

CONSIDERATIONS ON THE RULES ON COMPETITION GOVERNING UNDERTAKINGS IN THE EUROPEAN UNION

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Abstract

This study concerns the general rules on competition between undertakings in the EU. The author paid attention primarily to matters on the prohibition of agreements that aim to distort or impair competition on the internal market. Moreover, he examined in detail the matter concerning the regulation and interdiction of the abuse of a dominant position. The work also reviews doctrinal opinions, as well as the jurisprudential solutions in the area. The author's concern to summarize and develop the conditions for the implementation of each of the two legal mechanisms is worth noting: the prohibition of agreements between undertakings and the abuse of a dominant position. The essential considerations taken into account by the Court of Justice of the European Union in settling a case whose subject consisted of assessing the manner in which an undertaking reflected on competition on the internal market were selected at the end of the work.

Keywords: *undertaking in the European Union, prohibition of agreements, types of agreements, abuse of a dominant position, relevant market, types of abuse.*

JEL Classification: *K23, K33*

1. Introduction

The European Communities were established at a time when the component economies were characterized by a high level of governmental control, the existence of a significant number of legal cartels and protectionist policies reflecting on the idea of competitive freedom in the market economy. Therefore, considering that, in market economy, the consumer is the person dictating what products and services will be supplied, the aim was to find a system ensuring the welfare of each economy segment². This is a difficult process.

The doctrine³ briefly mentions that the competitive phenomenon exercises constant pressure in the benefit of the consumer, the end beneficiary of the goods and services provided by undertakings operating on the internal market. The constant and varied pressure is exercised on undertakings, to meet the requirements set by consumers, concerning matters related to consumer protection law, labor and social security law and labor law. The European Parliament specified⁴ that, in the promotion of productivity and innovation as engines of economic growth, competition holds a crucial role, and that a policy that can intensify competition shall stimulate economic growth.

To underline the framework including the competitive rules governing undertakings, we would like to indicate that the European Union Treaty stipulates in art. 3 par. (3) that “*The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance*”⁵.

Therefore, the internal market is the area where the commercial operation of undertakings occurs, which is governed by rules specific to several branches of law: competitive law, labor law, social security law, environmental law, etc. The actual action leads us to the analysis of the rules on competition concerning undertakings performing their operation in the European Union. The

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² See Giorgio Monti, *EC Competition Law*, Cambridge University Press, Cambridge, 2007, p. 42;

³ http://ec.europa.eu/competition/consumers/what_ro.html;

⁴ In a 2013 study on the contribution of the competitive policy to economic growth and to the fulfillment of the EU 2020 Strategy goals;

⁵ *Tratatele fundamentale ale Uniunii Europene*, C.H. Beck Publishing House, Bucharest, 2013, p. 7;

internal market is deemed the essence of the EU and it establishes the main economic reason of its existence⁶.

Following this line of thought, the economic size of the internal market is “reflected on” by the rules on competition, while the social dimension of this area is analyzed by the specialists in the respective sectors. We believe the rules on competition only manage to condemn anti-competitive conducts, as they attempt to discourage entrepreneurs from resorting to methods and techniques that can reflect on the internal market. However, the reality indicated by the jurisprudence indicates the contrary, i.e. that undertakings can find the practices and mechanisms through which to distort the market dynamics by breaching rules on competition.

The doctrine⁷ underlined the important role held by such rules in the market economy mechanism, in terms of the fact that such rules significantly contribute to the balancing of the demand and supply, to the stimulation of the creativity of participants to the economic circuit, to the maintaining of an innovation capacity, while also specifying that they can hold a role of control against the occurrence of monopolies. We will prove that such norms really do fight against clandestine, tacit or factual monopolies, as appropriate, or even against governmentally favored monopolies. Furthermore, we believe that all direct and indirect, immediate and mediated effects of such a competitive system are directed in the benefit and for the protection of consumers.

In terms of the monopoly on a competitive market, it was stated⁸ that it is difficult to conceive outside of any state intervention (legal or governmental). Therefore, a competitive market indicates an undertaking conduct that aims to preserve the freedom of the market economy. On the other hand, on a perfectly competitive market (that is next to impossible to find), a market that has no barriers to entry or to leave is useless and devoid of purpose in terms of the implementation of a competitive law system.

The elimination of barriers standing in the way of trade is the main objective of the union policy on competition. Therefore, it was assessed that union competition policies are closely related to the creation of the internal market⁹. Union policies were defined as *a set of decisions, measures, rules and codes of conduct adopted by the joint institutions established by member states, implemented and monitored by the latter, as well as by the national authorities, under the suzerainty transfer forming the basis of the European integration process*¹⁰.

The political factor in the competitive law area is just one of the factors shaping and influencing competition on the internal market. The economic factor and the institutional factor are also important, together with the political factor¹¹.

In terms of the political factor, it either tends to promote economic welfare, so as to direct undertaking conduct towards the minimization of costs and the maximization of benefits in favor of consumers, or to meet other public interests and objectives (such as increasing economic freedom, the preservation and development of the work force, the preservation of cultural values and the environment).

In terms of the economic factor, specialists in the area are found at opposite poles; on the one hand, there are economists who approach the matter from a structural level, and who believe that on a market with a low number of participants, there is a high risk of market unbalance, and, on the other hand, there are economists who deem that the economic industry structure is insufficient to forecast whether undertakings carry out their business with the aim of strengthening competition.

The political and the economic factor would have no utility in the absence of a third factor closing the triangle of elements influencing competition law. The institutions that enforce the rules

⁶ See Paul Craig, Grainne de Burca, *Dreptul Uniunii Europene. Comentarii, jurisprudență și doctrină*, 4th Edition, a series coordinated by Beatrice Andreșan-Grigoriu and Tudorel Ștefan, Hamangiu Publishing House, 2009, p. 755;

⁷ See Laura Lazăr, *Abuzul de poziție dominantă. Evoluții și perspective în dreptul european și național al concurenței*, C.H. Beck Publishing House, Bucharest, 2013, pp. 48-50;

⁸ See Albertina Albers, *EC Competition Law and Policy*, Willan Publishing, Portland, 2002, pp. 28-29;

⁹ See Ioana Eleonora Rusu, Gilbert Gornig, *Dreptul Uniunii Europene*, 3rd Edition, C.H. Beck Publishing House, Bucharest, 2009, p.229;

¹⁰ See Laura Lazăr, *op. cit.*, pp. 65-66;

¹¹ See Giorgio Monti, *op. cit.*, pp. 44-45;

specific to competition and that take administrative measures against the infringements made to competition norms are entities that, through their practices use, *in concreto*, the mechanisms developed through the political and economic factor.

Overall, the three factors exercise pressures of various intensities during different historical moments, and, therefore, it can be seen that, according to the actual time and space circumstances, each factor determines a stronger or weaker influence.

We deem it important to also underline the functions of competition, to better understand the whole phenomenon and mechanism of the rules on competition.

Firstly, the demand and supply balancing function occurs. It has been specified¹² that the analyzed system facilitates the automated adjustment of the demand and supply in any area of the economic operation. We deem that the opinion can only be valid when dealing with a balanced market, with clear and precise rules on competition and institutions implementing the respective rules in the way in which such implementation was thought out by the lawmaker.

Second of all, competition is also characterized by the function aiming to prevent monopoly and to register profit from such circumstance.

Thirdly, the function of creativity stimulus is noticed, in terms of innovations and technological progress.

Fourthly, the norms establishing union rules on competition tend to naturally establish actual prices, reflecting the market level.

Fifthly, the psychological function of competition and of the rules thereof occurs, and such a function determines undertakings to constantly find new solutions for issues concerning the maximization of profit and the satisfaction of consumer demands.

Sixthly, we would like to add that another function on consumer protection against the abuses of undertakings can also be identified, where such abuses can be directed towards consumers or towards the internal market.

The right on competition of the European Union is original through the contents and objectives thereof, i.e. through the participation to the creation of a framework on the unification of the internal market through the interpenetration of the economies of member states¹³.

2. Relevant concepts

Considering the importance of understanding the phenomenon establishing the subject of this study, it is essential to explain the basic notions that the European Union legislation and jurisprudence revolve around.

A first concept that is analyzed is that of an **undertaking**, a concept benefitting from a relatively wide acceptance from union institutions that were faced with interpreting the scope of such a concept, considering that it is not explicitly defined by the Treaty.

The Court of Justice of the European Union stated¹⁴ that, in the *context of competition law*, [...] *the concept of an undertaking encompasses every entity engaged in an economic activity regardless of the legal status of the entity and the way in which it is financed*. The finalistic interpretation creating a wide scope of the concept raised an entire range of issues that were settled in time by the union courts.

The European Commission defined an undertaking as an organized assembly of human and material resources intended to sustainably follow a determined, economic scope. Through the numerous orders of the Court of Justice of the EU, both cases where the position of undertaking was confirmed, and cases where such a position was denied were stated.

To this extent, the notion of undertaking includes trading companies, general partnerships, liberal professions, other forms of exercising trade operations (such as authorized natural persons or

¹² See Georgiu Coman, *Concurența în dreptul intern și european*, Hamangiu Publishing House, Bucharest, 2011, p. 3;

¹³ See Augustin Fuerea, *Drept comunitar al afacerilor*, 2nd Edition - revised and completed, Universul Juridic Publishing House, Bucharest, 2006, p. 185;

¹⁴ Case c-41/90 *Hofner and Elser v. Macroton GmbH*

family undertakings) and state owned undertakings only if they exercise their private law capacity. Agents and the status thereof in relation to the incidence of the undertaking notion varies if the agent acts in the name of and on behalf of another undertaking or if the mediator acts within the meaning of its qualities derived from the independent and autonomous operation it carries out¹⁵, and the agent is obviously included in the undertaking sphere, in the second situation. Moreover, in the C-67/96 case¹⁶, it was specified that any body consisting of employees, on the one hand, and of employers, on the other hand - a body created under a joint agreement, can be deemed an undertaking, if the affiliation/accession to such a body is compulsory for all employees in a specific market sector. We like to specify that, in the analyzed concept sphere, we will also include economic interest groups (such as the economic concentrations characterized by joint control¹⁷), where, despite the fact that several, legally separate companies are established, strong economic dependency occurs, diminishing the decisional power of branches in relation to the parent company¹⁸.

On the other hand, entities whose scope is exclusively social and that, thus, do not carry out any economic operation, were excluded from the scope of the notion of undertaking. For example, the Court established that the following shall not be deemed an undertaking: a body authorized to manage social security and age limit insurance activities, as defined by the national courts themselves¹⁹; an entity authorized by law to handle labor and occupational diseases insurances²⁰; an entity authorized by law to manage a work-related accident and occupational disease insurance plan²¹.

The second concept is that of the **relevant market**, considering that, in the case of anti-competitive conducts, it is extremely important to determine as accurately as possible the place where the conduct occurs. The importance resides in the fact that a conduct reflecting on trade between member states should be assessed in the report by a determining relevant market or by a determining sector thereof (a state territory, a region of a large state, a region including several small states).

In a very general acceptance, the market is the place where numerous transactions occur, however, in light of the policy on competition, it has a different meaning, in the sense that not all tenderers on a market compete, which has generated the concept of relevant market²².

The importance of the concept was argued in specialized literature²³, invoking the following arguments: the establishment of the relevant market is the first step in verifying a conduct, considering that an anti-competitive practice cannot exist without its relation to a delimited market; erroneous delimitation can lead to erroneous decisions (that, procedurally, shall lead to the censorship of the Commission's decision by the Court of Justice of the EU); and the accurate definition of the relevant market shall facilitate the avoidance of doubts concerning the consistency of the conduct with the policy on competition. In supplementing such an argument, we would also like to add that the relevant market and the delimitation thereof according to several criteria (the geographic criterion, the product criterion, the temporal criterion), lead to the accurate identification of the effects generated by the conduct on the respective market or on markets similar to the market on which the respective undertaking carries out its business.

The **geographic market** undoubtedly refers to the territory where traders carry out economic operations under the same conditions on competition concerning the relevant products or services. Such delimitation establishes whether certain actions of the undertakings have effects on

¹⁵ See A. Fuerea, *op. cit.*, p. 216

¹⁶ Case C-67/96 *Albany International BV v. StichtingBedrijfspesnioenfondsTextielindustrie*.

¹⁷ See Gh. Piperea, *Introducere în Dreptul contractelor profesionale*, C.H. Beck Publishing House, Bucharest, 2011, p. 284;

¹⁸ See Paul Craig, Grainne de Burca, *op. cit.*, p. 1189;

¹⁹ Joined cases 159 and 160/91 *Poucet and Pistre v. AssuranceGenerales de France*;

²⁰ Case C-67/96 *Albany International BV v. StichtingBedrijfspesnioenfondsTextielindustrie*

²¹ Case C-218/00 *Cisal di BattistelloVenanzio & C. Sas v. Istituzione nazionale per lassicurazionecontroffliinfortuni sul lavoro*;

²² See Giorgiu Coman, *op. cit.*, p. 174;

²³ See Laura Lazăr, *op. cit.*, p.152;

the competition in the EU internal market or only locally, regionally or nationally. We shall list a few indications that can identify the geographic size of the market:

- past evidence underlining diversions of the demand in other areas;
- basic characteristics of the demand, considering the local preferences based on brand, language, culture and the need for local presence;
- the perspectives of consumers and professionals (traders);
- the geographic sales matrixes;
- uniform access to the infrastructure and the distribution channels²⁴;
- governing legal requirements or restrictions, as well as legal rights or privileges.

The **product market** involves considering the physical characteristics of the product, if the products can satisfy the consumers' constant needs, and if the products are fungible (substitutable). The following criteria were used in specialized literature²⁵ and the jurisprudence, to identify the market in terms of the product outlining it:

- the physical characteristics of the product;
- the period when the product is available on the market;
- the comparable prices of fungible products;
- the characteristic of the product to meet the buyers' constant demands.

As an example, to indicate a real case, we can evoke the *United Brands* case²⁶, where the Court analyzed the banana market and the fruit market on the German territory (*the banana has a certain appearance, taste, a fine consistency, the absence of seeds, easy handling, a constant level of production enabling it to meet the constant demands of an important category of the population consisting of children, the elderly and the sick*).

The **temporal market** is not separate from the first two, but it expresses the temporal availability of a product or service. We would like to underline that, under such conditions, the identification of the temporal market is important if there is a substitutability of the product.

Therefore, the doctrine²⁷ noticed that the temporal market underlines the following cases:

- the supply of services benefitting from "peak periods" (tourism in certain areas);
- the production of assets registering seasonal variations;
- the case of innovative and intermediate products, found between generations of products.

We shall continue by analyzing the competition protection mechanisms on the internal market, established by the Treaty on the Functioning of the European Union (TFEU), mechanisms established by norms generating an entire series of normative acts, such as regulations or directives.

3. Competition mechanisms established by the TFEU, governing undertakings

Union regulations on competition, based on the legal grounds of art. 101 – 109 of the TFEU, concern²⁸:

1. the prohibition of agreements;
2. the abuse of a dominant position;
3. undertaking mergers;
4. state aid;
5. competition in the public sector.

The norms analyzed in this study, respectively the norms of art. 101 – 106, include the issue of the prohibition of agreements, the abuse of a dominant position and the interferences of competition in the public sector. They are found in Section 1 (Rules applying to undertakings), of

²⁴ Commission Decision 94/19/EC *SeaContainers v. StenaSealink*;

²⁵ See Ioana Eleonora Rusu, Gilbert Gornig, *op. cit.*, p. 244

²⁶ Case 27/76 *United Brands Company and United Brands Continental v. the Commission*;

²⁷ See Laura Lazăr, *op. cit.*, p. 166;

²⁸ See Nicoleta Diaconu, *Dreptul Uniunii Europene. Tratat*, second revised edition, Lumina Lex Publishing House, Bucharest, 2011, p. 324;

Chapter I (Rules on competition), Title VII (Common rules on competition, taxation and approximation of laws) of Part 3 (Union policies and internal actions) of the TFEU.

The part that is going to be discussed in detail below is also called *antitrust law* and it refers to two types of conducts of undertakings that are likely to reflect on competition: anti-competitive agreements (ententes or cartels) and the abuse of a dominant position.

Article 101, ex-article 81, is the main method of calculating anti-competitive agreements, which is how the internal market is protected from potential abuses of the undertakings. Therefore, aside from the protection provided to the internal market, and, therefore, to the freedom of competition, the provision of art. 101 protects consumers and small undertakings from large economic power accumulations²⁹. Moreover, the efficiency growth³⁰ of market undertakings is also aimed, registering balance between the interests of traders and those of consumers. The union policy concerning competition within the market “aims for the barriers hindering trade, free movement and the right of establishment to not be replaced by other obstacles created by undertakings and/or public authorities adopting a conduct leading to market segmentation”³¹.

The notion of the abuse of a dominant position (art. 102) concerns the anti-competitive practices that may be used by undertakings holding a dominant position on the relevant market, to maintain or consolidate the respective position. Moreover, conducts that reflect on the competition between undertakings, and that reflect on consumers and may even eliminate the need of the dominant undertaking to compete by using legal, moral and good commercial practice methods, are also prohibited.

To continue, article 101 covers conducts that can reflect on competition, resulting from a bilateral or multilateral will, i.e. undertaking agreements, decisions of the undertaking associations or concerted practices, while article 102 covers the dominant power abuse, that, in most cases, is unilateral, however, cases where the abuse of position can be the result of the conduct of one or several undertakings were identified and do exist.

The two norms of the Treaty on the Functioning of the European Union provide legal protection to the economic system established at the union level, within the meaning of creating an internal market based on rules on competition. The extensive way in which they were interpreted by EU institutions indicates that the aim is to achieve consumer protection, whose position is economic and inferior through its nature. Therefore, in both provisions, it is essential for the effect of any undertaking action that may affect trade between member states, instead of the actual form of the respective action³².

4. Prohibition of agreements. Conditions and exceptions. Legal grounds

Art. 101 (1) Any agreements between undertakings, any decisions of undertaking associations and any concerted practices that can impact trade between member states and whose subject or effect consists of the prevention, restriction or distortion of competition on the internal market are incompatible with the market and prohibited. Such agreements particularly include those that:

- (a) directly or indirectly establish buying or selling prices or any other trade conditions;
- (b) limit or control production, trading, technical development or investments;
- (c) divide markets or supply sources;
- (d) implement, in relation to their trade partners, unequal conditions for equivalent provisions, thus creating a competitive disadvantage;

²⁹ Paul Craig, Grainne de Burca, *op. cit.*, p. 1186;

³⁰ Ioana Eleonora Rusu, Gilbert Gornig, *op. cit.*, p. 229.

³¹ *Idem.*

³² See Alina Kaczorowska, *European Union Law*, second edition, Routledge Publishing House, London & New York, 2011, p. 857;

(e) condition the conclusion of contracts by the partners' acceptance of additional provisions that, through their nature or in accordance with the commercial usages, are not related to the subject of such contracts.

(2) Agreements or decisions prohibited within the meaning of this article shall be automatically made null and void.

(3) However, the provisions of paragraph (1) can be declared unenforceable for:

- any agreements or categories of agreements between undertakings;
- any decisions or categories of decisions of undertaking associations;
- any concerted practices or categories of concerted practices contributing to

the improvement of the product production or distribution, and to the promotion of technical or economic advance, while also providing consumers with an equitable part of the obtained benefit, and that:

(a) do not set restrictions that are not indispensable to meet such objectives, to the respective undertakings;

(b) do not provide undertakings with the option of eliminating competition in terms of a significant part of the respective products.

As we have emphasized earlier, art. 101, prohibiting agreements concluded between undertakings, agreements whose effects directly reflect on competition on the internal market, and indirectly impact the freedom of consumers and of small undertakings, considering the economic power accumulation generated by the conclusion of the agreement, is the main way to control anti-competitive agreements in the EU region.

In terms of the conditions on the enforcement of the norm stipulated by the TFEU, we would like to specify that they are not included in the doctrine, in this form, facing us with the task of settling the matter and of raising a new issue to specialized literature.

We believe the mechanism for the prohibition of agreements deemed harmful to the internal market can be applied if the following **conditions** are met:

1. agreements *should be concluded by two or more undertakings*.

The notion was previously analyzed and we deem that no other specifications are required to this extent.

2. it involves *an agreement*.

The notion does not occur in the union legislation, however we deem that, beyond any doubt, it is a notion meeting the lawmaker's vision, and including the three notions stipulated by art. 101, i.e. agreements between undertakings, decisions of the undertaking associations and concerted practices.

The notion of *agreement* that is not defined by the analyzed text, refers to any contract concluded between the economic participants. Similar to any contract, it can be concluded in a variety of forms, however, considering the scope of such anti-competitive agreements, undertakings use less official forms to this extent. Therefore, the provided protection shall also influence any clandestine agreements that, in practice, are encountered much more frequently than other official agreements. The doctrine³³ estimates that union institutions analyze such contracts pragmatically, and there are very low chances for such an agreement to observe the form conditions for the conclusion of a convention. By way of consequence, an agreement can fall under the incidence of art. 101 irrespective of whether it is concluded in writing, orally or if it is signed by the undertaking or not.

The concerned anti-competitive agreements can consist of the correspondence between undertakings, conversations between the representatives of undertakings or rules adopted by undertaking associations. Furthermore, the European Court of Justice also stated that a *gentlemen's*

³³ Alina Kaczorowska, *op. cit.*, p. 804;

*agreement*³⁴ falls under the incidence of art. 101, even if this type of agreement is not legally binding³⁵.

Therefore, in the 41, 44 and 45/69 joined cases, a case that is also referred to as the *Quinine cartel*, the Court analyzed the case of such an agreement. *De facto*, trading companies included in the same market segment set the prices and divided the quinine market³⁶. They concluded an export agreement capable of impacting non-Union member states. Subsequently, by concluding a *gentlemen's agreement*, the companies extended the agreement effects to also cover trade between member states. To this extent, the Court established that, to enforce art. 101, an agreement, whether in writing or oral, should manifest the will of the parties, with the intention to have certain conduct on the common market. In other words, such an agreement should be the faithful expression of the common will of the members of the agreement on their conduct on the market. The conduct should be examined in terms of 4 connection points, respectively: the sharing of national markets, the establishment of common prices, the establishment of sales quotas and the prohibition to manufacture synthetic quinine³⁷.

Such agreements only acquire weight when considered in a factual light involving the observation of the subject or effect of the respective agreement, which are notions that will be examined in a later section.

In terms of the *decisions of undertaking associations*, we would like to specify that the association shall comply with the norms of the state of origin of the respective association. The decision adopted by the association shall meet the statutory provisions of the association. Therefore, a chain of causes is created: the adopted decision shall comply with the statutory norms of associations, and the status shall observe the legislation of the member state where the association was formed.

In practice, such groups of economic powers were encountered in numerous areas of trade activities. To this extent, we would like to evoke: liberal profession associations (attorneys, architects, interpreters, and real estate agents), sports associations (FIFA) and trade associations³⁸. We would also like to note that commercial phenomena such as Eurovision, the Eurocheque or Lloyds association are being examined by the Commission³⁹.

In essence, the decisions of undertaking associations can only be censored by the treaty norms if they concern the distortion of competition on the internal market and if the subject or effect thereof is to influence the internal market (such notions establish a different condition of the analyzed mechanism).

From a notional perspective, specialized literature⁴⁰ has attempted to delimit agreements from the decisions of associations. It has been specified that the delimitation becomes difficult if undertakings, association members, express their will to comply with the decision, in which case, it becomes an agreement between undertakings. Moreover, there can be cases where undertaking associations concluded agreements between each other, holding the position of undertakings - parties in such an agreement. However, it can be seen⁴¹ that union institutions tend to no longer accurately distinguish the three forms of agreements stipulated by article 101 of the Treaty. Therefore, we believe the delimitations between the two notions are purely theoretical, enabling a better understanding of the analyzed phenomenon.

³⁴ The notion refers to a verbal agreement or understanding that does not generate any legal consequences, but that only creates moral obligations between the parties (in other words, an agreement between honorable individuals);

³⁵ Ioana Eleonora Rusu, Gilbert Gornig, *op. cit.*, p. 234.

³⁶ Quinidine is (according to DEX 2009) an alkaloid extracted from the bark of the quinine tree, in the form of a white, crystal substance, that is extremely bitter, used as a drug against malaria and certain febrile illnesses;

³⁷ Quinidine is (according to DEX 2009) an alkaloid extracted from the bark of the quinine tree, used in certain heart disorders;

³⁸ Ioana Eleonora Rusu, Gilbert Gornig, *op. cit.*, p. 235;

³⁹ A. Fuerea, *op. cit.*, p. 218.

⁴⁰ Paul Mircea Cosmovici, Roxana Munteanu, *Înțelegerile între întreprinderi. Reguli generale*, Romanian Academy Publishing House, Bucharest, 2001, p. 232;

⁴¹ *Idem*, p. 233;

The notion of *concerted practice* was coined in the US, specifically, in the US antitrust law, considering that, on the date when the concept was included in the EU acquis, no legislation of any member state contained the abovementioned institution⁴².

The definition of the concerted practice can be difficult, however, it is essential that there is factual cooperation between undertakings⁴³. The difficulty of providing a definition also results from the difficulty of providing evidence, considering that concerted practices are, in fact, secret agreements that undertakings try to conceal from the public. The meaning of the notice of concerted practice was analyzed by the European Court of Justice in numerous cases. For example, in case 48/69 *ICI v. the Commission*, the Court established that the existence of coordination and cooperation between undertakings is an essential element in establishing whether there is any concerted practice. If the two essential elements exist, the agreement between undertakings can even be absent.

It was deemed⁴⁴ that a practice does not involve agreement, within the meaning of a univocal manifestation of will. Therefore, “consultation also exists in cases where the conducts of the concerned undertakings are not identical”, meaning that “an approximate alignment of the prices or a collaboration within the meaning of the simultaneous increase of prices are sufficient”⁴⁵. In other words, “concerted practices require the convergence of the undertaking conducts through direct contract leading to the replacement of the risks on competition by their proximity on the market in terms of the product beneficiaries, the production volume or the business territorial areas”⁴⁶.

For similarities of the actions of undertakings, the Commission has admitted the following evidence, within the meaning of the existence of a concerted practice: the simultaneity and similarity of price increases, as well as the existence of repeated contacts between manufacturers; the simultaneity and similarity of the price change and an information exchange; the absence of simultaneous entry on the market⁴⁷. Following this line of thought, the parallel conduct of undertakings can be deemed strong evidence of the establishment of consultation. On the other hand, the European Court of Justice⁴⁸ established that the parallel conduct can only establish a concerted practice if it is the only possible explanation and if it can be corroborated with other evidence.

From a probative perspective, a special issue is raised by the contact between undertakings, the direct or indirect communications they have, aiming to deviate or alter competition on the internal market. Therefore, the Court of First Instance stated⁴⁹ that direct or indirect communication should exist, made in any form. However, both the undertaking submitting information, and the undertaking receiving information should be aware of the scope of such an exchange, and the contact between them aims to impact future conduct on the common market. The burden of proof falls with the Commission establishing the circumstances leading to the conclusion concerning the existence of a concerted practice or the absence thereof.

A concerted practice falls under the incidence of art. 101, even if the practice does not have anti-competitive effects, as the negative impact it could have on competition is sufficient⁵⁰, as established by the European Court of Justice in case C-199/92P *Huls AG v. the Commission*. The existence of a relative presumption was also noticed in this case⁵¹, implying a cause-effect type of relation between the consultation between the undertakings and the subsequent conduct of such

⁴² Ioana Eleonora Rusu, Gilbert Gornig, *op. cit.*, p. 235

⁴³ Alina Kaczorowska, *op. cit.*, pp. 811-812;

⁴⁴ Ioana Eleonora Rusu, Gilbert Gornig, *op. cit.*, p. 236.

⁴⁵ *Idem*.

⁴⁶ Octavian Manolache, *Regimul juridic al concurenței în dreptul comunitar*, All Educational Publishing House, Bucharest, 1997, p. 16;

⁴⁷ *Idem*, pp. 236-237.

⁴⁸ Joined cases c-89, 104, 114, 116, 117 and 125-129/85 *A. Ahlstrom Oy v. the Commission*;

⁴⁹ Joined cases T-25 to 104/96 *Cimenteries CBR v. the Commission*;

⁵⁰ Ioana Eleonora Rusu, Gilbert Gornig, *op. cit.*, p. 236, Alina Kaczorowska, *op. cit.*, pp. 814-815;

⁵¹ Alina Kaczorowska, *op. cit.*, p. 816;

consultation. Therefore, it is relatively presumed that parties participating in a consultation *consider the information they exchange with their competitors to establish the conduct thereof on the market.*

We believe that concerted practices have special significance for competition law in the European Union, particularly in terms of the evidence thereof, considering that they are *de facto* elements that cannot be subject to the automatic nullity stipulated by paragraph (2) of art. 101 of the TFEU, but must be carefully identified and subject to cessation, to no longer have effects deviating free competition.

3. *the subject or the effect of the agreement shall consist of the prevention, restriction or deviation of competition*, thus reflecting on trade between member states.

In the European Union, the approach was relatively different due to the existence of the exceptional cases stipulated in paragraph (3) of article 101. Therefore, the European Court of Justice has tried to delimit the concept of the notions of *subject* or *effect* in case 56/65 *SocieteTechnique Miniere v. Maschinenbau Ulm GmbH*. First of all, it shall be established if the subject of an agreement, a decision or a concerted practice is to restrict the market. Secondly, if the subject of the agreement, decision or concerted practice is not to restrict the market, it shall be verified if there are any restrictive effects on the market. Furthermore, not just the direct and current effect shall be considered, but also the indirect and even potential effect on the market. Moreover, it was also mentioned that the two notions should not be considered cumulatively, but alternatively, underlining the fact that the presence of the “or” conjunction establishes that the analysis shall first of all deal with the subject of an agreement, and only subsequently with its effect. Therefore, only analyzing the subject of an agreement cannot be deemed a fault of the decision made under the conditions where the subject of the agreement is the limitation, prevention or deviation of competition⁵². This underlines, in case 56/65, that “the deviation of competition shall fully or partly result from the provisions of the agreement itself”.

The notions of “subject” or “effect” are, in fact, alternatives for the enforcement of article 101, and it is sufficient to meet one of the two, for an agreement to be subject to sanctions. Concerning the alternative nature, the Court of Justice declared that it is useless to analyze the effects if it is noticed that the subject of the agreement is the restriction, prevention or deviation of competition. Furthermore, such an alternative, in the order stipulated in the Treaty (subject or effect), indicates the implementation of a hierarchy principle⁵³, within the meaning that the subject of the agreement shall first be analyzed and that, only if the anti-competitive subject shall not be established, the effect of such an agreement shall also be analyzed.

The prevention, limitation or deviation of competition are notions involving market manipulation so as to impact free competition between undertakings⁵⁴. To this extent, the Treaty provides a list of agreements as examples, the most frequently encountered, and such agreements are analyzed below. We would also like to specify that the agreements we have listed are decisive for a generic definition of restrictive agreements⁵⁵. Following this line of ideas, the Commission has noted that there are agreements whose effects do not need to be analyzed, as the simple evidence concerning the establishment of such agreements is sufficient to enforce article 101. Therefore, the restrictive nature of an agreement must be ascertained⁵⁶ to establish if it prevents, restricts or distorts competition on the common market.

4. *the agreement shall not be excluded from enforcement* by meeting the conditions of the exception from the rules established by art. 101.

In the following section we will summarize the four conditions of the exception from the mechanism prohibiting agreements.

⁵² Cases 56 and 58/64 *Etablissements Consten Sarl and Grundig-Verkaufs-GmbH v. the Commission*.

⁵³ Paul Mircea Cosmovici, Roxana Munteanu, *op. cit.*, p. 286;

⁵⁴ *Idem*.

⁵⁵ A. Fuerea, *op. cit.*, p. 223.

⁵⁶ Octavian Manolache, *op. cit.*, p. 17;

5. Conditions on the exception

To provide the clearest possible image of the unenforceability of the interdiction stipulated by article 101 paragraph (1) and prior to carrying out a detailed analysis, we shall list the four conditions (the first two are positive conditions, while the last two are negative conditions) that should be met to benefit from the exoneration:

- the agreement shall contribute to the improvement of the product manufacturing or distribution or to the promotion of technical or economic advance (or economic benefit);
- the agreement shall provide consumers with an equitable part of the registered profit (the consumer profit);
- the agreement shall not establish restrictions to undertakings, that are not indispensable to meet the objectives set by the requirements of the first two conditions (the indispensability of restrictions);
- the agreement shall not provide undertakings with the option of eliminating competition in terms of a significant part of the respective products (the agreement should not aim to eliminate competition).

The economic benefit concerns the registration of efficiency profit, where such profit can be quantity (lower costs), as well as quality profit (the improvement of research and development).

The concept includes several elements that can be applied alternatively. Therefore, to meet the condition, it is sufficient for one of its constituent elements to be carried out (improvement of production, improvement of distribution, promotion of technical or economic progress). On the assessment of economic benefit, both the advantages occurring from the agreement, and the disadvantages resulting from the influence on competition shall be considered⁵⁷, and it is obvious that the advantages should prevail.

The benefit of consumers concerns the fact that the agreement concluded between undertakings should “also provide consumers with an equitable part of the registered benefit”. We understand that the advantages of an agreement, a decision or a concerted practice occurring between undertakings should not only provide benefits to them, but that they should impact, at least in part, the end consumers or end users⁵⁸.

The notion of “equitable part”, in the acceptance of the Commission⁵⁹, involves the fact that “the transmission of benefits should at least compensate the actual or potential negative impact on consumers, caused by the restriction of competition”. It is also specified that the “decisive factor is the global impact on the consumers of products on the relevant market, instead of the impact on the individual members of such a consumer category”.

In terms of the *restriction indispensability* (the first negative condition), we would like to specify that the restrictions established on undertakings shall not exceed the elements that are indispensable to obtain the favorable effects of the agreement (i.e. the two positive conditions).

The conditions involve two elements that, in fact, represent a condition involving the implementation of the proportionality principle⁶⁰: the causality relation and action proportionality. The causality relation occurs between the competition restriction and the invoked advantages, and the evidence falls with the party raising a claim, while the proportionality shall only be subject to the analysis following the submission of evidence on the causality relation. Specialized literature⁶¹ has indicated that a control of proportionality is carried out according to the methods established by the parties and the scope aimed thereby.

The last condition of the exemption from the enforcement of article 101 paragraph (1) and the second negative condition is for *the agreement not to lead to the elimination of competition in*

⁵⁷ Alina Kaczorowska, *op. cit.*, p. 840;

⁵⁸ A. Fuerea, *op. cit.*, p. 250;

⁵⁹ *Idem*;

⁶⁰ A. Fuerea, *op. cit.*, p. 250;

⁶¹ Paul Mircea Cosmovici, Roxana Munteanu, *op. cit.*, p. 417;

terms of a significant part of the market for the respective product or service⁶². To this extent, the Commission has deemed⁶³ that “rivalry between undertakings is an essential driver of economic efficiency, including dynamic efficiencies in the shape of innovation”. Furthermore, “whether competition is being eliminated within the meaning of the last condition of Article 81(3) depends on the degree of competition existing prior to the agreement and on the impact of the restrictive agreement on competition, i.e. the reduction in competition that the agreement brings about. The more competition is already weakened in the market concerned, the slighter the further reduction required for competition to be eliminated”.

6. The abuse of a dominant position. Types of abuse. Legal grounds

Art. 102 (1) The abusive use by one or several undertakings of a dominant position held on the internal market or on a significant part thereof is incompatible with the internal market and prohibited, if it can influence trade between member states.

Such practices can specifically consist of:

- (a) the direct or indirect establishment of selling or buying prices or of other inequitable trading conditions;
- (b) limiting production, trading or technical development to the consumers' disadvantage;
- (c) implementing unequal conditions to equivalent provisions, in relations with commercial partners, thus creating competitive disadvantage for them;
- (d) conditioning the conclusion of contracts by the acceptance by partners of additional provisions that, through their nature or under trade usage, are not related to the subject of such contracts.

Specialized literature stated that article 102 is an important “companion” of article 101 of the Treaty⁶⁴.

We would like to note that article 102 benefits from a simpler structure than article 101. Therefore, in a single paragraph, it indicates the interdiction of the abuse of dominant power impacting trade between member states and, moreover, it includes a list of examples of abusive practices. Unlike article 101, it contains no exemption⁶⁵.

Within the meaning of identifying the existence of a potential abuse of a dominant position, the *de facto* circumstance should be analyzed with great care. To do so optimally, the already analyzed notions should be mastered, i.e. the *undertaking* and the *relevant market* with the three components of the undertaking (the product market, the geographic market and the temporal market).

The notion of dominant position is a purely legal concept⁶⁶, occurring for the first time in the Treaty of Rome, and the task of providing the definition thereof has fallen with the jurisprudence of the European courts. The definition given by the European jurisprudence varies significantly from the American definition, where the dominant position is defined as the power to control the price and to exclude competition, where the definition leads to the concept of market power. At the same time, the concept of dominant position does not exclusively refer to the dominant position of the tenderer that, for a monopsony⁶⁷ or an oligopsony⁶⁸, can influence the product price by reducing the volume of its acquisitions.

⁶² Paul Craig, Grainne de Burca, *op. cit.*, p. 1221;

⁶³ *Guidelines on the application of Article 81(3) of the Treaty* - [http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52004XC0427\(07\):RO:HTML](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52004XC0427(07):RO:HTML);

⁶⁴ See Richard Whish, *Competition Law – Seventh Edition*, Oxford University Press, 2012, p. 173;

⁶⁵ See Albertina Albors, *EC competition Law and Policy*, Willan Publishing, Portland-Oregon, 2002, p. 74;

⁶⁶ See Laura Lazăr, *op. cit.*, p.169;

⁶⁷ Monopsony is, according to DEX 2009, the case where there is a single company on the market, monopolizing the procurement of assets;

⁶⁸ Oligopsony is, according to DEX 2009, a market with an extremely low number of buyers compared to the number of sellers;

The act of domination is nothing more than a state of affairs⁶⁹. The terms of *domination*, *dominance* or *market power* are used synonymously in practice and in specialized literature. In the *United Brands* case⁷⁰, the Court stated that the dominant position, within the meaning of the European Union Law, *relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers.*"

In the *Hoffman-La Roche* case, it was established that "*substantial market share as evidence of the existence of a dominant position is not a constant factor and its importance varies from market to market according to the structure of these markets, especially as far as production, supply and demand are concerned.*"

Practically, we are dealing with competition unbalance generated by certain *de facto* conditions that are more or less dependent on the will of the undertakings on the respective market. Domination, whether individual or joint, can exist outside any intentional element⁷¹ since the concept has a factual size.

Domination can be individual (exercised by a single undertaking) or joint (when the action of dominating is jointly exercised by several undertakings). In the matter of joint domination, the Court of Justice established⁷² that, to identify the existence of a joint entity, it is required to examine any connections or economic correlation factors.

7. Types of abuse

According to a general classification⁷³, there are three large categories of dominant position abuses:

A. *exploitative abuses*;

This category of abuses implies that the intention of the undertaking is to direct its abuse towards an economic operation that shall maintain the position of the undertaking or even consolidate it. Exploitative abuses can be ascertained in: the establishment of excessive requirements or prices or any case where consumers are bound to pay for a product they do not want.

B. *exclusive abuses*;

The discriminatory nature of abuse is the most frequently encountered in the matter of prices (the predatory pricing notion is established in a similar and related way⁷⁴), however, it can also influence other terms and conditions (discrimination can be geographical). There are two types of price discrimination: explicit – when the different price is based on differences between consumers (ex. age, location, etc.), or implicit – when customers are formally provided with the same options, however, the different prices result from the different combinations between options and better contracting conditions are offered for larger purchases.

C. *elimination of competitors*.

Abuses aiming to eliminate competitors, also referred to as repressive abuses⁷⁵, can be represented by any of the anti-competitive and abusive practices of a dominant undertaking. However, such practices should aim to eliminate competitors. Therefore, it is particularly important to establish if a specific practice of an undertaking is part of a plan to eliminate competitors on the relevant market (the market that, as shown, can be the market on which the dominant undertaking is active or a market on which the effects following its operations are generated).

⁶⁹ See A. Fuerea, *op. cit.*, p. 274;

⁷⁰ Case C-27/76 *United brands v. the Commission*;

⁷¹ See A. Fuerea, *op. cit.*, p. 275;

⁷² Case C-395 and 396/96 *Compagnie Maritime Belge Transports SA, Compagnie Maritime Belge SA and Dafra Lines A/S v. the Commission*.

⁷³ See Ioana Eleonora Rusu, Gilber Gornig, *op. cit.*, p. 248;

⁷⁴ For more details, see Paul Craig, Grainne de Burca, p. 1290;

⁷⁵ See Alina Kaczorowska, *op. cit.*, p. 897;

However, the Commission together with the CJEU use a traditional classification, as follows:

1. exploitative abuses: occurring when an undertaking uses its economic power, obtained due to consumers, to obtain competitive benefits or to establish unordinary tasks for the competition;
2. discriminatory abuses: occurring when the dominant undertaking applies differential treatment to its customers, in the absence of any price grounds or legal justifications;
3. exclusive abuses: aiming to segment the market;
4. elimination of competitors: occurring when the conduct of a dominant position undertaking is directed towards the predation of competitors (by preventing the access of competitors on the market, constraining competitors to leave the market, often times by using predatory pricing)⁷⁶.

In considering the 2 classifications and the structure of the norm in article 102, we shall continue by analyzing the types of abuse based on the classification established by the European Union institutions.

We would also like to specify that the delimitations between such categories are not very clear, given that the list of the union lawmaker is provided as an example, and that the practice of economic life has repeatedly proven that undertakings can “play both sides of the table”.

According to the criterion on the business conduct of the respective undertaking, we can identify: conduct abuses and structure abuses⁷⁷. **Conduct abuses** include business practices that can directly prejudice the dominant undertaking customers. **Structure abuses** are compartments meant to preserve or consolidate the market power of undertakings, by excluding competitors on the market (the elimination from the market or the prevention from entering the market) or by tempering the competitive conduct of undertakings established on the market. Short term effects benefitting consumers could occur in the second category of abuses, however, long term negative effects could also occur, within the meaning of the change of the competitive structure on the market.

Furthermore, structure abuses can, in their own turn, be classified in 2 categories: abuses based on the price criterion (predatory pricing) and abuses that are not based on the price criterion (conditioning the procurement of a good by the procurement of another).

We would like to once again specify that the abovementioned classification of abusive practices is not essential to implement the norms included in the treaty, seeing as the provisions thereof concern any abuse of a dominant position⁷⁸.

8. Conclusions

In conclusion, we believe the antitrust law of the European Union is an indispensable mechanism for the internal market, based on the principles of consumer society and of the freedom to compete, within the limits of the union *acquis*.

We believe such norms are currently meeting their aim, however, reality could face us with the event where they become obsolete, in which case, the union lawmaker shall take measures to update the legal instruments on the protection of the internal market against anti-competitive agreements and practices.

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⁷⁶ *Idem*;

⁷⁷ See Laura Lazăr, *op. cit.*, p. 192;

⁷⁸ *Idem*, p. 195;

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