – PRIVATE FACE CONDUCT NORMS

The analysis performed shows that the CBA's Code of Ethics can be considered – *to some extent* – a substantive code of ethics (i.e., a code containing *ethical norms*), which is no surprise. A genuine formal code of ethics (i.e., a code containing exclusively *conduct norms*) can hardly be expected in reality. A more precise question is, *to what extent* is the CBA's Code of Ethics a formal code and to what extent is it a substantive code?

The results show that the CBA's Code of Ethics predominantly (approximately 70%) deals with topics other than ethics. Approximately 67% (71 occurrences) of the 70% of the topics other than ethics are *private face conduct norms*.

The largest group of provisions of such type comes from part three entitled The Competition Rules of Attorneys-at-law. For example, the provisions state that *"*[t]*he designation of 'attorney-at-law' can also be used by the attorney outside of the Bar profession"*,[31] that the attorney may also use her/his academic degrees and degrees of

integrity and consistently supervises their activities. Provision of Art. 15(4) and (7) on trainee attorneys applies to such persons by analogy."

[31] Art. 19(2) of the CBA's Code of Ethics.

associate or full professor as part of the designation,[32] and state a number of other rights and obligations dealing with designation and other similar issues.[33]

The regulation of an attorney's fee represents a major area of regulation in this group.[34] It is a relatively broadly covered area despite the basis being quite simple in principle – the fee is determined as either non-contractual or contractual. A contractual attorney's fee is to be reasonable,[35] the costs of legal services are to be borne by the client rather than the attorney.[36] This is a statement of a common standard, it is unlikely that a regulation of this type would advocate for an unreasonable fee. The remaining paragraphs of Article 10 are primarily of a technical nature, they define what is meant by a reasonable fee[37] and reasonable advance,[38] they provide for the duty of the attorney to keep records of her/his acts,[39] the impossibility of concluding a contract that would be disadvantageous for the client,[40] the duty to resolve a dispute effectively,[41] and to inform of the possibilities of obtaining free legal aid.[42] From the perspective of classification, the only slightly more complex provision is Article 10(5), which allows the parties to agree on a contractual fee in the form of a success fee. The possibility of a success fee as such represents an interesting ethical issue because such a fee interferes with the attorney's independence vis-a-vis the client or the client's case. Potential interference with independence is usually balanced by an increase in the client's *access to justice*.[43] With respect to the technical language of this paragraph, which deals primarily with the determination of the amount of the fee (which should be reasonable and usually not exceeding 25%), rather than ethics, this paragraph was classified as a *private face conduct norm*.

Another significant group of *private face conduct norms* includes the provisions the code generally refers to as duties toward the Bar profession. For example, they concern a polite prohibition on slandering another attorney,[44] determining a fee in the case of

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32 Art. 21(3) of the CBA's Code of Ethics.

33 Art. 20, Art. 21(1) and (2), Art. 22(1–5), Art. 23(1–4), Art. 24, Art. 24a, Art. 24b(1) and (2), Art. 24c(1) and (2), Art. 27, Art. 29(1–4) of the CBA's Code of Ethics.

34 All 9 paragraphs of Art. 10 of the CBA's Code of Ethics.

35 Art. 10(1) and (2) of the CBA's Code of Ethics.

36 Art. 8(6) of the CBA's Code of Ethics.

37 Art. 10(3) of the CBA's Code of Ethics. It is hard to resist the impression arising from this paragraph that it is possible to take into consideration virtually any imaginable circumstances – from the attorney's capabilities to the client's information on the legal services market.

38 Art. 10(7) of the CBA's Code of Ethics.

39 Art. 10(4) of the CBA's Code of Ethics.

40 Art. 10(6) of the CBA's Code of Ethics. Of course, the impossibility is relative. The Article makes it possible for a client to conclude a disadvantageous contract if concluded in writing and the client has a reasonable possibility (i.e., an option which s/he do not have to use) to consult the contract with another attorney. The related text simultaneously excludes the possibility of the attorney "underselling", meaning to provide services below the cost determined by the amount of reimbursement for the costs of proceedings.

41 Art. 10(8) of the CBA's Code of Ethics.

42 Art. 10(9) of the CBA's Code of Ethics.

43 Put simply, a success fee makes the services of an attorney-at-law affordable even for a client who would otherwise have to do without legal representation.

44 Art. 11(1) of the CBA's Code of Ethics.

substitution,[45] various informational duties towards the CBA,[46] or the duty of an attorney to carry out the profession primarily in the attorney's registered office.[47, 48]

The remaining *private face conduct norms* do not constitute any larger groups and relate to various areas such as the regulation of entrepreneurial activities other than the business of acting as attorney-at-law,[49] the scope of the liability insurance of the attorney,[50] or advertising.[51, 52]

3.3 ANALYSIS RESULTS – PUBLIC FACE CONDUCT NORMS

Another part analysed – approximately 3% (3 occurrences) – out of the 70% of ethically indifferent provisions of the CBA's Code of Ethics are *public face conduct norms*. This is a small group of provisions of Article 17(1), (4), and (5), dealing with the rules of etiquette of the attorney in contact with the courts and similar bodies (addressing for example the mode of address of third parties and the attorney dress code).

3.4 ANALYSIS RESULTS – PRIVATE FACE ETHICAL NORMS

The content of the penultimate group of provisions is concerned with ethical topics. In this group 25% (27 occurrences) are *private face ethical norms*. A substantial part of these provisions focuses on the cornerstone of the Bar, and the relationship between client and attorney-at-law primarily in two respects: the quality of legal services provided and conflict of interests.

In terms of the quality of legal services provided, the attorney has a duty to provide the same standard of service when appointed by the court or the CBA or when providing services to clients under a contract,[53] clients must be informed properly of the course of action,[54] and money and other deposited valuables must be kept in custody applying the standard of due managerial care.[55] Most provisions on the refusal to provide legal services by the attorney are directed at the protection against conflict of interest and will be discussed in the following paragraph. Nevertheless, some refusal provisions aim at

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45 Art. 13(1) of the CBA's Code of Ethics.

46 For example, to inform that one has accepted to represent a client in dispute with another attorney under Art. 14(1) or to inform the CBA that the attorney-at-law has become a supervisor of a trainee attorney under Art. 15(2).

47 Art. 16(1) of the CBA's Code of Ethics.

48 For the sake of providing a complete list, other provisions included in this group are Art. 11(2) and (3), Art. 14(2), Art. 15(1), (3), (4), and (5), Art. 15a(1) and (2), Art. 16(2), (3), and (4) of the CBA's Code of Ethics.

49 Art. 5(1) and (2) of the CBA's Code of Ethics.

50 Art. 9(3) of the CBA's Code of Ethics.

51 Art. 26 of the CBA's Code of Ethics.

52 For the sake of providing a complete list let us also name the remaining provisions: Art. 4(4), Art. 6(5), Art. 9a, Art. 17a, Art. 18a(1) to (3), Art. 19(3), Art. 25, Art. 26a, Art. 28, Art. 31(1) and (2), Art. 32(1) and (2) of the CBA's Code of Ethics.

53 Art. (2) of the CBA's Code of Ethics.

54 Art. 9(1) of the CBA's Code of Ethics.

55 Art. 9(2) of the CBA's Code of Ethics.

protecting the quality of services provided, or the client's case and due legal processing of the case. Under these provisions the attorney is to refuse to provide the services if s/he do not have sufficient experience or specialised knowledge[56] or if prevented from providing the services by health or mental condition.[57] Even if attorneys refuse to provide the service they must take reasonable measures to prevent serious injury caused to the applicant as a result of refusal.[58] When an attorney ceases to provide legal services to a client, s/he must hand over to the client all important documents related to the provision of legal services.[59]

The fact that the attorney should put the interest of the client above all other interests[60] is clearly stated in numerous provisions of the code on conflict of interests. The attorney must not use information on the client against the interest of the client, nor is s/he allowed to use the information for her/his own interest or in the interest of third parties,[61] the attorney must refuse a potential client who would put the interests of existing clients in danger.[62] Other provisions specify the steps to be taken when multiple persons are involved on the part of the client or the law office[63] or when a trainee attorney is involved.[64]

Similarly, to *private face conduct norms*, in the case of *private face ethical norms* the CBA's Code of Ethics also contains norms which are relatively independent in nature, not elaborated further in the code, and at the same time mutually unrelated. Without any further elaboration an attorney-at-law is directed to act honestly and fairly,[65] to fulfil the obligations,[66] and not to knowingly tell an untruth.[67] The provision prohibiting the attorney from verifying the information provided by the client[68] may be considered as the basis of trust between the attorney and the client. The remaining provisions point out

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56 Art. 8(3) of the CBA's Code of Ethics. The paragraph may also be interpreted as an effort by the CBA to make it possible for the attorney to provide the services in such circumstances. Because the first part of the provision containing the prohibition is followed by a list of grounds on which an attorney may provide the services despite lack of experience or specialist knowledge.

57 Art. 8(4) of the CBA's Code of Ethics.

58 Art. 8(1) of the CBA's Code of Ethics. Similarly in the case of substitution of legal representation under Art. 13(2) of the CBA's Code of Ethics.

59 Art. 9(4) of the CBA's Code of Ethics.

60 Art. 6(1) of the CBA's Code of Ethics.

61 Art. 6(4) of the CBA's Code of Ethics, a similar prohibition applies to cases when an attorney provides legal services in association or in a company together with other attorneys, see Art. 12(3) of the CBA's Code of Ethics.

62 Art. 8(2) of the CBA's Code of Ethics.

63 Art. 7(1–3), Art. 8(5), Art. 12(2) of the CBA's Code of Ethics.

64 Art. 15(6) of the CBA's Code of Ethics.

65 Art. 4(1) of the CBA's Code of Ethics, this is also applicable to competition with other attorneys under Art. 19(1) of the CBA's Code of Ethics.

66 Art. 4(2) of the CBA's Code of Ethics.

67 Art. 4(3) of the CBA's Code of Ethics. In the case of this article, a question could be raised as to whether it should be classified as public face ethical norm, because the obligation not to tell lies is certainly beneficial to the public. Similarly, to the success fee provision with reference to the occurrence of the article within the code system, more weight was given to the importance of self-presentation of the profession.

68 Art. 6(3) of the CBA's Code of Ethics.

the importance of the law and the guild rules in specific situations[69] and set the quality standard for a request for substitution and report on substitution.[70]

3.5 ANALYSIS RESULTS – PUBLIC FACE ETHICAL NORMS

The last component of our analysis with the size of approximately 5% (5 occurrences) covers *public face ethical norms*. The low percentage indicates that there are only few such provisions in the CBA's Code of Ethics. In part they are norms mentioned by the code elsewhere. The distinctive feature of *public face ethical norms* is that the norms refer exclusively to third parties. Hence the direction not to state misleading or false facts[71] in proceedings before courts and other bodies and the direction to act in the proceedings honestly and in a way not harming the dignity of persons involved[72] is modelled on Article 4(1) and (3),[73] and in the context of clients and attorneys in competition with other attorneys both the rules are stated in Article 19(1).[74]

The moral obligation to serve the public is also reflected in two provisions dealing with activities for the benefit of the public. It is an obligation upon a reasonable request to assist, for a fee or gratuitously, projects aimed at asserting and defending human rights[75] and an obligation upon request from the CBA to assist projects supporting the principles of a democratic state respecting the rule of law and improving the legal order of the Czech Republic.[76] The last provision which has not been mentioned is the direction to act towards the public in a way that persons requiring legal services choose an attorney-at-law freely and not under pressure.[77]

4. CONCLUSION: A "CODE OF ETHICS" RATHER THAN A CODE OF ETHICS

Let us briefly summarise the results of the analysis before evaluating them. Using a combination of two criteria (I. *ethical norms and conduct norms* and II. *private face norms and public face norms*) we have classified 105 paragraphs of the CBA's Code of Ethics into four categories. The most widely represented category is *private face conduct norms*, which represent approximately 67% of the CBA's Code of Ethics. Approximately one quarter of the analysed provisions are *private face ethical norms*.

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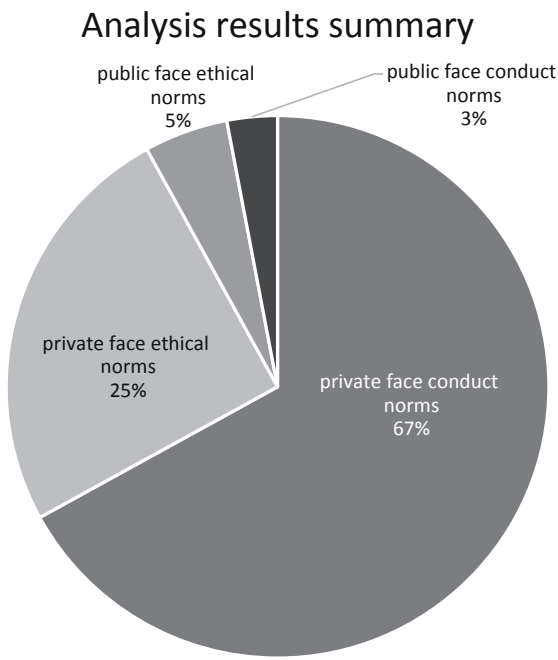
69 Art. 12(1) and Art. 15a(3) of the CBA's Code of Ethics.
70 Art. 13(3) of the CBA's Code of Ethics.
71 Art. 17(2) of the CBA's Code of Ethics.
72 Art. 17(3) of the CBA's Code of Ethics.
73 *"An attorney's statements in connection with the practice of law are factual, sober, and not knowingly false."*
74 *"In the interest of clients and other competitors, the attorney proceeds fairly in the competition with other attorneys. In particular the attorney does not use data which are knowingly false, misleading, and degrading another attorney…"*
75 Art. 18(1) of the CBA's Code of Ethics.
76 Art. 18(2) of the CBA's Code of Ethics.
77 Art. 30 of the CBA's Code of Ethics.

Public face ethical norms are considerably less represented, they are found in a mere 5% of the provisions analysed. The least represented are *public face conduct norms*, representing approximately 3% of the provisions analysed.[78]



How should the results be evaluated? It is evident that the text of the CBA's Code of Ethics does not contain many provisions aimed at areas that were classified as *public face norms*. *Public face conduct norms* and *public face ethical norms* combined represent less than 10% of all the provisions. In the case of a code of ethics focusing on attorneys-at-law it is not surprising that priority is given to issues concerning the attorneys, their clients, and the profession of attorneys. However, the intensity with which the emphasis is placed can be considered surprising. It becomes even more prominent once we realise that only 5% of these norms deal with ethics. It is hard to imagine that such a code of ethics can serve to build the trust of the public, if only every tenth rule

[78] Our results are consistent – although not entirely – with Nicolson's findings. He concluded that the *Code of Conduct of the Bar of England and Wales* largely contained private face conduct norms; the rest of the code was fairly evenly spread between public and private ethical norms. As regards the *Guide to the Professional Conduct of Solicitors* private face ethical norms were covered approximately to similar extent as private face conduct norm, while public face ethical norms were represented substantially fewer.

concerns the public.[79] In contrast to Nicolson we could perhaps forgive the Czech code that it fails to explicitly protect the interest of the environment or whistle-blowing, because these areas are gradually gaining in importance. However, it is much more difficult to forgive the scarcity of references to general justice and public interest. And this is not the only incompleteness. For example, the CBA's Code of Ethics does not cover politeness or honesty towards persons outside the proceedings before the court or a public body, and in particular there are no rules protecting an opposing party which is not represented by an attorney.

The share of *ethical norms* and *conduct norms* is also problematic. It would hardly be surprising if a candidate for admission to the Bar had the impression after reading the CBA's Code of Ethics that the manner in which s/he is designated in various situations is more important for the profession than the provisions concerning honesty. There is approximately one *ethical norm* to two *conduct norms*.[80] This despite the fact that a high moral standard is one of the cornerstones of the profession.

The above conclusions could be relatively simply resolved so that we could move from "code of ethics" to code of ethics.[81] The first solution is the simplest one, i.e., to be more prudent in calling a document a code of ethics. There is enough misunderstanding among legal professions[82] without adding more due to awkward naming. The intensity of the above impressions would be greatly reduced if the existing CBA's Code of Ethics encompassed only part two (Rules of Professional Ethics) and if the contents of part three (Rules of Competition among Attorneys-at-law) were enshrined in a separate set of guild rules.[83]

A review of the CBA's Code of Ethics and its separation into two documents would be slightly more complicated, yet not an unfeasible task. The first document would be dedicated primarily to ethical issues, the second would deal with other matters that the CBA considers important. (This is primarily because from the perspective of legislative technique in some cases it will make sense to add to the ethical norms a reference to the norms of etiquette or *mere regulation*, and conversely to occasionally add a provision with ethical overlap to *mere regulation*).

The research could be extended in the future by focusing on the issues of the practical use of the CBA's Code of Ethics. It would be possible to concentrate on the role of the Code of Ethics in the everyday operation of an office of attorneys-at-law by

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[79] Unless we apply a very narrow interpretation of justice and public interest and consider them satisfied by the possibility to find an independent attorney. While it is a classical concept of *adversarial advocacy*, in the Czech Republic this concept is considerably less common than in Anglo-American legal systems. For other possible concepts of the Bar (*responsible lawyering*, *moral activism*, *ethics of care*) see PARKER, C. – EVANS, A. *Inside Lawyers' Ethics*. Cambridge: Cambridge University Press, 2006, p. 5 et seq.

[80] NICOLSON, *c. d.*, pp. 65–66.

[81] For proposals cf. NICOLSON, *c. d.*, pp. 67–69.

[82] Cf. for example different concepts in NICOLSON – WEBB, *c. d.*; HERRING, *c. d.*; BOON, A. *Lawyers' Ethics and Professional Responsibility*. Oxford: Hart Publishing, 2015; or LERMAN, L. – SCHRAG, P. *Ethical Problems in the Practice of Law*. 4th ed. New York: Wolters Kluwer, 2016.

[83] Such a simple intervention would increase the percentage of *private and public ethical norms* to almost 45%. (This is, of course, a gross figure because the separation could not be purely mechanical. But even with such a reservation it would represent major progress.)

investigating through structured interviews with attorneys-at-law,[84] and on the disciplinary practice which has the potential to stimulate the area of ethics and a further discussion of the issues.[85]

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[84] For example, the researchers of one of the cited papers held structured interviews on the importance of codes of ethics directly with attorneys-at-law. See WILKINSON – WALKER – MERCES, *c. d.*, p. 653 et seq. They concluded that the code of ethics in Ontario is basically not used in practice. And in cases when it is applied, it usually inhibits independent moral deliberation.

[85] In case of the Czech Republic, the access to results of disciplinary practice is limited by the fact that disciplinary proceedings are not public, which means that there is a lack of data to be analysed in detail. An alternative could be analysis of the column dealing with disciplinary practice included in every issue of the monthly Bar Bulletin.

REVIEW

FRINTOVÁ, DITA. MEZITÍMNÍ A ČÁSTEČNÉ ROZHODNUTÍ VE SVĚTLE JUDIKATURY A EVROPSKÉ KOMPARACE [INTERLOCUTORY AND PARTIAL DECISIONS IN THE CONTEXT OF CASE LAW AND EUROPEAN COMPARISONS]. PRAHA: WOLTERS KLUWER ČR, 2022, 320 S.

The author has written a publication entitled *Interlocutory and Partial Decisions in the Context of Case Law and European Comparisons*, published by Wolters Kluwer Czech Republic in 2022, comprising 320 pages. The publication deals with two decisions issued in civil court proceedings – an interlocutory judgment and a partial judgment.

Both judgments are exceptions to the principle that a judgment should exhaust the entire subject matter of the proceedings, both in theory and in practice – their frequency is relatively low (cf. p. 2). Their application in a particular case is, moreover, at the discretion of the court, in spite of the fact that this is within the limits defined by their legal provisions (cf. p. 2). The main objective of the publication is to cover the subject of interlocutory and partial judgments in a comprehensive manner, especially by taking into consideration the case law and European comparisons, usual in traditional civil procedure institutions (cf. p. 273). The author's effort to grasp the whole issue made a precise conceptual definition of both types of judgments necessary; however, this could not have been done universally for all the legislations researched, but it was necessary to do it separately in the analysis of a given legal system.

In terms of systematics, the publication is divided into nine (9) main chapters, including an introduction and a conclusion. The first (introductory) chapter focuses on the background to the chosen issue, the description of the main conceptual framework, the basic definition of the objectives, structure, and methodology of the publication (pp. 1 to 8). The second, third and fourth chapters aimed to help broaden the reader's perspective on the historical development of the issue (pp. 9 to 40). A detailed analysis of the current legislation contained in Act No 99/1963 Sb., Civil Procedure Code, as amended, is the subject of chapter 5 (pp. 41 to 68). There, the author also considers the situation of partial and interlocutory judgments for recognition, stating that the provisions of Article 153a of the Czech Code of Civil Procedure do not constitute a special type of partial and interlocutory judgment which would require, as *lex specialis*, the introduction of different principles for its application (sub-chapter V.2). This provision can be understood rather as emphasizing the fact that a partial or an interlocutory judgment may be issued even if the defendant recognizes the claim (in whole or in part) (cf. p. 49). The publication does not omit to draw attention to the "fiction" of the defendant's recognition of the claim (sub-chapter V.3), the exceptions to the possibility of issuing a partial or interlocutory judgment (sub-chapter V.4), or the formalities of both types of judgment (sub-chapter V.5). The substantive intent of the future Civil Procedure Code, which is the matter that the author is focusing on in chapter 6 (pp. 69 to 126), could not be left

aside. The analysis of the substantive intent in this regard has shown that civil courts should issue partial and interlocutory judgments as soon as the required conditions for their issuance are fulfilled. In the case of a partial judgment, the possibility is mentioned of not issuing that judgment if it is not expedient in the facts of the matter (para 315 of the substantive intent); in the case of an interlocutory judgment, the substantive intent does not set expediency as a condition for the court's procedure (para 316 of the substantive intent). This is a difference to the current legislation, which treats partial and interlocutory judgments uniformly and provides for both to be made conditional on the expediency of such a procedure (cf. p. 275). However, in comparison with the currently applicable Code of Civil Procedure, despite the changes made to the wording and reasoning of paragraphs 315 and 316 of the substantive intent of the future Civil Procedure Code, there are no fundamental changes to the conditions for the issuing of a partial or interlocutory judgment. The author's reflections are preceded by chapter 7, which is concerned with the Model European Rules of Civil Procedure in relation to the subject under analysis (pp. 127 to 148), the aim of which is not to offer a detailed legal framework, but rather a certain minimum standard as a basis for modern European procedural rules (cf. p. 277). In Chapter eight, a detailed comparison with selected foreign systems was subsequently provided (pp. 149 to 272). The last (final) chapter summarizes the results of the author's analysis of the topic covered by the publication (pp. 27 to 281). The chapters of the monograph are logically connected to each other, the publication forms a compact entity.

The concept of partial and interlocutory judgment varies in different legal systems. Thus, analyses of the Slovak legislation were proposed, which tries to follow the modern trends of civil procedure and that is aware of the practical problems caused by the restrictive approach of Section 152 of the Czech Code of Civil Procedure (sub-chapter VIII.1), the Austrian procedural regulations, which maintains the traditional approach to the two types of judgments (sub-chapter VIII.2), and the German legislation, which considers that decisions issued before the final judgment are a way of speeding up proceedings and recognizes the advantages of such a procedure in terms of optimizing procedural economy (sub-chapter VIII.3). In the Polish procedural rules, we may find a brief regulation of both partial and interlocutory judgments, which is very similar to the current Czech legislation (sub-chapter VIII.4). The procedural legislation of the Principality of Liechtenstein is based on Austrian legislation, which it practically follows, also in terms of decision-making and the types of judgments that can be issued in civil court proceedings (sub-chapter VIII.5). It even adopts Austrian doctrinal interpretation and decision-making practice, but there are also relevant decisions of the Liechtenstein courts (cf. p. 262). Finally, the Swiss procedural rules are also addressed, where the civil court is entitled to issue any decision, whether partial, interlocutory, or final, it deems appropriate at the time, provided the legal prerequisites are satisfied (sub-chapter VIII.6). The author is convinced that the experience of foreign legal systems, however familiar to our legal context by the tradition of long-term common historical development, or at least geographically, could offer a solid basis for the expected discussion on

the re-codification of Czech Code of Civil Procedure, both from the perspective of legal science and the legislative process.

According to the above, it may be gradually summarized that the author has not only presented a comprehensive analysis of the Czech legislation on interlocutory and partial judgments, but also presented a broad comparison of these institutes, including relevant foreign case law. The stated objectives and hypotheses also determined the methodology of the thesis, as the author chose the proven logical procedure from general to detailed, from older to newer. The logical methods of deduction, induction, generalization, and classification were used in the analysis of legal rules, and the comparative method was applied in the analysis of the foreign legal regulations. However, other methods were also used. The research with sources can be described as an extremely meticulous, particularly with a wide range of case law, not only Czech, but especially foreign jurisprudence.

The author has prepared a publication that is rightly described as significant both in its subject matter and in the way it is handled. The main objective has certainly been fulfilled. The publication is therefore a very useful contribution to the legal field of interlocutory and partial judgments, which may well serve for both practical and pedagogical purposes.

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