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Competition Law and the COVID-19 Pandemic – Towards More Room for Public Interest Objectives?

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The article aims at analysing activities of the European Commission and the national competition authorities of the Member States of the European Union in response to the Covid-19 outbreak. This analysis is carried out in the light of the objectives of EU competition law. The specific research question of this article is whether the competition law framework is sufficiently resilient to the current COVID-19 crisis and allows for the inclusion of public or non-economic interests, particularly with regard to the application of Article 101 of the Treaty of the Functioning of the European Union. With a view to answering this question, the temporary framework that has been adopted because of the pandemic will be assessed in the light of the framework for the application of Article 101 TFEU. Then the actions of competition authorities undertaken EU-wide will be analysed against the background of the current debate on the goals of EU competition law.

Keywords: Article 101 TFEU; non-economic objectives of competition law; EU competition law

1. Introduction

The COVID-19 outbreak triggered an unprecedented crisis. It was also a crash or resilience test for the normative systems that regulate health protection, public administration and market regulation, including EU competition law. The reactions of competition authorities across the European Union were impressively quick and visible in different areas of competition law, including state aid and antitrust. They adopted a balancing approach, that is, their actions were focused on preventing the pandemic from being used by entrepreneurs to generate additional profit using market failures, and they allowed companies to cooperate in order to overcome supply shortages or adjust disrupted supply channels.

This article examines the responses of competition authorities, including the European Commission and national competition authorities (NCAs), to the coronavirus outbreak in light of the central objective of EU competition law, which is foremost the protection of consumer interests (wellbeing, welfare).¹ The protection of specific competition-related objectives like efficiencies became less important. Specifically, the article analyses this shift against the backdrop of the current discussion about whether there is sufficient room in the application of the EU competition rules to take public interests on board, including broader interests such as health protection and sustainability. As indicated by Townley, 'limiting competition law to considerations of efficiency is undesirable since efficiency does not account for all of one's well-being, and competition law intervention cannot be said to "make (...) society better off (...) unless one considers the effect on wider public policy goals too."' ²

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¹ Joined Cases T213/01 and T214/01 *Österreichische Postsparkasse and Bank für Arbeit und Wirtschaft v Commission* [2006] ECR II-0000, 115; Case T-168/01 *GlaxoSmithKline Services* [2006] ECLI:EU:T:2006:265, 118.

² Christopher Townley, Article 81 EC and Public Policy (Hart Publishing 2009). For the discussion with Townley, see: O. Odudu 'The Wider Concerns of Competition Law' (2010) *Oxford Journal of Legal Studies* 602. For the literature review and discussion on objectives of competition law, see: Konstantinos Stylianou and Marios Iacovides, 'The Goals of EU Competition Law – A Comprehensive Empirical Investigation' (December 4, 2020), https://www.konkurrensverket.se/globalassets/dokument/kunskap-och-forskning/forskningsprojekt/19-0407_the-goals-of-eu-competition-law.pdf (accessed 31 August 2021).

It is a truism that a crisis creates specific urgent needs that become predominant. As Stucke and Ezrachi pointed out, the COVID-19 crisis revealed the necessity to redefine the goals of competition law provisions, their role within the economies of the Member States and the contrast between social purposes and the maximisation of efficiencies and gains.³ As advocated by the so-called 'New-Brandeis' School, the values which are broader than narrow consumer welfare should be included in the application of competition law.⁴ Thus, as shown during the COVID-19 outbreak, the ivory tower centralised on market functions referred to by Marsden in 2018 (though mainly to *chilling competitive conduct and innovation*) should not rest in isolation.⁵

The reactions of competition authorities during the pandemic addressed various issues related to the crisis. They also showed that it is possible to take into consideration objectives other than economic ones without the authorities engaging an abundance of resources. This is especially relevant to the current discussion on sustainability.⁶

Therefore, the specific research question of this article is whether the competition law framework is sufficiently resilient to the current COVID-19 crisis and allows for the inclusion of public or non-economic interests, particularly with regard to the application of Article 101 of the Treaty of the Functioning of the European Union (TFEU)⁷ (and to some extent, Article 102 TFEU) is concerned.⁸ With a view to answering this question, the temporary framework that has been adopted because of the pandemic will be assessed in the light of the framework for the application of Article 101 TFEU. Then the actions of competition authorities undertaken EU-wide will be analysed against the background of the current debate on the goals of EU competition law.

This analysis will mainly concentrate on the application of Article 101 TFEU, which contains the cartel prohibition. The application of Article 102 TFEU which prohibits the abuse of a dominant position will be discussed only with respect to shortages of supply as this is an imminent feature of the present crisis. Merger control and state aid remain beyond the scope of this analysis. The analysis of the reactions of competition authorities also includes that of the UK Competition and Market Authority.

2. Competition law (temporary) framework during the COVID-19 pandemic and the objectives of Article 101 TFEU

2.1. Introduction

In the case of antitrust, the legal framework of Articles 101 and 102 TFEU is relevant. The European Commission and national competition authorities published temporary frameworks (in different forms) concerning antitrust issues which were aimed at providing assistance and legal security for undertakings during the COVID-19 pandemic.

Pursuant to Article 288 TFEU, these *soft law* instruments have no binding force;⁹ however, they produce some legal effects.¹⁰ As the Commission, on the basis of their 'outcome discretion' under Article 7 of Regulation 1/2003 can decide which cases it would like to investigate, and they indicate which categories of cooperation between undertakings will fall beyond their focus.¹¹ These recently adopted legal instruments also illustrate a certain level of flexibility that competition authorities are ready to accept in the application of a standard legal framework. However, this flexibility is conditioned upon the objectives to be fulfilled by specific forms of cooperation between undertakings.

³ Maurice E. Stucke and Ariel Ezrachi, 'Covid-19 and Competition – Aspiring for More than our Old Normality' (2020) 8 Journal of Antitrust Enforcement 312, 315.

⁴ Jan Polański, 'Neobrandeizianizm i polityczność ochrony konkurencji' (2020) 5(9) iKAR, 46.

⁵ Philip Marsden, 'High Time for Rhyme and Reason' (2018) <https://globalcompetitionreview.com/high-time-rhyme-and-reason> accessed 21 July 2021; Sandra Marco Colino, *Competition Law of the EU and the UK* (Oxford University Press 2019) 15.

⁶ Simon Holmes 'Climate Change, Sustainability and Competition Law: Lessons from Covid-19' Kluwer Competition Law Blog (23 April 2020), <http://competitionlawblog.kluwercompetitionlaw.com/2020/04/23/climate-change-sustainability-and-competition-law-lessons-from-covid-19/#_edn6> accessed 18 July 2021.

⁷ Consolidated version of the Treaty on the Functioning of the European Union, OJ [2012] C 326/47.

⁸ Chiara Fumagalli, Massimo Motta and Martin Peitz, 'Which Role for State Aid and Merger Control During and After the Covid Crisis?' [2020] 219 Journal of European Competition Law & Practice 294.

⁹ Stefan A. Oana and others, 'EU Soft Law in the EU Legal Order: A Literature Review' (4 March 2019) King's College London Law School Research Paper (Forthcoming, available at SSRN: <<https://ssrn.com/abstract=3346629>> or <<http://dx.doi.org/10.2139/ssrn.3346629>>; Linda Senden, *Soft Law in European Community Law* (Hart Publishing 2004) 45.

¹⁰ Francis Snyder, 'The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques' (1993) 56 MLR 19, 64.

¹¹ Nicolas Petit, 'How Much Discretion Do, and Should, Competition Authorities Enjoy in the Course of their Enforcement Activities? A Multi-Jurisdictional Assessment' [2010] 44 Concurrences 56.

Therefore, we will first analyse the Temporary Framework Communication (TFC) for assessing antitrust issues against the background of the framework of the application of Article 101 TFEU and its objective.¹² The application of the current framework to research and development cooperation will then be briefly discussed. Next, other legislative sector-related initiatives at the European level relevant to this paper will be referenced. Finally, the response of the European Competition Network (ECN) will be examined.

2.2. Temporary Framework Communication for assessing the non-economic interest of antitrust issues

2.2.1. Introduction

As indicated in the TFC adopted by the Commission, it applies to agreements that increase output in the most efficient way to address or avoid a shortage in the supply of essential products or services, such as those that are used to treat COVID-19 patients.¹³ The TFC covers the main criteria that the Commission will follow in assessing possible cooperation projects that are aimed at addressing the shortage of essential products and services during the COVID-19 outbreak, the enforcement priorities during this crisis and a temporary process' that the Commission has exceptionally set up to provide, as appropriate, *ad hoc* written comfort letters¹⁴ to undertakings in relation to specific and well-defined cooperation projects.¹⁵ The TFC can be revised and remains applicable until the Commission withdraws it. The TFC does not cover vertical relations,¹⁶ and how they will be included in the legal framework of Article 101 TFEU is not clear.

2.2.2. Three possibilities to include non-economic interests in the application of Article 101 TFEU

In applying Article 101 TFEU, there are three possibilities by which to include non-economic considerations. The first one is connected to a conclusion that Article 101(1) TFEU does not apply due to a lack of fulfilment of one of its conditions. More specifically, this may concern the situation in which a specific entity is not an undertaking because it does not carry out an economic activity¹⁷ or when there is a state prerogative involved.¹⁸ This possibility is not relevant to this analysis.¹⁹

Another possibility is the lack of or insignificant restriction of competition. According to the Horizontal Guidelines,²⁰ the restrictive effect on competition of the agreement means that:

It must have, or be likely to have, an appreciable adverse impact on at least one of the parameters of competition on the market, such as price, output, product quality, product variety or innovation. Agreements can have such effects by appreciably reducing competition between the parties to the agreement or between any one of them and third parties. This means that the agreement must reduce parties' decision-making independence,²¹ either due to obligations contained in the agreement which regulate the market conduct of at least one of the parties or by influencing the market conduct of at least one of the parties by causing a change in its incentives.²²

Nevertheless, if Article 101(1) TFEU is applicable, there exists the possibility of balancing the pro- and anticompetitive effects under the so-called 'rule of reason' (*Wouters* approach) or in applying Article 101(3) TFEU.²³

¹² Communication from the Commission Temporary Framework for Assessing Antitrust Issues Related to Business Cooperation in Response to Situations of Urgency Stemming from the Current Covid-19 Outbreak (2020) OJ C 116I, 7–10.

¹³ *ibid.*

¹⁴ The Directorate-General for Competition announced its availability to guide companies, associations and their legal advisors in order to assess specific cooperation initiatives with an EU dimension. The European Commission understands the need for their swift implementation in order to effectively tackle the coronavirus pandemic (in case of uncertainty about whether such initiatives are compatible with EU competition law).

¹⁵ Temporary Framework Communication (n 12) para 5.

¹⁶ Faustine Viala and David Kupka, 'Cooperation Between Companies in Times of Health Crisis' (2020) 2 *Concurrences* 113.

¹⁷ Case C-41/90 *Klaus Höfner and Fritz Elser v Macrotron GmbH* ECLI:EU:C:1991:161.

¹⁸ Case C-364/92 *SAT Fluggesellschaft mbH v. Eurocontrol* [1994] ECLI:EU:C:1994; Case C-481/07P *Selex Sistemi Integrati SpA. v Commission* [2009] ECLI:EU:C:2009:461.

¹⁹ E.g., for a discussion on the introduction of sustainability goals: Julian Nowag and Alexandra Teorell, 'Beyond Balancing Sustainability and Competition Law' (2020) 4 *Concurrences* 33.

²⁰ Communication from the Commission Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Co-operation Agreements, 2011/C 11/01.

²¹ See Case C-7/95 P *John Deere* ECLI:EU:C:1998:256, para 88; Case C-238/05 *Asnef-Equifax* ECLI:EU:C:2006:734, para 51.

²² Horizontal Guidelines (n20) para 27.

²³ Case C-309/99 *Wouters* ECLI:EU:C:2002:98.

In the first case, as specified by the Court of Justice of the European Union (ECJ) in respect to a national regulation adopted by the Bar of the Netherlands, such a regulation:

(...) does not infringe Article 85(1) of the Treaty [now Article 101 TFEU], since that body could reasonably have considered that that regulation, despite the effects restrictive of competition that are inherent in it, is necessary for the proper practice of the legal profession, as organised in the Member State concerned.²⁴

A similar approach was adopted by the ECJ in respect to the anti-doping rules of the International Olympic Committee which were not considered 'a restriction of competition incompatible with the common market, within the meaning of Article 81 EC [now Article 101 TFEU], since they are justified by a legitimate objective.' The ECJ emphasised that '[s]uch a limitation is inherent in the organisation and proper conduct of competitive sport and its very purpose is to ensure healthy rivalry between athletes.'²⁵

In the case of the application of paragraph 3 of Article 101 TFEU, as was already pointed out by the ECJ in 1977,

The powers conferred upon the Commission under Article [101(3) TFEU] show that the requirements for the maintenance of workable competition may be reconciled with the safeguarding of objectives of a different nature and that to this end certain restrictions on competition are permissible, provided that they are essential to the attainment of those objectives and that they do not result in the elimination of competition for a substantial part of the Common Market.²⁶

It is thus widely debated whether Article 101(3) should be applied to broader, *non-competition* considerations.²⁷ In this respect, the notion of a consumer as specified as a second condition of Article 101(3) TFEU becomes crucial. As indicated in the Guidelines on the Application of Article 101(3) TFEU,

The objective of Article 81 is to protect competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources. Competition and market integration serve these ends since the creation and preservation of an open single market promotes an efficient allocation of resources throughout the Community for the benefit of consumers.²⁸

Competition law primarily serves consumer welfare which, if interpreted broadly, includes the health and wellbeing of consumers. Here, competition law and health policies may go side by side.

2.2.3. What welfare is protected under Article 101 TFEU?

The core objectives of competition law are the promotion of the competitive process and the attainment of economic efficiency which enhance consumer welfare thanks to an efficient allocation of resources (correction of market failures).²⁹

The concept of consumer welfare in competition law is widely discussed, although it still remains unclear. It centres around the narrow or broad distinction of consumer welfare which Cseres calls the 'Chicago Trap'.³⁰ Bork introduced the concept of consumer welfare and associated it with the broad concept of total welfare.³¹ Consumer welfare is equated with consumer surplus which in turn is reduced to a price advantage.³² Including other variables in the competition assessment, such as quality or innovation, is subject of much

²⁴ Wouters (n23) para. 110.

²⁵ Case C-519/04 P *Meca-Medina* ECLI:EU:C:2006:492, para 45.

²⁶ Case 26/76 *Metro SB-Großmärkte GmbH & Co. KG v Commission of the European Communities* ECLI:EU:C:1977:167 para 21.

²⁷ Richard Whish and David Bailey, *Competition Law* (OUP 2018) 164. Case T-528/93, *Metropole télévision SA and Reti Televisive Italiane SpA and Gestevisión Telecinco SA and Antena 3 de Televisión v Commission of the European Communities* ECLI:EU:T:1996:99 para 118.

²⁸ Communication from the Commission – Notice – Guidelines on the Application of Article 81(3) of the Treaty (2004) OJ C 101, para 13.

²⁹ Katalin Judit Cseres, *Competition Law and Consumer Protection* (Kluwer Law International 2005) 307.

³⁰ *ibid*, 331.

³¹ Robert Bork, *The Antitrust Paradox* (2nd edn, Maxwell Macmillan International 1993) 91; Maria Ioannidou, *Consumer Involvement in Private EU Competition Law Enforcement* (OUP 2015) 22; Victoria Daskalova, 'Consumer Welfare in EU Competition Law: What is it (not) About?' (2015) 11 (1) *The Competition Law Review* 133.

³² Daskalova (n31) 137.

discussion.³³ In this context, total welfare is understood as the combination of the surpluses of all customers in the supply chain and consumers (end-users) regardless of whether they are legal or natural persons, whereas in consumer protection law, consumer is defined as ‘any natural person who (...) is acting for purposes which are outside his trade, business, craft or profession.’³⁴

The narrow understanding of consumer welfare refers to a limited group of final users.³⁵ Under a narrow understanding of this concept, agreements that lead to price increases and output limitations (including quantity, quality or range) are prohibited, while other values fall beyond the scope of Article 101 TFEU.³⁶

In competition law, the notion of consumers is broader than that used in consumer law. As defined in Commission Article 101(3) TFEU Guidelines:

The concept of “consumers” encompasses all direct or indirect users of the products covered by the agreement, including producers that use the products as an input, wholesalers, retailers and final consumers, i.e. natural persons who are acting for purposes which can be regarded as outside their trade or profession. In other words, consumers within the meaning of Article [101(3) TFEU] are the customers of the parties to the agreement and subsequent purchasers. These customers can be undertakings as in the case of buyers of industrial machinery or an input for further processing or final consumers as for instance in the case of buyers of impulse ice-cream or bicycles.³⁷

This distinction is important from the point of view of the theory of harm which refers to how competition and ultimately consumers will be harmed by specific activity relative to an appropriately defined counterfactual (description of the state of competition in the market in the absence of the conduct under scrutiny). In principle, it provides an explanation for why ‘a particular type of conduct constitutes a breach of competition law,’ so that specific harm to competition (and to consumers) which justifies the prohibition of this conduct can be indicated.³⁸

Claassen and Gerbrandy proposed to add to this discussion an inclusive welfare standard which directly takes into account the interests of consumers and the broadest non-welfarist *capability approach*³⁹ as developed by Sen⁴⁰ and Nussbaum.⁴¹ This approach focuses on specific functional capabilities of individuals, understood as ‘ability or opportunity to function in a certain way.’⁴² Among those capabilities, so-called *consumptive* capabilities, including capabilities for health, are distinguished. In this case, the efficiency argument, understood as the most efficient way to provide specific goods at the lowest possible price, can be applied (threshold level).⁴³ This threshold level creates a benchmark which can be used in competition analysis.

³³ See the debate on inclusion of sustainability goals, e.g., Simon Holmes, Dirk Middelschulte and Martijn Snoep (eds), *Competition Law, Climate Change & Environmental Sustainability* (Institute of Competition Law 2021); Guy Canivet, Julian Nowag, Lucas Peepers, Michael Ristianiemi, Ekaterina Rousseva, Alexandra Teorell, Maria Wasastjerna and Dirk Middelschulte, ‘Sustainability and Competition Law’ (2020) 4 Concurrences; Giorgio Monti and Jotte Mulder, ‘Escaping the Clutches of EU Competition Law – Pathways to Assess Private Sustainability Initiatives’ (2017) 42(5) European Law Review 635.

³⁴ Art. 2 (1), Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on Consumer Rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council (2011) OJ L 304, 64.

³⁵ Case T-168/01 *GlaxoSmithKline Services* [2006] ECLI:EU:T:2006:265 para 118; Joined Cases T213/01 and T214/01 *Österreichische Postsparkasse and Bank für Arbeit und Wirtschaft v Commission* [2006] ECR II-0000, para 115; Commission (EU), Notice Published Pursuant to Article 27(4) of Council Regulation (EC) No 1/2003 in Case COMP/C-3/39.530–*Microsoft* (Tying) [2009] OJ C242/20, para 8.

³⁶ Rutger Claassen and Anna Gerbrandy, ‘Rethinking European Competition Law: From a Consumer Welfare to a Capability Approach’ (2016) 12 (1) Utrecht Law Review 2.

³⁷ Communication from the Commission – Notice – Guidelines on the Application of Article 81(3) of the Treaty (2004) OJ C 101, para 84.

³⁸ <https://digitalfreedomfund.org/wp-content/uploads/2020/05/4_DFF-Factsheet-Theories-of-harm-in-competition-law-cases.pdf>; Hans Zenger and Mike Walker, ‘Theories of Harm in European Competition Law: A Progress Report (22 February 2021), in Jacques Bourgeois and Denis Waelbroeck (eds), *Ten Years of Effects-Based Approach in EU Competition Law*, available at SSRN <<https://ssrn.com/abstract=2009296>>.

³⁹ Claassen and Gerbrandy (n36) 1.

⁴⁰ Amartya Sen, *Commodities and Capabilities* (Oxford India 1985); Amartya Sen, *The Standard of Living* (1987) <https://tannerlectures.utah.edu/_documents/a-to-z/s/sen86.pdf> accessed 21 July 2021.

⁴¹ Martha Nussbaum, ‘Nature, Function and Capability: Aristotle on Political Distribution’ (1988) 1 Oxford Studies in Ancient Philosophy, 145–184.

⁴² Claassen and Gerbrandy (n36) 4.

⁴³ *ibid.* 6.

Finally, while analysing whether competition law could be applied to wage equality, Cengiz proposed the introduction of the citizen welfare standard. This standard should take into account the interests of groups

where competition rules and principles come into conflict with public interest or other policy objectives, such as cases involving industrial policy, environmental policy or other social objectives in which competition authorities and courts are yet to produce a consistent approach. As a result, in these cases, competition authorities and courts would be able to look at how the specific behaviour in question affects citizens in their entirety as a holistic group, rather than focusing on the interests of the narrow category of consumers.⁴⁴

Those two last proposals are interesting as they provide a certain flexibility for authorities and judges by taking into account different interests. They also allow the inclusion of arguments other than those that are efficiency related within the framework of the analysis of Article 101 TFEU.

2.2.4. The Temporary Framework and non-economic interests

In the TFC,⁴⁵ the European Commission underlined that ‘the response to emergencies related to the COVID-19 outbreak might require different degrees of cooperation, with a varying scale of potential antitrust concerns.’ This implies the need to apply the Commission’s Guidelines on the applicability of Article 101 of TFEU to horizontal cooperation agreements.⁴⁶

In respect to exchanges of commercially sensitive information related to measures to adapt production, stock management and potentially distribution will not be considered problematic or be an enforcement priority of the Commission in view of the emergency situation and its temporary nature – provided that they fulfil the following conditions: (1) they are designed and objectively necessary to increase output in the most efficient way to address or avoid a shortage in the supply of essential products or services during the COVID-19 pandemic; (2) they are temporary in nature, that is, to be applied only as long as there is a risk of shortage or, in any event, only during the COVID-19 outbreak; and (3) they do not exceed what is strictly necessary to achieve the objective of addressing or avoiding the supply shortage.⁴⁷ Such exchanges of information should be documented and made available to the Commission upon request. Another factor that will be taken into account by the Commission is whether or not the cooperation is encouraged and/or coordinated by a public authority (or carried out within a framework set up by a public authority). Similar conditions were included in the Competition & Markets Authority (CMA) Guidelines which states that measures taken by businesses should be:⁴⁸ ‘(1) appropriate and necessary in order to avoid a shortage, or ensure security, of supply; (2) are clearly in the public interest; (3) contribute to the benefit or wellbeing of consumers; (4) deal with critical issues that arise as a result of the coronavirus pandemic; and (5) are temporary.’⁴⁹

These conditions link the objective, which is avoidance of shortages of supply, with necessity and proportionality requirements which show a *rule of reason* type of approach referring to the condition of inherency as indicated in *Wouters* or *Meca Medina*.^{50,51} In spite of the temporary character (directly related to the pandemic), it is an interesting indication of how non-economic objectives could in practice be included in the Article 101 framework.

Moreover, the TFC explicitly allows cooperation in the case of an imperative request to undertakings from public authorities to temporarily cooperate in response to urgent situations related to the current

⁴⁴ Firat Cengiz, ‘The Conflict Between Market Competition and Worker Solidarity: Moving From Consumer To A Citizen Welfare Standard In Competition Law’ (2021) 41 Legal Studies 73; Anne C Witt ‘Public Policy Goals Under EU Competition Law – Now Is The Time to Set the House in Order’ (2012) 8 European Competition Journal 443.

⁴⁵ Commission, ‘Temporary Framework for assessing antitrust issues related to business cooperation in response to situations of urgency stemming from the current Covid-19 outbreak’ (Communication, 2020) OJ C 116 I/02 para 11.

⁴⁶ Communication from the Commission Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements (2011) OJ C 11/1.

⁴⁷ *ibid*, sec 15.

⁴⁸ CMA, Guidance, CMA approach to business cooperation in response to coronavirus (Covid-19) (25 March 2020), <<https://www.gov.uk/government/publications/cma-approach-to-business-cooperation-in-response-to-covid-19/cma-approach-to-business-cooperation-in-response-to-covid-19>> accessed 18 July 2021.

⁴⁹ Simon Holmes ‘Climate Change, Sustainability and Competition Law: Lessons from Covid-19’ Kluwer Competition Law Blog (23 April 2020) <http://competitionlawblog.kluwercompetitionlaw.com/2020/04/23/climate-change-sustainability-and-competition-law-lessons-from-covid-19/#_edn6> accessed 18 July 2021.

⁵⁰ *Wouters* (n23) para. 110.

⁵¹ *Meca-Medina* (n25) para 45.

COVID-19 outbreak. However, the Commission made a firm statement that it ‘will not tolerate conduct by undertakings that opportunistically seek to exploit the crisis as a cover for anticompetitive collusion or abuses of their dominant position (including dominant positions conferred by the particular circumstances of this crisis).’⁵² The examples of such conduct and relevant reactions of competition authorities will be discussed in the subsequent section.

The TFC does not specify which approach to inclusion of non-economic interests, for example, *Wouters* or Article 101(3) TFEU, was chosen by the Commission. However, it refers to the fact that the entry into force of Regulation 1/2003 and the introduction of the self-assessment system put an end to *comfort letters* on individual exemptions. Moreover, there is no discussion therein as to the understanding of the concept of consumers. It is interesting to note that the TFC does not mention the effects on the consumer wellbeing, seemingly focusing on public interests which confirms much broader approach than a consumer welfare.

Other conditions of Article 101(3) TFEU are not analysed. Therefore, the overview of the TFC could indicate that authorities followed the *Wouters* approach and the application of rule of reason in case of a contradiction between public interest and the application of competition law.

2.3. Research and Development

Neither TFC or ECN joint statements refer specifically to collaboration in the field of research and development (R&D) in respect to vaccines, diagnostic tests and potential medicines that are essential products to tackle the pandemic as mentioned in the TFC. Thus, the regular frameworks of Regulation 1217/2010 (R&D Regulation) and Regulation 1218/2010⁵³ (Specialisation Regulation)⁵⁴ do apply.⁵⁵ Those regulations are accompanied by horizontal guidelines.⁵⁶

The R&D Regulation defines categories of research and development agreements which the Commission normally regards as satisfying the conditions laid down in Article 101(3) of the Treaty.⁵⁷ Without entering into a specific analysis of the R&D Regulation exemption criteria, it must be mentioned that pursuant to Article 3(2), the research and development agreement must stipulate that all parties have full access to the final results of the joint research and development or paid-for research and development, including any resulting intellectual property rights and know how, for the purposes of further research, development and exploitation as soon as they become available. Moreover, the agreement can’t include any hardcore restrictions.

These two regulations are currently under the process of evaluation. On 6 May 2021, the European Commission published a Staff Working Document (SWD) concerning this evaluation. In spite of the fact that developments related to the COVID-19 outbreak are very recent and the impact of the pandemic has not been extensively dealt with in SWD,⁵⁸ it was recognised in the SWD that more clarification is needed with respect to standardisation agreements related to the COVID-19 crisis.⁵⁹ The most needed clarification indicated by NCAs and stakeholders refers to digital matters and sustainability.

2.4. Sector derogations

In addition to the TFC, the European Commission adopted exceptional derogations from the EU competition rules for six months for milk, live plants, flowers and potatoes as part of a package of measures to support the agri-food sector during the COVID-19 pandemic.⁶⁰ The package was adopted under Article 222 of

⁵² Communication from the Commission Temporary Framework for assessing antitrust issues related to business cooperation in response to situations of urgency stemming from the current Covid-19 outbreak, C/3200 [2020] OJ C 116/7.

⁵³ EU Regulation 1217/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of research and development agreements (2010) OJ L 335, 36.

⁵⁴ EU Regulation 1218/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of specialisation agreements (2010) OJ L 335, 43.

⁵⁵ Beatris Gielen and Carmen Verdonck, ‘Does Competition Law Allow Competing Researchers to Collaborate on COVID-19-related R&D?’ <<https://www.lexology.com/library/detail.aspx?g=6720f901-5321-4531-8571-0ee6a896bec5>> accessed 21 June 2021.

⁵⁶ Horizontal Guidelines (n46).

⁵⁷ Recital 3, Preamble, Regulation 1217/2010 (n52).

⁵⁸ Commission Staff Working Document Evaluation of the Horizontal Block Exemption Regulations (SWD [2021] 104 final) 5.

⁵⁹ *ibid*, 57, 105.

⁶⁰ Commission Implementing Regulation (EU) 2020/593 of 30 April 2020 authorising agreements and decisions on market stabilisation measures in the potatoes sector (2020) 140 OJ L 13; Commission Implementing Regulation (EU) 2020/594 of 30 April 2020 authorising agreements and decisions on market stabilisation measures in the live trees and other plants, bulbs, roots and the like, cut flowers and ornamental foliage sector (2020) 140 OJ L; Commission Implementing Regulation (EU) 2020/599 of 30 April 2020 authorising agreements and decisions on the planning of production in the milk and milk products sector (2020) 140 OJ L 37.

Regulation 1308/2013 which establishes a common organisation of the markets in agricultural products (CMO Regulation).⁶¹ Pursuant to Article 222, during periods of severe imbalance in markets, the Commission can adopt implementing acts. In terms of effect, Article 101 of the TFEU does not apply to agreements and decisions of recognised producer organisations, their associations and recognised interbranch organisations in any of the agricultural sectors covered by the Regulation provided that such agreements and decisions do not undermine the proper functioning of the internal market, are strictly aimed to stabilise the sector concerned and fall under certain specified categories of self-organisation of the market. In other words, this is a possibility to stabilise the market under specific, enumerated conditions.

The adopted package allows different categories of producers and farmers to take joint actions to conclude agreements and make common decisions. It concerns market withdrawals, free distribution, transformation and processing. In addition, storage, joint promotion and temporary planning of production in potatoes and live trees, as well as other plants, bulbs, roots and the like, were included. The package also added cut flowers and ornamental foliage sectors together with agreements and common decisions on planning the volume of raw milk to be produced. It requires notification to competent national authorities and the Member States of certain agreements and decisions to ensure that they do not undermine the proper functioning of the internal market and strictly aim to stabilise the relevant sectors. On 7 July 2020, the European Commission announced its adoption of a temporary derogation from the EU competition rules for the wine sector.⁶²

2.5. Position of National Competition Authorities

The European Competition Network also issued a joint statement on the application of the antitrust rules during the current COVID-19 crisis,⁶³ explaining how competition authorities can help companies deal with these unprecedented times. A similar statement by the International Competition Network was published on 8 April 2020.⁶⁴

The European Commission and the ECN's statements were endorsed by the various communications, statements and guidelines of NCAs on how they will apply competition law during the COVID-19 pandemic, among others by the Dutch,⁶⁵ Finnish,⁶⁶ and Romanian NCAs.⁶⁷ These statements concerned principles governing antitrust enforcement during the COVID-19 outbreak crisis. The message coming across in these statements is that authorities will be verifying whether or not undertakings are taking advantage of the current situation by cartelising or abusing their dominant positions. However, they will take into account responses to market failures similar to the approach of the TFC.⁶⁸ Therefore, it is clear that the fundamental principles of competition enforcement remain.⁶⁹

The ECN recognises that it will not 'actively intervene against necessary and temporary measures put in place in order to avoid a shortage of supply.' Last but not least, ECN reminds producers that the setting of maximum prices could be a legal tool to limit speculations.

⁶¹ Regulation (EU) No 1308/2013 of the European Parliament and of the Council of 17 December 2013 establishing a common organisation of the markets in agricultural products and repealing Council Regulations (EEC) No 922/72, (EEC) No 234/79, (EC) No 1037/2001 and (EC) No 1234/2007 (2013) 347 OJ L 671.

⁶² Commission Implementing Regulation (EU) 2020/975 of 6 July 2020 authorising agreements and decisions on market stabilisation measures in the wine sector [2020] 215 OJ L 13.

⁶³ ECN, 'Antitrust: Joint statement by the European Competition Network (ECN) on application of competition law during the Corona crisis' (2020) <https://ec.europa.eu/competition/ecn/202003_joint-statement_ecn_corona-crisis.pdf>.

⁶⁴ ICN Steering Group Statement: Competition during and after the Covid-19 Pandemic (2020) <<https://www.internationalcompetitionnetwork.org/featured/statement-competition-and-covid19/>> accessed 21 July 2021.

⁶⁵ ACM, 'ACM's oversight during the Coronavirus crisis' (2020) <<https://www.acm.nl/en/publications/acms-oversight-during-coronavirus-crisis>> accessed 21 July 2021.

⁶⁶ KKV, 'Exceptional circumstances caused by the coronavirus to affect the application of the Finnish Competition Act' (23 March 2020) <<https://www.kkv.fi/en/current-issues/press-releases/2020/23.3.2020-exceptional-circumstances-caused-by-the-coronavirus-to-affect-the-application-of-the-competition-act/>>. The authority announced that it will not intervene in measures that are necessary to ensure the availability of products. However, it stated that even during the state of emergency, it would resolutely intervene in cartels and in any abuse of dominance.

⁶⁷ Consiliul Concurenței, 'Companiile pot acționa astfel încât să evite lipsa unor produse esențiale' (2020) <http://www.consiliulconcurenței.ro/uploads/docs/items/bucket15/id15829/masuri_ce_mar_2020.pdf>.

⁶⁸ ECN, 'Antitrust: Joint statement by the European Competition Network (ECN) on application of competition law during the Corona crisis' (2020) <https://ec.europa.eu/competition/ecn/202003_joint-statement_ecn_corona-crisis.pdf>.

⁶⁹ Christian Ritz and Matthias Schalu, 'Crisis Cartels' in times of Covid-19: Lessons from former crises teach a cautious approach' (2020) 2 Concurrences 99.

2.6. Conclusion

The above analysis proves that the pandemic strongly influenced the way in which the interpretation of the scope of application of Article 101 TFEU is carried. The shifts in interpretation also led to change in the paradigm of the (non)triggering of the Commission's (and NCAs) enforcement activities in the case of an overarching public interest. In spite of its theoretically temporary character, the signalled need to clarify horizontal guidelines in respect to non-economic objectives shows that the existing regime should provide competition authorities and judges with more flexibility in a more permanent way, even in the case of horizontal cooperation that is aimed to carry out non-economic objectives, such as avoiding a shortage in the supply of essential products or services necessary during the pandemic.

3. Competition law in action during the COVID-19 pandemic

3.1. Introduction

In order to analyse which objectives were addressed by competition authorities during the COVID-19 pandemic, we will analyse in this section various actions undertaken by competition authorities against the background of consumer welfare objectives.

First of all, we will look at actions concentrated around the shortages of supply, then the treatment of crisis cartels will be scrutinised from the perspective as well of taking into account other interests than those of final users.

3.2. Shortages of supply

Due to the COVID-19 crisis, many concerns were raised with regard to the need to deal with capacity shortages. As the pandemic required new urgent instruments, such as vaccines, specific medicines and medical equipment, it was necessary for companies to cooperate in order to provide these items. In such a case, the assessment of cooperation should also take into account the related possible negative effects which result from competition enforcement.⁷⁰ The ultimate question that is raised in this respect is: what is the objective of such protection and is this a competitive process as such or is it broader societal welfare linked with health protection?

The European Commission in the form of comfort letters allowed Medicines for Europe (MfE) to engage in certain cooperation practices.⁷¹ The practices were aimed at effectively responding to challenges regarding shortages of medicines in the EU as a result of the COVID-19 outbreak. MfE made their request on behalf of their members and other pharmaceutical manufacturers that could be part of the cooperation. The cooperation practices are aimed at improving supply and increasing production in the most expedient and effective way, and possibly also at improving distribution. The Commission underlined that 'the cooperation is necessary to achieve the increases in production and to improve the supply of those urgently needed COVID-19 medicines across the EU in the most efficient way.'⁷² Its accord was conditioned as follows: that the cooperation is open to any pharmaceutical manufacturer willing to participate; all the agreements must be registered and shared with the Commission; the exchange of confidential business information among manufacturers should be limited to what is indispensable for effectively achieving the aims; and, finally, the cooperation should be limited in time 'until the risk of shortages, including a possible second wave of the COVID-19 epidemic, is overcome.'⁷³

In March 2021, the Commission issued a second comfort letter addressing bottlenecks in the current production of COVID-19 vaccines and accelerating the use of additional available capacities across Europe.⁷⁴ The letter specifically addressed cooperation at a Matchmaking Event where commercial information is supposed to be exchanged. This event is organised by consortium partners, and the European Commission will be the host of the event. 'The Matchmaking Event provides the B2Match platform for manufacturers of relevant raw materials, companies with relevant production capacities, or other key inputs for COVID-19

⁷⁰ John Noble, 'Competition Law in Times of Crisis – Tackling the Covid-19 Challenge: A Producer Perspective' (2020) 8 *Journal of Antitrust Enforcement* 293.

⁷¹ Pablo Ibáñez Colomo and Andriani Kalintiri, 'The Evolution of EU Antitrust Policy: 1966–2017' (2020) 83 *Modern Law Review* 321, available at SSRN <<https://ssrn.com/abstract=3527419>>.

⁷² Commission, 'Comfort letter: Coordination in the pharmaceutical industry to increase production and to improve supply of urgently needed critical hospital medicines to treat Covid-19 patients' D(2020/044003) 3.

⁷³ *ibid.*

⁷⁴ Commission, 'Comfort letter: cooperation at a Matchmaking Event – Towards COVID19 vaccines upscale production' COMP/E-1/GV/BV/nb (2021/034137).

vaccines to engage with the developers and manufacturers of the vaccines seeking to match their demand with the supply of potentially scarce inputs.' Participants include companies operating at the same (horizontal) or different levels of supply chains.⁷⁵ The Commission specified two sets of conditions to prevent infringements of Article 101 TFEU. The first one concerns matchmaking events between any companies, regardless of whether they are competitors or not. The second one concerns meetings between direct competitors. In the first case, any exchange of confidential business information is conditioned upon the indispensability for 'effectively resolving the supply challenges.' In the latter case, the sharing of 'any confidential business information regarding [...] competing products, in particular information relating to prices, discounts, costs, sales, commercial strategies, expansion plans and investments, customers list, etc.' is excluded. Moreover, direct competitors are bound to keep records of discussed topics.⁷⁶

Historically, the question of how to deal with shortages of supply in cases of companies that enjoy a dominant position was dealt with in a decision of the European Commission dating to the oil crisis,⁷⁷ in which the Commission considered that economic restrictions existing at the moment were able to significantly alter commercial relations between suppliers with substantial market shares and their customers and considered that BP infringed Article 102 TEU by reducing substantially and proportionately its supplies to one of its customers (ABG) to a much greater extent than in relation to all its other customers and of not being able to provide any objective reasons for its behaviour.⁷⁸ The Court disagreed with the Commission and took into consideration the general shortage of supply, the difficult position in which the whole of the Dutch market was placed, and that the application of the reduction rate by BP in respect to ABG would be identical or very close to that applied to its traditional customers and would have resulted in a considerable diminution of the deliveries which those customers expected.⁷⁹ This means that the reduction of supply during times of crisis is possible; however, it cannot be discriminatory and disproportionate. Moreover, the crisis could provide an objective justification for the restriction.⁸⁰

The aforementioned developments show that authorities could accept cooperation and an exchange of information even between competitors. However, this acceptance is strictly related to the crisis as there are some broader benefits resulting from cooperation. Nevertheless, a supportive approach is worth considering in post-crisis times as in some cases, such as innovative or green initiatives, cooperation between undertakings could be desirable.

3.3. Horizontal cooperation during crisis

In contrast to the well-established treatment of horizontal cooperation even in cases of sector economic crises⁸¹ as *per se* violations of Article 101 TFEU, undertakings may resort to horizontal agreements in the context of market disturbances.⁸¹ What is interesting in analysing the approaches of competition authorities to previous crises is the fact that for previous so-called 'crisis cartels',⁸² the major problem was the overcapacity in specific sectors. However, even crisis cartels have never been treated in a more lenient way by the European Commission, as the underlying principle is that in spite of a crisis, undertakings must act independently in the market. Article 101(1) TFEU refers to potential effects of the agreement.⁸³ Moreover, cartel arrangements are perceived as object restrictions.⁸⁴ Therefore, it is difficult to justify the existence of a crisis cartel.

Crisis cartels are defined in two ways, as 'a cartel that was formed during a severe sectoral, national, or global economic downturn without state permission or legal sanction' and as 'situations where a government has permitted, even fostered, the formation of a cartel among firms during severe sectoral, national, or

⁷⁵ *ibid* 2.

⁷⁶ *ibid* 3.

⁷⁷ ABG oil companies operating in the Netherlands (Case IV/28.841) Commission Decision 77/327/EEC [1977] OJ L 117/1. Overturned by the ECJ, Case 77/77 *Benzine en Petroleum Handelsmaatschappij BV and others v Commission of the European Communities* [1978] ECLI:EU:C:1978:141, para 19.

⁷⁸ Frédéric Jenny, 'Competition Law Enforcement and the Covid-19 Crisis: Business As (Un)usual?' (2020) SSRN 6 accessed 22 February 2021

⁷⁹ Case 77/77 *Benzine en Petroleum Handelsmaatschappij BV and others v Commission of the European Communities*, paras 33 and 34.

⁸⁰ Ioannis Kokkoris, *Antitrust Law Amidst Financial Crises* (Cambridge University Press 2010) 494.

⁸¹ Case 209/07 *Competition Authority v Beef Industry Development Society Ltd and Barry Brothers (Carrigmore) Meats Ltd (BIDS)* [2008] ECLI:EU:C:2008:643; Ritz and Schalu, (n69) 99; Siún O'Keeffe, 'Competition in a Time of Corona: 'Primum non nocere' (2020) *Concurrences* 96.

⁸² Kokkoris (n80).

⁸³ Whish and Bailey (n27).

⁸⁴ *BIDS* (n81) para 21.

global economic downturns, or when national competition law allows for the creation of cartels during such downturns.⁸⁵ They emerge on the markets when consumer demand decreases as a consequence of unfavourable market conditions.⁸⁶ They are mainly linked to 'structural overcapacity when, over a long period, undertaking experience a reduction in their capacity utilization and a drop in output and rise in operating losses, and when there is no sign of possible recovery in the medium term.'⁸⁷

In the case of crisis cartels, it has been argued that in the absence of industry-wide agreement on capacity reduction, 'smaller firms may exit the market, leaving a limited number of choices for customers as well as inducing unemployment. In such conditions, firms may operate at inefficient output levels and may even incur losses.'⁸⁸ An important effect of a crisis and a potential justification for crisis cartels is related to potential employment inducement. The European Commission in their XXIII Report on Competition Policy noted this by indicating that the Commission will authorise sectoral agreements provided that 'the reductions in capacity are likely in the long run to increase profitability and restore competitiveness and if the coordination of closures helps to mitigate, spread and stagger their impact on employment.'⁸⁹ In such a way, reorganisation should be aimed at stabilisation and the securing of the employment situation.⁹⁰ With the entry into force of the Lisbon Treaty, the inclusion of social objectives, including full employment, strengthens the position of workers in times of reorganisation. Thus, additional social arguments come into play.

To illustrate the need to include workers, suppliers or customers of specific services, it is interesting to note that the Netherlands Authority for Consumers and Markets (ACM) indicated that in the case of time-limited agreements, entrepreneurs of, for example, perishable food as well as flower producers, could exchange information due to the closure of recipients of their products (restaurants, supermarkets) in order to effectively allocate these products. In the event of threats to supply to supermarkets, ACM has allowed joint actions regarding food distribution.⁹¹

Another interesting illustration of an attempt to balance the interests of consumers and entrepreneurs who, due to the coronavirus epidemic, have failed to meet their obligations towards consumers and have issued vouchers that can be used later by consumers is the establishment of the rules for such a voucher issuing scheme by the ACM. In practice, this scheme means a horizontal agreement between entrepreneurs to avoid bankruptcy. At the same time, it provides consumers with a way to recover their funds.⁹²

Moreover, the Bundeskartellamt (BKA) sent a comfort letter to the German Association of the Automotive Industry. It includes a model process for individual restructuring and conditions for coordinated production restarts. Its objective is to assist swift restructuring of firms that are in financial distress due to the COVID-19 pandemic. A best practice guide will be issued to ensure the effective allocation of resources.⁹³ This comfort letter presents an interesting example of the consideration of the interests of employees, which is a wider group of individuals than just consumers.

The individual actions of the European Commission and the NCAs show that interests of other entities besides the final users or 'direct or indirect users of the products covered by the agreement, including producers that use the products as an input, wholesalers, retailers and final consumers' are taken into account, thereby proving the application of the broader concept of consumer welfare.

As concluded by Kokkoris in respect to crisis cartels during a financial crisis, sectoral restructuring plans were accepted provided that the criteria of paragraph 3 of Article 101 TFEU were met.⁹⁴ However, the ultimate question remains on the interpretation of the notion of a consumer included in Article 101(3) point 2 TFEU, which definitively excludes such groups as workers. In case of a conflict between efficiency objectives and non-economic (public interest) goals, it could be proposed that instead of applying Article 101(3) TFEU, the interpretation should follow the *Wouters* approach in combination with a citizens' welfare

⁸⁵ OECD, Crisis Cartels, DAF/COMP/GF(2011)11 9; Simon J. Evenett, 'Background Note' DAF/COMP/GF(2011)11 20.

⁸⁶ Ioannis Kokkoris, 'Should Crisis Cartels Exist Amid Crises?' 55 (2010) 4 The Antitrust Bulletin 727.

⁸⁷ Kokkoris (n80) 457.

⁸⁸ *ibid.*, 261.

⁸⁹ XXIII Report on Competition Policy available, para 85 (i).

⁹⁰ *Ibid.*, para 88.

⁹¹ Martijn Snoep, 'Competition Enforcement in Times of Crisis – A Perspective from the ACM' (2020) 8 Journal of Antitrust Enforcement 268.

⁹² *ibid.*, 269.

⁹³ Latham & Watkins, 'Impact of Covid-19 New Exemptions under Antitrust Law' (2020) <<https://www.lw.com/thoughtLeadership/Covid-19-impact-new-exemptions-under-antitrust-law>> accessed 21 July 2021.

⁹⁴ Kokkoris (n80) 347.

standard and conclude that public interest objectives, such as health related ones, justify non-application of Article 101(1) TFEU. Depending on policy priorities, these objectives could be included in the conditions, such as those proposed in the TFC or by the CMA, and emphasise the necessity and proportionality of the envisaged undertakings' actions.

3.4. Conclusion

It appears that the NCAs include broader categories of objectives than those indicated by a pure economic efficiencies analysis while applying Article 101 TFEU. Moreover, various interventions show that the group protected by competition authorities is broader than consumers as defined in Article 101(3) Guidelines. This crisis situation proves that the authorities should dispose of a certain margin of discretion in taking into account non-economic goals and allowing for cooperation that otherwise would be prohibited.

4. Conclusion – towards a better inclusion of non-economic objectives?

The purpose of this article was to analyse the actions taken by competition authorities of the European Union during the coronavirus pandemic against the backdrop of a broader discussion of the objectives of Article 101 TFEU. The analysed activities indicate that the postulated necessity to take into account not only the economic aspects of competition law is justified in terms of the crisis. The need to allow undertakings to cooperate to counter shortages in the market or the development of new drugs or innovative methods in light of COVID-19 indicates that these areas of EU competition law could benefit from an application of the *Wouters* approach to public interest cases. As shown by the intervention of competition authorities, the maximisation of efficiencies and gains as postulated by economists cannot be an end in themselves but should be applied and interpreted in accordance with the overarching public interest which may also allow the use of other non-economic criteria.

Therefore, in order to ensure the legal security of undertakings and their equal treatment by competition authorities, it is postulated that this type of approach to the application of competition law should be associated with an appropriate definition of those public interest objectives in Commission guidance communication. In case of a conflict between such non-economic interests and Article 101 TFEU, the conditions of the application of Article 101 TFEU should be the following: (1) the non-economic objective is clearly and specifically formulated; (2) the agreement (and the potential restriction of competition) is necessary to achieve this objective; and (3) the agreement (and the potential restriction of competition) does not exceed what is strictly necessary to achieve the objective.

Competing Interests

The author has no competing interests to declare.

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