COMPETITION LAW IN THE EU

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Abstract

The competition policy and norms in the European Union are a vital part of the internal market. Competition, although it is an element whose existence is essential for the proper functioning of the market, can be seen as an element of pressure on companies in trying to offer consumers a variety of products at the lowest possible prices. European Union competition policy has, at its disposal, a set of tools to protect against anti-competitive practices. The purpose of this paper is to analyse how anti-competitive policy is implemented in the European Union.

This essay aims to understand the way in which the European Union is treating anti-competitive practices, addressing the various illegal issues, as well as the exceptions and their conditions. In the case of defining legal terms, the interpretations offered in the case law of the Luxembourg Court will be used. An assessment of the European Union's purpose and objectives with regard to protecting against anti-competitive practices is also an indicator of the implementation of the policy in this area. The paper will analyse the legal instruments and the way in which the Commission applies these instruments of protection against anti-competitive practices in order to restore the competitive conditions, by correcting the inappropriate practices of the enterprises. The results of the interaction between anti-competitive practices (agreements and abuse of a dominant position) and unfair trade practices (including dumping and subsidisation) will be discussed to understand the effectiveness of legal instruments in practice.

Keywords: *business law, competition law, anti-competitive, dominant position, agreements.*

1. Introduction

Competition law plays an important part in European Union (EU) law and it covers anti-competitive agreements between firms, abuse of a dominant position, and mergers. This paper only focuses on the first two matters in order to remain concise. The principal way in which anti-competitive agreements are controlled is through the Treaty on the Functioning of the European Union (TFEU), more specifically art. 101 and 102. The paper will look at what agreements mean and what types of agreements exist, such as horizontal (between companies at the same level of the production cycle) and vertical ones (between companies at different levels of the distribution cycle). It will also look at what the abuse of market power means, analysing the legislative controls of market power, by single or multiple firms.

Competition law is important in the EU because of what it promotes through the competition policy. This policy enhances consumer welfare and it aims to achieve the optimal allocation of resources. The idea is to create a workable competition[1] which would make goods and services be produced more efficiently. Agreements between companies should not hinder this competition. Competition law also aims to protect consumers and smaller firms from other firms that aggregated into monopolies or act as one unit. Finally, EU competition law facilitates the European single market by prohibiting tariffs and quotas through the limitation of the partition of the EU market along national lines by private companies ("undertakings"). Thus, it is important to see what legislative means are available to the EU and whether the EU is capable of assuring the protection that is needed in this domain, for both companies and consumers.

This paper will address this issue first by laying down the legislation and the case law that govern anti-competitive agreements and the abuse of a dominant position. It will conduct an in-depth analysis of art. 102 and 103 TFEU and it will approach all relevant court decisions on this matter. Regarding agreements, the paper will look at what the term refers to, analysing vertical and horizontal agreements, and the relevance of economic factors. Regarding the abuse of dominant position, it is important first to define what the relevant market is and then to determine whether a specific firm has indeed abused its dominant position.

The paper is based on a thorough analysis of the information provided by the literature using a large number of examples, drawing conclusions from them and, finally, illustrating the current situation in the EU.

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[1] Frederic Scherer, David Ross, *Industrial Market Structure and Economic Performance*, Houghton Mifflin, Boston, 1990.

2. Anti-competitive practices - agreements and abuse of a dominant position

Competition policy in Europe is a vital part of the internal market. At the business level, there is constant pressure due to competition, in an attempt to offer consumers a variety of products and at the lowest possible prices. Thus, anti-competitive practices may emerge, but they are supervised and corrected by the EU authorities: agreements between companies, abuse of a dominant position, state aid, economic concentrations, and market liberalization in sectors with a state monopoly that can bring them unfair advantages.[2]

Agreements between undertakings incompatible with the common market are governed by art. 101 TFEU which, in para. (1), prohibits agreements between undertakings, decisions of associated undertakings, activities leading to control of production, sales process, and situations in which the sale or purchase price is established or which creates a competitive disadvantage by applying unequal conditions to equal services, in relation to trading partners.

The notion of "undertakings", although used by art. 101 (1) TFEU, is not defined in the Treaty. This concept is included in the list of autonomous notions of European Union law by the CJEU in the judgment in Höfner[3].[4] In the Court's interpretation of Höfner, the term 'undertaking' covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed. The term was considered to include: corporations, partnerships, commercial companies, liberal professions, state-owned corporations and cooperatives.[5] However, the notion of undertakings does not include entities with social objectives, which are not engaged in economic activities.[6]

As regards the terms "agreement" and "concerted practice", interpretations have been provided in the case law of the Luxembourg Court[7]: both gentlemen's agreements (according to the Chemiefarma[8] case) and concerted practices (with Imperial Chemical Industries[9]) being a court-sanctioned conduct as anti-competitive practices. From an economic point of view, agreements fall into two categories: horizontal agreements (made between economic agents at the same level of the production cycle) and vertical agreements (made between economic agents at different levels of the distribution cycle).[10]

Art. 101 (3) TFEU provides for accepted exceptions to the prohibition of agreements. Exceptions are possible if the agreements lead to efficiency gains, consumers receive a fair share of the benefit, the agreements do not lead to the elimination of competition, and restrictions in the agreement prove indispensable. Exceptionally, these conditions must be tested and met simultaneously.[11]

Derogations have also been regulated by exemption regulations by category of individual agreements (Regulation (EU) 330/2010[12], Regulation 19/65/EEC[13], etc.). Agreements which have an insignificant impact on the market and which do not lead to a restriction of competition are excluded.[14]

The abuse of a dominant position is regulated by art. 102 of the TFEU, which does not prohibit an undertaking from being in a dominant position, but rather the misuse of that position. The notion of "dominant position" is defined by the Commission in its Communication[15] as the situation of economic power of an undertaking which gives it the opportunity to prevent the maintenance of effective competition in the market and gives it the ability to behave, to an appreciable extent, independent of its customers, consumers and competitors (according to United Brands[16]). A dominant undertaking may behave abusively in both the market in which it operates and in

[2] "Competition & you", European Commission, accessed March 15, 2022, https://ec.europa.eu/competition-policy/consumers_en.
[3] Judgment of the Court (Sixth Chamber) of 23 April 1991- Klaus Höfner and Fritz Elser v Macrotron GmbH. Case C-41/90. EU:C:1991:161.
[4] Augustin Fuerea, *Dreptul Uniunii Europene principii, acțiuni, libertăți*, (Bucharest: Editura Universul Juridic, 2016), p. 314.
[5] Jurgita Malinauskaite, *Competition Law, by R. Wish and D. Bailey* (Oxford: Oxford University Press, 2012), p. 1015.
[6] Paul Craig, Grainne de Burca, *EU Law Text, Cases and Materials*, (Oxford: Oxford University Press, 2011), p. 962.
[7] Augustin Fuerea, *Dreptul Uniunii Europene principii, acțiuni, libertăți*, Universul Juridic Publishing House, Bucharest, 2016, p. 316.
[8] Judgment of the Court of 15 July 1970. ACF Chemiefarma NV v. Commission of the European Communities. Case 41-69. EU:C:1970:71.
[9] Judgment of the Court of 14 July 1972. Imperial Chemical Industries Ltd. v. Commission of the European Communities. Case 48-69. EU:C:1972:70.
[10] Tatiana Moşteanu, *Concurenţa. Abordări teoretice şi practice*, Economică Publishing House, Bucharest, 2000, p. 293.
[11] Augustin Fuerea, *Dreptul Uniunii Europene principii, acțiuni, libertăți*, Universul Juridic Publishing House, Bucharest, 2016, p. 319.
[12] Commission Regulation (EU) no. 330/2010 of 20 April 2010 on the application of art. 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices OJ L 102, 23.4.2010, p. 1-7.
[13] Regulation No 19/65/EEC of 2 March of the Council on application of art. 85 (3) of the Treaty to certain categories of agreements and concerted practices. OJ 36, 6.3.1965, pp. 533-535.
[14] Radostina Parenti, *Competition policy*, European Parliament, accessed March 15, 2022, https://www.europarl.europa.eu/factsheets/ro /sheet/82/politica-in-domeniul-concurentei.
[15] Communication from the Commission — Guidance on the Commission's enforcement priorities in applying art. 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings. OJ C 45, 24.2.2009, pp. 7-20.
[16] Judgment of the Court of 14 February 1978. United Brands Company and United Brands Continentaal BV v. Commission of the European Communities. Chiquita Bananas. Case 27/76. *European Court Reports 1978 -00207*. EU:C:1978:22.

a different market when the two markets are connected (for example, when having common consumers).[17]

In defining the notion of the relevant market, two aspects must be taken into account: the relevant geographic market and the relevant market for the product.[18] The geographic market is the area in which the conditions of competition are sufficiently homogeneous for the undertakings operating there. The relevant product market is the totality of products (or services) with certain characteristics, price and utility, interchangeable from the consumer's point of view.[19]

The dominant position, in itself, is not prohibited by art. 102 TFEU, but gives the undertaking concerned an increased responsibility to ensure that its conduct does not distort competition. Thus, an undertaking which does not have a dominant position but behaves in the same way does not act illegally. Prohibited behaviours for the dominant undertaking are: the perception of excessively high and costly prices, tied sales and the imposition of a group of products on sale, and the refusal to deal with market partners.[20]

The Microsoft[21] case highlights the way in which the relationship between the Court and the Commission work. The Commission sanctioned Microsoft for finding that it had infringed upon art. 102 TFEU through the practice of abuse of a dominant position in two situations: it refused to provide its competitors with information on the interoperability of the software and conditioned its customers to buy Windows Media Player. The Court of First Instance upheld the Commission's initial decision.[22]

3. A look at the legal basis of anti-competitive business practices

Measures against anti-competitive practices are part of the EU competition policy. In terms of the anti-competitive policy, the foundation is again primary law. The "main weapon"[23] in the control of antitrust anti-competitive behaviour is art. 101 TFEU. Along with this legal instrument is art. 102 TFEU, which regulates the abusive conduct of undertakings in a dominant position on the market. In order to implement primary legislation, as in the case of unfair trade policies, the Council and the Commission have adopted directives and regulations containing general rules and provisions giving the Commission the power to conduct investigations (for example, Regulation (EC) 1/2003[24] on the application of competition rules, Regulation (EC) 773/2004[25], and Directive (EU) 2014/104[26]). The Commission provides details and interpretations of various issues, procedures and concepts in a number of documents: notes, guidelines and rules.[27]

According to the provisions of art. 3 TFEU, setting the rules regarding EU competition, necessary for the functioning of the internal market, is an exclusive competence of the EU. The area regarding the internal market is legislated by art. 4 TFEU as a shared competence of the EU with the Member States. The institutions involved are: the European Parliament, the Council of Ministers, the Commission, the CJEU, respectively the Court of First Instance and the national authorities. As with the common commercial policies, the Commission is the institution responsible for implementing the competition policy at EU level. The Commission adopts formal decisions (prepared by the Directorate-General for Competition) through a simple majority. The investigation procedure is carried out in a similar manner, following a complaint or on its own initiative, with the Commission acting to investigate specific situations or even an economic sector. The European Parliament evaluates the Commission's actions in an annual report. The Council of Ministers is the one that authorizes the regulations on categories of exemptions, as well as any changes in the relevant legislation.[28]

Following the consolidation of art. 101 and art. 102 TFEU ("antitrust rules"), competition policy

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[17] Ioan Lazăr, Laura Lazăr, *Abuzul de poziție dominantă în dreptul european al concurenței*, Universul Juridic Publishing House, Bucharest, 2015, pp. 89-152.

[18] Augustin Fuerea, *Dreptul Uniunii Europene principii, acțiuni, libertăți*, Universul Juridic Publishing House, Bucharest, 2016, p. 337.

[19] Order no. 388/2010, issued by the Competition Council, for the implementation of the Instructions on the definition of the relevant market, published in Official Gazette of Romania no. 553 of 5 August 2010.

[20] Radostina Parenti, *Competition policy*, European Parliament, accessed March 15, 2022, https://www.europarl.europa.eu/factsheets/ro/sheet/82/politica-in-domeniul-concurentei.

[21] Judgment of the Court of First Instance (Grand Chamber) of 17 September 2007. Microsoft Corp. v. Commission of the European Communities. Case T-201/04. *European Court Reports 2007 II-03601*. EU:T:2007:289.

[22] *Ibidem.*

[23] Paul Craig, Grainne de Burca, *EU Law Text, Cases and Materials*, Oxford University Press, Oxford, 2011, p. 960.

[24] Council Regulation (EC) no. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in art. 81 and 82 of the Treaty. OJ L 1, 4.1.2003, 0.1-25.

[25] Commission Regulation (EC) no. 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to art. 81 and 82 of the EC Treaty. *OJ L 123, 27.4.2004, pp. 18-24.*

[26] 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.*

[27] "Antitrust", European Commission, accessed March 15, 2022, https://ec.europa.eu/competition/antitrust/legislation/legislation.html.

[28] European Institute in Romania, accessed March 15, 2022, http://ier.gov.ro/wp-content/uploads/publicații/Politica_concurenta.pdf.

follows a trend of decentralization, with a significant role being attributed both to the competent national authorities and to the courts and tribunals of the Member States. Art. 1 of Regulation (EC) no. 1/2003 introduces the direct effectiveness of art. 101 and art. 102 TFEU. By art. 6 Regulation (EC) 1/2003 takes over the exclusive powers of the Commission (conferred on it by Regulation no. 17[29]) and confers on the national courts powers relating to the application of Community competition rules. It also assigns to the national competition authorities powers in the application of Community competition rules in close cooperation with the Commission [art. 11 (1) of Regulation (EC) 1/2003].

The final arbiter of the application of the measures is the CJEU. The Court is entitled to act in the case of appeals against decisions of the Commission (in particular, the Court of First Instance), but also in the case of applications from national courts.[30]

4. EU goal and objective of protection against anti-competitive practices

In terms of the competition policy, this is not seen "as an end in itself" but rather as a necessity of the internal market.[31] The doctrine[32] groups the objectives of competition policy in three directions. A first goal is to increase consumer welfare and to achieve an optimal allocation of resources in the EU, given that traditional economic theories claim that the production of goods is rendered much more efficient by fair competition. A second objective is to protect consumers together with small and medium-sized enterprises from large aggregations of economic power (either monopoly or business-to-business agreements) that have market-distorting behaviour. A third objective is the proper functioning of the European single market, by preventing discriminatory government intervention in favour of state-owned enterprises, or by granting state aid to private enterprises.[33]

In order to achieve the goal of ensuring that every European citizen has the best quality products and services at the lowest prices, competition policy has at its disposal a set of tools to protect against anti-competitive practices. These instruments monitor compliance with competition rules so as to achieve the fundamental objective of ensuring the proper functioning of the European internal market. A competitive climate encourages both the development of trade and the efficiency of production. The consumer thus has a greater variety of products at their disposal, which makes it easier to lower prices and increase the quality of products.[34]

The Commission applies anti-competitive practices to restore competitive conditions by correcting companies' misconduct (such as agreements, abusive behaviour of dominant undertakings, concentration and state aid) and the correlation of these instruments with market developments.[35]

5. Comparison between anti-competitive practices (agreements and abuse of a dominant position) and unfair commercial practices (including dumping and subsidies)

The interaction between the anti-dumping policy objectives and the antitrust policy objectives is a highly controversial issue, for both legal and economic reasons. Thus, in its decisions on the imposition of anti-dumping measures, the Commission takes into account and overrides compliance with anti-competitive rules.[36] From a legal point of view, anti-dumping regulations, on the one hand, allow practices such as price undertakings or the limitation of quantities of products marketed - practices that are prohibited by competition regulations; on the other hand, anti-dumping regulations penalize certain price differences (the difference between normal value and export price) - which is justifiable and acceptable from the point of view of competition rules. From an economic perspective, the two policies pursue different objectives, which can lead to conflicting situations at some point. Anti-dumping is a remedy for industries affected by the competitiveness of imports. The ultimate goal of antitrust policy is to promote consumer welfare and the efficiency of the production of goods which, in part, depend on the proper functioning of the

[29] EEC Council: Regulation no. 17: First Regulation implementing art. 85 and 86 of the Treaty. *OJ 13, 21.2.1962, pp. 204-211.*

[30] European Institute in Romania, *Politica în domeniul concurenței, Seria Micromonografii - Politici Europene*, versiune actualizată, European Institute in Romania, Bucharest, 2003.

[31] "Competition. Overview: making markets work better", European Commission, accessed March 15, 2022, https://ec.europa.eu/competition/general/overview_en.html.

[32] Paul Craig, Grainne de Burca, *EU Law Text, Cases and Materials*, Oxford University Press, Oxford, 2011, pp. 959-960.

[33] *Ibidem.*

[34] "Competition. Overview: making markets work better", European Commission, accessed March 15, 2022, https://ec.europa.eu/competition/general/overview_en.html.

[35] Radostina Parenti, "Competition policy", European Parliament, accessed March 15, 2022, https://www.europarl.europa.eu/factsheets/ro/sheet/82/politica-in-domeniul-concurentei.

[36] Meg A. Mataraso, "The Independent Importar's Right of Review of Antidumping Regulations Before the Court of Justice of the European Communities", *Fordham International Law Journal,* vol. 12, no. 4, art. 3 (The Berkeley Electronic Press, 1988), p. 694.

competitive market system, in which, in turn, the competitive import system plays an important role.[37]

Basically, the two types of trade defence instruments pursue different measures by applying their own measures. In reality, however, both are aimed at unfair or non competitive practices of private companies in international trade, in order to correct behaviours that lead to distortions of the basic principles of the functioning of the common market.

6. Conclusions

In the context of market liberalisation, imbalances and inequities may arise between countries. Under these conditions, competitive pressures between market participants are of major importance: economic growth, declining unemployment, and individual well-being can only be achieved by improving global competitiveness. Concepts such as sustainable development and the green economy are beginning to take shape. The European legal framework must keep pace with these changes, requiring the need to monitor the external situation and tighten legislation in order to protect against unfair commercial practices.

In summary, we can say that competition, although it is an element whose existence is essential for the proper functioning of the market, can be seen as an element of pressure on companies in trying to offer consumers a variety of products, at the lowest possible prices. Thus, the role of EU regulations is to monitor and correct cases of illegal anti-competitive practices, such as: agreements between companies, abuse of a dominant position, state aid, economic concentrations, and all those activities that lead to the control of production, sale, and dictating the price. However, if the agreement fulfills, cumulatively, two conditions: the agreement leads to increases in efficiency and consumers receive a fair share of the benefit, then that agreement does not cause the elimination of competition. Thus, the limitation caused by the agreement is considered indispensable, so the exception is allowed. It should be noted that art. 102 TFEU does not prohibit an undertaking from being in a dominant position, but rather prohibits the misuse of that position. Abuse of dominant power is seen by the regulators as the use of the ability to prevent the maintenance of effective competition in the market as well as the use of prohibited behaviors such as charging excessively high prices or prices below the manufacturing cost, tied sales, imposing a group of products for sale and the refusal to deal with market partners. In terms of the regulations imposed on the market, the EU has adopted directives, regulations, as well as a series of documents, such as notes, guidelines and rules, to offer additional clarifications. The Commission is responsible for implementing the competition policy. The Commission acts to investigate specific situations or even entire economic sectors. Following the trend towards the decentralization of the competition policy, an important role has been assigned to both competent national authorities and the courts and tribunals of Member States.

The impact of this research is seen in the results of the analysis on the effectiveness of EU competition law. In itself, competition policy is not seen "as an end in itself" but rather as a necessity of the internal market. Through the adopted legislation and the resulting procedures, the competition policy ensures that the primary objective is to increase the welfare of consumers and to supervise the optimal allocation of resources in the EU. A second objective is to protect consumers and small and medium-sized enterprises from large aggregations of economic power that may have market-distorting behaviors. The ultimate goal is the proper functioning of the European single market, through higher-level surveillance to prevent discriminatory government intervention in favor of state-owned enterprises, or by granting state aid to private enterprises. It is thus observed that the Commission applies the instruments of protection against anti-competitive practices in order to restore competitive conditions, while seeking to correlate these instruments with market developments, by constantly updating the legislation.

I found it particularly interesting how, from an economic point of view, on the one hand, a competitive market price system generates consumer welfare and the efficiency of the production of goods; on the other hand, the competitive market system is affected by the competitiveness of imports, which in turn may harm certain domestic industries. Thus, a limitation imposed due to the anti-dumping policy, may lead to a result sanctioned by the antitrust policy. A contradictory result can also appear from a legal perspective: on the one hand, practices allowed by anti-dumping regulations (such as price setting or limiting the quantities of products sold) are sanctioned by competition regulations; on the other hand, practices sanctioned by anti-dumping regulations (price differences such as the difference between normal value and export price) are accepted from the perspective of competition regulations. I have discussed them in this paper. However, it remains for further research work to find the interaction between the objectives of the anti-dumping policy and the objectives of the antitrust policy.

[37] José Jr. Tavares de Araujo, *Legal and economic interfaces between antidumping and competition policy*, in Revista de comerț internațional (Santiago: United Nations, 2001), p. 7.

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