Klára Drličková (ed).

COFOLA INTERNATIONAL 2019

Private Enforcement of Antitrust Law and Unfair Competition with Cross-border Element

Conference Proceedings

MASARYKOVA UNIVERZITA

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Brno 2019

Vzor citace:
DRLIČKOVÁ, Klára (ed.) *Cofola International 2019 :* Private Enforcement of Antitrust Law and Unfair Competition with Cross-Border Element : *Conference Proceedings*. 1st editions. Brno: Masaryk University, 2019. 69 p. Publications of the Masaryk University, theoretical series, editions Scientia, File No. 675. ISBN 978-80-210-9491-8 (print), 978-80-210-9492-5 (online), ISSN 2464-8485.

CIP - Katalogizace v knize

Cofola international 2019 : private enforcement of antitrust law and unfair competition with cross-border element : conference proceedings / Klára Drličková (ed.). -- 1st edition. -- Brno: Masaryk University, 2019. 69 stran. -- Publications of the Masaryk University, theoretical series, edition Scientia ; File. No. 675. ISBN 978-80-210-9491-8 (print), 978-80-210-9492-5 (online), ISSN 2464-8485

34* 341.61* 346.546* 346.545* (062.534)*
- právo
- mezinárodní spory
- právo hospodářské soutěže
- nekalá soutěž
- sborníky konferencí

34 – Právo [16]

This publication was written at Masaryk University as part of the project MUNI/B/1206/2018 “COFOLA INTERNATIONAL 2019” with the support of the Specific University Research Grant, as provided by the Ministry of Education, Youth and Sports of the Czech Republic in the year 2019.

The conference proceedings follows the Principles of publication ethics for the conference proceedings published by the Faculty of Law of the Masaryk University that are available at: http://cofola.law.muni.cz/content/en/publication-ethics/

Reviewers:
Mgr. Ivan Cisár, Ph.D.
Mgr. Slavomír Halla, Ph.D.

ISBN 978-80-210-9491-8
ISBN 978-80-210-9492-5 (online ; pdf)
ISSN 2464-8485

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Preface

The conference "COFOLA = Conference for Young Lawyers" is annually organized by the Masaryk University, Faculty of Law from 2007. The main aim of this conference is to give floor to the doctoral students and young scientists at their early stage of career and enable them to present the results of their scientific activities.

Since 2013 COFOLA has been enriched by a special part called "COFOLA INTERNATIONAL". COFOLA INTERNATIONAL focuses primarily on issues of international law and the regulation of cross-border relations and is also oriented to doctoral students and young scientists from foreign countries. COFOLA INTERNATIONAL contributes to the development of international cooperation between students and young scientists from different countries. It constitutes the platform for academic discussion and develops scientific and presentation skills of young scientists. Such a platform for scientific debate beyond the boundaries of one country contributes to the global view on the law, which is so important in current days.

COFOLA INTERNATIONAL 2019 focused on the Private Enforcement of Antitrust Law and Unfair Competition with Cross-border Element. Same as in previous years the participants from several countries had very lively discussions and covered various current and interesting topics. The conference proceedings unfortunately contain only a limited number of papers. There were more applications to the conference and more oral presentations. Only the following papers have been submitted in written form and have been recommended by reviewers for publication.

Klára Drličková

(scientific and organizational guarantor of COFOLA INTERNATIONAL)

About the Authors

Enrico Verdolini is a Ph.D. student in Constitutional Law in Alma Mater Studiorum - University of Bologna. He studies the Italian Constitution with particular attention to economic relationships, competition, and public politics. His project of research deals with the connection between market, competition and inequality, from the point of view of Constitutional Law and Antitrust Law. His latest studies involve the Italian Competition Authority, its position, and its functions in the constitutional framework of the Republic. He is studying, in particular, the Constitutional Court's decision 13/2019, about the features of the Italian Competition Authority and his nature of public administration. He has written a comment about this case, focusing the attention on the Italian Competition Authority's access to constitutional justice. He has also published comments about the ILVA case (ILVA Taranto is the most important steelworks in Europe): he has written an article about Constitutional Court's decision 182/2017, published in *Forum di Quaderni Costituzionali* (Forum of Constitutional Papers), and a short comment about Constitutional Court's decision 58/2018, published in *Il Diritto Costituzionale nella Giurisprudenza* (Public Law in the Jurisprudence).

Kateřina Zabloudilová is a Ph.D. student at Faculty of Law, Masaryk University. She mainly focuses on International Trade Law, arbitration, ADR and Private International Law. She gained practical experience in several legal internships and participated in Vis. To broaden her horizons, she spent one school year studying at Aix-Marseille University in France and volunteered as an English teacher in Indonesia. Full list of her publications is available at: https://www.muni.cz/en/people/421137-katerina-zabloudilova/publications

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List of Abbreviations

CFREU	Charter of Fundamental Rights of the European Union
Directive 2014/104/EU	The Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union
ECHR	European Convention on Human Rights
EU	European Union
New York Convention	United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958
Regulation 1/2003	Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of rules on competition laid down in Articles 81 and 82 of the Treaty
TEC	Treaty Establishing European Communities
TFEU	Treaty on the Functioning of the European Union
UDHR	Universal Declaration of Human Rights
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL Model Law	UNCITRAL Model Law on International Commercial Arbitration, with amendments as adopted in 2006

Constitutional Questions about the Directive on Antitrust Damages Action: The Rule of Binding Effect of National Competition Authorities' Decisions

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Abstract

The Directive 2014/104/EU fixes specific rules about the relationship between antitrust public enforcement and antitrust private enforcement. More specifically, Article 9(1) of the Directive states that National Competition Authorities' decisions has got binding effects in civil litigation before a judge of the same Member State. Article 9(1) raises different doubts about its consistency with the principles of separation of constitutional powers and fair trial, affirmed by the ECHR, the EU Charter of Fundamental Rights and the Member States' Constitutions. There could be different possible solutions. Which is the judge's role in the context of antitrust private enforcement?

Keywords

Antitrust Private Enforcement; Binding Effect of National Competition Authorities' Decisions; Right of Defence; Separation of Powers.

1 Introduction: Two Constitutional Questions about the Article 9(1) of the Directive 2014/104/EU

The Directive 2014/104/EU establishes important rules about the coordination between the two pillars of European antitrust enforcement:

the aim is to ensure the effective application of the Articles 101 and 102 of the TFEU.[1]

The Directive 2014/104/EU fixes the legal value of final decisions of National Competition Authorities, in the context of the antitrust private enforcement, distinguishing between two hypothetical situations.

First of all, Article 9(1) of the Directive 2014/104/EU states that any national civil court must recognize a binding effect to the definitive decision of the same Member State's National Competition Authority.

Article 9(1) is valid for National Competition Authorities' final decisions: these decisions cannot be appealed before a judge, because the relative term to claim is expired or the administrative act was confirmed by judge's ruling.

Article 9(2) adds then another rule to its abovementioned first part: any decision adopted from Member States' National Competition Authorities have got a legal value of *prima facie* evidence before a different Member State's national civil court: it means that these decisions have no binding effect. Through the Directive 2014/104/EU, they gain, however, a remarkable role of evidence in the context of civil judge's evaluation.

Article 9(1) of the Directive 2014/104/EU, in particular, raises two different constitutional questions. The first question refers to the principle of fair

1 The network composed of Member States' Competition Authorities and the European Commission is responsible for antitrust public enforcement: the most important aim of the first pillar is to ensure markets' equilibrium, sanctioning certain category of undertakings' behaviours, like abuses of dominant position and agreements that are restrictive of competition. It means that the European Competition Network pursues the goal of public interest's realization. In this general context, Member States' civil judges can take a complementary role in the application of European antitrust law. The task of the second pillar, the antitrust private enforcement, is satisfying private interests damaged by anticompetitive conducts: antitrust rules can be invoked by private citizens or undertakings before the civil judge, in order to obtain a serious restoration. It is possible to affirm that these two pillars, the first one consisting in the activity of the European Competition Network, the second one based on the functions of Member States' civil judges, can pursue the scope to realize optimal enforcement of European antitrust law, working in a complementary way. WHISH, Richard and David BAILEY. *Competition Law*. 8th ed. Oxford: Oxford University Press, 2018, pp. 306–324; DANIELE, Luigi. *Law of the Common Market*. Milano: Giuffrè Editore, 2016, pp. 313–317; FATTORI, Pietro and Mario TODINO. *Competition Law in Italy*. Bologna: Il Mulino, 2010, pp. 481–523; DUNNE, Niham. *The Role of Private Enforcement within EU Competition Law*, University of Cambridge Faculty of Law Research Paper, 2014, Vol. XVI, No. 36, pp. 143–187; WILS, Wouter P. *Private Enforcement of EU Antitrust Law and its Relationship with Public Enforcement: Past, Present and Future*, World Competition. 2017, Vol. XL, No. 1, pp. 3–45.

trial and the concept of equality of arms between the disputing parties: can the binding effect of the decision limit the counterpart's right of defence? This is an important issue that involves, most of all, the exercise of a fundamental right of the citizen.

The second question refers to the problem of the consistency of the Article 9(1) of the Directive 2014/104/EU with the principle of independence of the judiciary: can the judge be subjected to the binding decision of a National Competition Authority? This issue involves the idea of separation of public powers. In general terms, can the judiciary branch of the State be subjected to the administrative branch?

The method of the present research is to analyse both the constitutional questions raised by the transposition of the Article 9(1) of the Directive 2014/104/EU. The study will concern, first of all, the nature of the constitutional principles that are involved. In a second moment, the analysis will focus on the problems of the consistency of the Article 9(1) with these constitutional values from a European perspective. It will be important, most of all, to determine the extension of the limitations of these constitutional principles by the transposition of the Article 9(1): the study will try to assess these questions through the standard methodology of proportionality test.

The research will use as references the core principles established in the UDHR, the ECHR as amended by the Protocols Nos. 11 and 14 supplemented by the Protocols Nos. 1, 4, 6, 7, 12, 13 and 16, the CFREU and of the constitutions[2] of the EU Member States (the analysis will focus on the main models of constitution). The research will also refer to the relevant case law of the European Court of Human Rights, of the Court of Justice and of the national constitutional courts (in particular, two relevant cases from the Republic of Italy and the Republic of Bulgaria).

The aim of the present study is to propose a possible solution to the constitutional questions that are connected to the Article 9(1) of the Directive 2014/104/EU, coherently with the sources adopted as references. The final scope is to solve the critical issues and to facilitate the application of antitrust law.

2 MORRONE, Andrea. *Constitutions and European Law.* Napoli: Editoriale Scientifica, 2014; PALICI DI SUNI PRAT, Elisabetta, Fabrizio CASSELLA and Mario COMBA. *European Member States' Constitutions.* Padova: Cedam, 2001.

2 Article 9 of the Directive 2014/104/EU and the Debate about the First Proposal of the White Paper

The White Paper on Damages Action for Breach of the EU Antitrust Rules[3] ("White Paper") was published by European Commission on 2 April 2008.[4] It paved the way to the Directive 2014/104/EU.

The White Paper contained the following draft of the relevant rule: *"National courts that have to rule in actions for damages on practices under Article 81 or 82 on which an N.C.A. in the E.C.N. has already given a final decision finding an infringement of those articles, or on which a review court has given a final judgment upholding the N.C.A decision or itself finding an infringement, cannot take decisions running counter to any such decision or ruling."*

The text of the White Paper recognized a binding effect to the decisions of any Antitrust Authority of the European Competition Network in the context of civil litigation. It did not make a distinction between two different hypothetical situations. The rationale of White Paper's original formulation is different from the Article 9(1) of the Directive 2014/104/EU.

The White Paper text was based on a specific model, namely the Article 16(1) of the Regulation 1/2003.[5] The said provision states: *"When national courts rule on agreements, decisions or practices under Article 81 or Article 82 of the Treaty which are already the subject of a Commission decision, they cannot take decisions running counter to the decision adopted by the Commission."*

The first proposals of the Article 9 of the Directive 2014/104/EU's draft followed the same perspective of the White Paper and of the Article 16(1) of the Regulation 1/2003:[6] the original intention was to adopt a directive that could recognize the same binding effect before civil courts to the decisions

3 *White Paper on Damages Action for Breach of the EC Antitrust Rules* [online]. European Commission – Competition [cit. 3. 9. 2019].

4 WILS, Wouter P. Private Enforcement of EU Antitrust Law and its Relationship with Public Enforcement: Past, Present and Future. *World Competition*, 2017, Vol. XL, No. 1, p. 22.

5 NAZZINI, Renato. The Effect of Decision by Competition Authorities in the European Union. *Italian Antitrust Review,* 2015, Vol. II, No. 2, p. 68.

6 MEROLA, Massimo and Leonardo ARMATI. The Binding Effect of NCA Decisions under the Damages Directive: Rationale and Practical Implications. *Italian Antitrust Review,* 2016, Vol. III, No. 1, pp. 95-97.

rendered by any European Network's National Competition Authority. This proposal was criticized by some Member States and, most of all, from the Independent Authorities of Italy and France.

From Italian Authorities'[7] perspective, as pointed out in the document with the title Italian Authorities' Observations about the European Commission's White Paper in Matter of Actions for Damages for Infringement of the European Antitrust Rules ("Italian Authorities' Document"), the White Paper proposed rules that could reduce the extension of the right of defence in the context of civil litigations.

According to the Italian Authorities' Document, first of all there was a problem about the application of the rule of binding effect to the Italian Competition Authority's decisions before the Italian civil court. Moreover, the same question was present in the case of the application of the rule to other Member States' Competition Authorities decisions.[8] These issues involved the consistency of the proposals of the White Paper with a right, the right of defence, characterized by a strong protection accorded by the Article 24 and Article 111 of the Constitution of the Italian Republic[9] ("Italian Constitution").

French Authorities, in their document The White Paper about Actions for Damages and Interests for Infringements of the European Laws about Agreements and Abuses of Dominant Position – French Authorities' Observations[10] ("French Authorities' Document"), emphasized that rules contained in the White Paper could have a further effect in the context of legal order: *"A similar measure could modify in a deep way the inner legal order*

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7 *Italian Authorities' Observations about the European Commission's White Paper in Matter of Actions for Damages for Infringement of the European Antitrust Rules* [online]. European Commission – Competition [cit. 3. 9. 2019].

8 Italian Authorities' document about White Paper affirmed: *"The White Paper would like to rule the binding nature of the decisions of the National Competition Authorities in civil proceedings for damages, not only within the Member State where the decisions are issued, but also in respect of all the other Member States. In this regard, the Italian Authorities are strongly against both of these extensions (…)."*

9 REPUBLIC OF ITALY. Constitution of the Italian Republic. *Senato della Repubblica Italiana* [online]. [cit. 3. 9. 2019].

10 *The White Paper about Actions for Damages and Interests for Infringements of the European Laws about Agreements and Abuses of Dominant Position – French Authorities' Observations* [online]. European Commission – Competition [cit. 3. 9. 2019].

of the Member States, as France, in which the value of ruling is not accorded to an act issued from an administrative instance, as National Competition Authority (…).”[11] So, French Authorities underlined, in particular, the consequences of the introduction of White Paper's draft, containing rules dealing with the equilibrium of powers: French Authorities' Document referred without distinction to the two cases of application of the rule of binding effects, as in the case of Italian Authorities' document.

It is important to consider that the original formulation of the Directive 2014/104/EU was not adopted in the final text. Following to the criticisms raised up by Italian and French Authorities[12], the Council changed partially the text of the Article 9, in particular Article 9(2).

After the modification, the constitutional questions raised by the first version of the Article 9 were partially solved and, most of all, confined to the Article 9(1). However, the analysis will focus only on the actual version of the Article 9(1) that regards the relationship between the civil judge and the National Competition Authority of the same Member State: the constitutional questions now involve only institutions belonging to the same national legal order.

3 The First Constitutional Question about the Transposition of the Directive 2014/104/EU: The Alleged Violation of the Right of Defence

The first constitutional question raised on the Article 9(1) of the Directive 2014/104/EU refers to the consistency of the same Directive with counterparts' right of defence in the context of civil litigation.

The principle of fair trial is stated by different international sources, first of all Article 8 and Article 10 of the UDHR, Article 5 and Article 6

11 A document with a similar perspective was issued by Portuguese Competition Authority. See *Comment of the Portuguese Competition Authority on the White Paper about Actions for Damages for Infringements of the European Antitrust Laws* [online]. European Commission – Competition [cit. 3. 9. 2019]. The Portuguese Competition Authority affirmed that: “*The rule proposed by the Commission can be considered in contrast with the principles of separation of powers and independence of judges.*”

12 SQUILLANTE, Francesco. A Brief Overview of the Directive on Antitrust Damages Actions. *Italian Antitrust Review,* 2014, Vol. II, No. 1, p. 161.

of the ECHR and Article 47 of the CFREU; it is affirmed also by the constitutions of the EU Member States.[13]

The principle of fair trial implies the concept of equality of arms. The respect of these principles is important not only in the context of criminal cases, but also in the context of civil cases.

The jurisprudence of the European Court of Human Rights evidenced as equality of arms implies that *"each party must be afforded a reasonable opportunity to present his case – including his evidence – under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent"*. However, a fair trial should be characterized by a fair balance between the parties.[14]

Initially, the Court of Justice transposed in its jurisprudence this interpretation of the Article 6 of the ECHR.[15] In a second moment, the Court of Justice started to apply in its decisions Article 47 of the CFREU that is similar to the Article 6 of the ECHR.[16]

The first constitutional question that this study analyses is if the Article 9(1) of the Directive 2014/104/EU, that grants binding effect for National Competition Authorities' decisions, can undermine the counterpart's right of defence, causing a violation of the principle of equality of arms.

Before the Directive 2014/104/EU, the subject (a private consumer or an undertaking[17]) that was harmed by an antitrust law infringement,

13 MORRONE, Andrea. *Constitutions and European Law.* Napoli: Editoriale Scientifica, 2014, pp. 286–287 (Article 111 of the Constitution of the Italian Republic), pp. 499–500 (Article 103 of the Fundamental Law of the German Federal Republic), p. 581 (Article 24 of the Constitution of the Kingdom of Spain); PALICI DI SUNI PRAT, Elisabetta, Fabrizio CASSELLA and Mario COMBA. *European Member States' Constitutions.* Padova: Cedam, 2001.

14 See e.g. judgment of European Court of Human Rights of 27 October 1993, *Dombo Beheer b.v. v. the Netherlands*, Application No. 14448/88. In: *HUDOC* [online]. [cit. 3. 9. 2019].

15 See judgment of the Court of Justice of 2 December 2009, *European Commission v. Ireland and others*, case C-89/08. In: *EUR-Lex* [online]. [cit. 3. 9. 2019]; judgment of the Court of Justice of 26 June 2007, *Ordre des barreaux francophones et germanophone and others v. Conseil des Ministres*, case C-305/05. In: *EUR-Lex* [online]. [cit. 3. 9. 2019].

16 See e.g. judgment of the Court of Justice of 6 November 2012, *European Commission v. Otis and others*, case C-199/11. In: *EUR-Lex* [online]. [cit. 3. 9. 2019]; judgment of the Court of Justice of 16 May 2017, *Berlioz Investment Fund SA v. Directeur de l'administration des contributions directes*, case C-682/15. In: *EUR-Lex* [online]. [cit. 3. 9. 2019].

17 SCUFFI, Massimo. Antitrust Damages Actions: The New Framework of the Legislative Decree 3 of 2017 that Transposed the Directive 2014/104/EU and Further European Perspectives. In: BENACCHIO, Gian Antonio and Michele CARPAGNANO. *Institutional Assets and Perspectives of Application of the Private Antitrust Enforcement in the European Union.* Napoli: Editoriale Scientifica, 2018, p. 84.

as for example abuse of dominant position or cartels, started the civil litigation from a weak position. The injured party needed information that were not easy to collect. It was necessary a complex investigation,[18] through technical instruments, in order to acquire all the economic data and the factual evidence of the case, presenting the necessary framework of proof.

First of all, this investigation had to be carried out by an expert or a professional: specific skills and knowledge were required to conduct the investigation.[19] Secondly, the investigation could interest a relevant market of remarkable dimensions, in which multiple undertakings may take part into, in a complex competitive framework. For these reasons, said investigation could be actually difficult for a private consumer to be run, from a practical point of view.

Most of all, the information that the claimant needed could be held by the author of the anticompetitive conduct or by a third party. There could be a situation of asymmetric information, in which the consumer could have assumed a disadvantaged position.

The private consumer had to fix the *quantum* of the harm suffered, through a determination of the *damnum emergens* (the concrete loss for the anticompetitive behaviour) and *lucrum cessans (*the potential profit that was lost): it was difficult to determine the exact amount of damages, considering that it was hard for the claimant to obtain all the necessary information and elements of proof.[20]

For these reasons, the Directive 2014/104/EU introduces new rules about antitrust private enforcement, in order to reinforce the position

18 RORDORF, Renato. The Role of the Judge and the Role of the Italian Market and Competition Authority in the Context of Antitrust Damages Action. *Società,* 2014, Vol. XXVIII, No. 7, p. 784; SQUILLANTE, Francesco. A BRIEF OVERVIEW of the Directive on Antitrust Damages Actions. *Italian Antitrust Review,* 2014, Vol. II, No. 1, pp. 159–164.

19 PARDOLESI, Roberto. Antitrust Private Enforcement: A Fantastic Animal, and Where to Find It. In: BENACCHIO, Gian Antonio and Michele CARPAGNANO. *Institutional Assets and Perspectives of Application of the Private Antitrust Enforcement in the European Union.* Napoli: Editoriale Scientifica, 2018, p. 52.

20 WHISH, Richard and David BAILEY. *Competition Law.* 8th ed. Oxford: Oxford University Press, 2018, p. 312.

of the private consumer, to make easier gathering information and to enable his action before the civil judge.[21]

It is possible to quote different Articles of the Directive 2014/104/EU, like Article 5 and others, about the disclosure of relevant evidence, that empower the national courts to order the defendant or a third party (including public Authorities) to produce documents that are necessary to the claimant's argumentation; Article 9 and others, that fixes the legal value of the decision of National Competition Authorities in the context of the civil litigation, making easier the assessment of the behaviour; Article 17(1), that authorizes the quantification of damages by the national court, avoiding a situation in which *"it is practically impossible or excessively difficult precisely to quantify the harm suffered on the basis of the evidence available*"; Article 17(2) that establishes the presumption that cartels are anticompetitive conduct causing damages, because the losses due to cartels are difficult to demonstrate for the consumers.

In conclusion, it is possible to affirm that the Directive 2014/104/EU tries to remove the obstacles that prevent the consumer from obtaining a full restoration of the antitrust damages he suffered. In several cases, these obstacles consist of difficulties in accessing information.

The Directive 2014/104/EU pursues the goal to solve the asymmetry of information between the parties of the civil litigation through different instruments. Article 9(1) is one of these instruments.

Article 9(1) determines different consequences in the context of the civil court: first of all, it is possible to think about a hypothesis of limitation of counterpart's right of defence.

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21 SQUILLANTE, Francesco. A Brief Overview of the Directive on Antitrust Damages Actions. *Italian Antitrust Review,* 2014, Vol. II, No. 1, pp. 159–164; DE SANTIS, Angelo Danilo. The Directive 2014/104/EU and Its Consequences in the Context of Civil Litigation. In: GIUSTOLISI, Claudia. *The Directive Consumer Rights.* Roma: Roma Tre Press, 2017, pp. 145–159; PARDOLESI, Roberto. Antitrust Private Enforcement: A Fantastic Animal, and Where to Find It. In: BENACCHIO, Gian Antonio and Michele CARPAGNANO. *Institutional Assets and Perspectives of Application of the Private Antitrust Enforcement in the European Union.* Napoli: Editoriale Scientifica, 2018, p. 59–61; MUSCOLO, Gabriella. The New Institutional Asset of Antitrust Private Enforcement in Italy and in the European Union: The Cooperation Between Public and Private Enforcement. In: BENACCHIO, Gian Antonio and Michele CARPAGNANO. *Institutional Assets and Perspectives of Application of the Private Antitrust Enforcement in the European Union.* Napoli: Editoriale Scientifica, 2018, pp. 15–25.

The civil proceeding represents the first institutional space in which there is a confrontation of the damaged party with the undertaking[22] that altered the market's equilibrium (through its anticompetitive agreement, its practice or its abuse of dominant position): it is not possible to run this kind of confrontation in the context of the administrative proceeding before the National Competition Authority. In fact, in the administrative procedure, the case law is about the comparison between the undertaking and the public interest held by the same institution.

Despite that civil litigation is the first space of debate between the parties, the author of the anticompetitive conduct cannot oppose any objection to the National Competition Authority's binding decision. The defendant cannot criticize the reconstruction of the conduct contained in the decision, suggesting a different author, a divergent description of the factual evidence or a new framework of evidence; he cannot present an alternative economic analysis about the infringement, its relevant market and its duration; he cannot propose another legal qualification of the behaviour, using the categories of antitrust law. In conclusion, the defendant cannot submit to the judge any reconstruction or legal interpretation not consistent with the content of the National Competition Authority's decision.

The rule of binding effect contained in the Article 9(1) of the Directive 2014/104/EU does not allow a debate between the parties about the most important elements of the factual case in the context of the civil litigation; this lack of discussion, most of all, could limit counterpart's right of defence.

During the civil proceeding, there is the possibility of a limitation of the right of defence by the application of the Article 9(1). In order to evaluate this criticism, before drawing conclusions, it's necessary to consider also another element in the general context.

22 PORENA, Daniela. Remarks and Observations, with a Constitutional Perspective, about Legislative Decree 3 of 2017 (Transposition of the Directive 2014/104/EU about Antitrust Private Enforcement). National Judge's Role: From Subjection of Judiciary to the Law to Subjection of Judiciary to the Law And… National Competition Authority? *Federalismi,* 2018, Vol. XVI, No. 7, pp. 22–29.

In the case *European Commission v. Otis and others*[23] the Court of Justice affirmed the importance of the antitrust damages action: *"Any person can claim compensation for the harm suffered where there is a causal relationship between that harm and an agreement or practice prohibited."* This right of action must be exercised observing the principle of fair trial and equality of arms provided by the Article 47 of the CFREU.

The Court of Justice also clarified that the Article 16(1) of the Regulation 1/2003 fixed the rule of binding effect for the European Commission's decision before the civil tribunal. Any national civil judge, in the context of civil litigation about antitrust damages action, could not run against the European Commission's decision on the same actual case.

The Court of Justice evidenced that the Article 16(1) did not breach the principle of fair trial and that the European legal system ensured the fundamental rights of the defendant: the decision of the European Commission could be appealed before the same Court of Justice. So, the Court of Justice could review the content of the Commission's decision: the counterpart's right of defence was guaranteed by the possibility of deep scrutiny of the Commission's decision by the European judge. Moreover, the Court of Justice could discuss the analysis of the economic elements and the interpretation of the European antitrust law conducted by the European Commission.

In the context of each national legal system, the evaluation about the extension of an alleged violation of the counterpart's right of defence is linked to the clarification of an element: it is the possibility of a direct judiciary review of the National Competition Authority's decision. If there is the chance to appeal the decision of the Authority before a court, the situation can be different. It is important to consider if the national tribunal can review the decision, starting from the point of view of the author of the anticompetitive behaviour. It is also important to consider what are the powers of the judge in the context of the judiciary review. Therefore, in order to evaluate the consistency of the Article 9(1) with the principle of right of defence, the interpretation must consider also the context of the judicial system of each Member State.

23 Judgment of the Court of Justice of 6 November 2012, *European Commission v. Otis and others*, case C-199/11. In: *EUR-Lex* [online]. [cit. 3. 9. 2019].

4 The Second Constitutional Question about the Transposition of the Directive 2014/104/EU: The Alleged Violation of the Principles of the Independence of the Judiciary and Separation of Powers

The second constitutional question about the transposition of the Directive 2014/104/EU regards the alleged violation of the principle of independence of the judiciary, a principle that characterizes the constitutional legal order of all the European democracies,[24] as part of the concept of separation of powers; this principle is stated also by the Article 47 of CFREU and by the Article 6 of the ECHR, affirming the need of *"an independent and impartial tribunal"*.

The final decision of the National Competition Authority, having binding effect pursuant to the Article 9(1) of the Directive 2014/104/EU, can limit the judge's power to examine each actual behaviour: after the Authority act, that has concluding the proceeding of the antitrust public enforcement, the civil court cannot examine important factual elements of the infringement (the author of the infringement, the relevant market, the temporal duration of the behaviour, its material features…); most of all, the judge cannot ascertain the legal qualification of the infringement, because this evaluation has already been fulfilled by the binding decision of the Authority.[25]

Furthermore, in the case of the Italian legal order, the civil court cannot exercise the power of disusing the administrative act, established by the Article 5 of Law 2249/1865 containing Rules on Administrative Dispute, a power that characterizes in particular the Italian civil judge: in the Italian legal

24 MORRONE, Andrea. *Constitutions and European Law.* Napoli: Editoriale Scientifica, 2014, pp. 284–285 (Article 101 and Article 104 of the Constitution of the Italian Republic), p. 365 (Article 64 of the Constitution of the French Republic), p. 497 (Article 97 of the Fundamental Law of the German Federal Republic), p. 633 (Article 117 of the Constitution of the Kingdom of Spain); PALICI DI SUNI PRAT, Elisabetta, Fabrizio CASSELLA and Mario COMBA. *European Member States' Constitutions.* Padova: Cedam, 2001.

25 BARIATTI, Stefania and Luca PERFETTI. First Observation about the Provision of "White Paper For Damages Actions in Antitrust Law Infringements" of the Commission and of the Consumer Code in Matter of Relationship Between Antitrust Proceedings and Jurisdiction. *Italian Review of European Public Law,* 2008, Vol. XVIII, No. 5, pp. 1173–1176.

system, in one specific case, if an administrative act is found to be against a law, the judge can decide to ignore the act in his general evaluation during the civil litigation.

In the context of actions for antitrust damages, this particular power is limited[26] by the Article 9(1) of the Directive 2014/104/EU and by the Article 7 of the Legislative decree 3/2017[27] that transposes the Directive 2014/104/EU in the Italian legal order.[28]

The constitutional question, in general, is if an administrative institution, like a National Competition Authority, with its own binding effect decisions, can limit the role and the powers of the judge in civil litigation, contributing to determine the content of the sentence. It is difficult to answer this question in a positive way: can a decision of the administrative body prevail over the pronouncement of the judiciary power, influencing its decision making-process?

In the present study, it is necessary to consider the jurisprudence of the Court of Justice about the legal nature of National Competition Authorities. Most of all, it is important to evidence *Syfait case.* [29]

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26 PORENA, Daniela. Remarks and Observations, with a Constitutional Perspective, about Legislative Decree 3 of 2017 (Transposition of the Directive 2014/104/EU about Antitrust Private Enforcement). National Judge's Role: From Subjection of Judiciary to the Law to Subjection of Judiciary to the Law And… National Competition Authority? *Federalismi,* 2018, Vol. XVI, No. 7, pp. 19–21.

27 REPUBLIC OF ITALY. Legislative decree 3/2017 containing implementation of Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union Text. *Gazzetta Ufficiale della Repubblica Italiana* [online]. [cit. 3. 9. 2019].

28 The Legislative decree 3/2017 affirms in Article 7(1) that *"for the purposes of the action for compensation for damages, it is considered definitively ascertained, in relation to the author, the infringement of the competition law established by a decision of the Italian Competition Authority, referred to art. 10 of the law 287/1990, no longer subject to appeal before the Court of Appeal, or by a judgment of the Court of Appeal which has become res judicata"* (the law 287/1990 is official known in the Italian legal order as law 287/1990 containing Rules on Protection of Competition and Market).

29 Judgement of the Court of Justice of 31 May 2005, *Syfait and others v. GlaxoSmithKline*, case C-53/03. In: *EUR-Lex* [online]. [cit. 3. 9. 2019]; BARENTS, Renè. *Directory of EU Case Law on the Preliminary Ruling Procedure.* Alphen aan den Rijn: Wolters Kluwer, 2009, p. 67; EZRACHI, Ariel. *EU Competition Law. An Analytical Guide to the Leading Cases.* 5th ed. Oxford and Portland: Hart Publishing, 2016, p. 617; BROBERG, Morten and Niels FENGER. *Preliminary References to the European Court of Justice.* 2nd ed. Oxford: Oxford University Press, 2014, p. 90; MENTO, Sandro. Case Comment. *Administrative Law Journal,* 2005, No. 12, pp. 1279–1284.

In *Syfait case*, the Court of Justice found that the Greek Competition Commission cannot be qualified as a court or tribunal; therefore, the Greek Competition Commission could not apply to the Court of Justice for a preliminary ruling.

There are different reasons that explain said decision. First of all, the Greek Competition Commission is subjected to the supervision of the Minister for Development: it implies that the Minister is empowered to review the lawfulness of its decisions. In addition, the Greek Government can influence the decision making-process of the Commission: in fact, no particular guarantees of the independence of the members of the Commission are granted by Greek law, especially with reference to their dismissal or to their office's term.

The Court of Justice pointed out that the relationship between the Government and the Greek Competition Commission allows to qualify the body as dependent from the executive. It is possible therefore to affirm that there is, at least, a National Competition Authority of the European Competition Network that is not completely independent from the State executive power: this means that the content of Greek Competition Commission's decisions can be determined also by a political institution. However, the argumentation of the Court of Justice in the *Syfait case* makes more difficult the application of the Article 9(1) of the Directive 2014/104/EU in the context of civil litigation.

Another important jurisprudence about the role and the nature of National Competition Authorities in the context of the constitutional system of check and balances is the jurisprudence of the Italian Constitutional Court. Most of all it shall be analysed one of its recent cases: the decision of the Constitutional Court of Italy of 5 December 2018[30] firmly excludes that nature and the functions of the Italian Antitrust Authority may be considered as judiciary ones. The Constitutional Court's decision ascertains their pure administrative substance, using the traditional concept of public administration and public interest. So, the decision classifies the Italian Competition

30 Decision of the Constitutional Court, Italy of 5 December 2018, No. 13/2019. In: *Corte Costituzionale – Ricerca delle pronounce dal 1956 ad oggi* [online]. The Italian Constitutional Court [cit. 3. 9. 2019].

Authority as a part of the administrative branch, referring to the standard model of public administration contained in administrative law. The decision raises different problems in the context of this study: the common idea of public administration is the idea of an organization that is subjected to the political address of the executive power. Can the decision undermine the concept of independence of the Italian Competition Authority?

Finally, there is also another case that involved another Member State, namely the decision of the Constitutional Court of Bulgaria of 24 September 1998, No. 22/1998[31] that can be relevant in the context of the present research.

While Article 8 of the Constitution of the Republic of Bulgaria[32] enshrines the traditional principle of separation of powers,[33] Article 117(2) of the same Constitution specifies the principle of independence of the judiciary.[34]

In 1998 the Constitutional Court of Bulgaria ruled about the Article 36 of the Protection of Competition Act[35] that established that National Competition Authority's decisions had a binding effect in the context of civil proceedings; this rule was similar to the Article 9(1) of the Directive 2014/104/EU.

The decision of the Constitutional Court of Bulgaria pointed out that the Article 36 conflicted with the principles of independence of the judiciary: the binding effect of decisions could be recognized only to the acts that were confirmed by a judicial review of the Supreme Administrative Court.

This case is an important precedent to be considered in the general context of the present analysis: the Constitutional Court of Bulgaria affirmed that there was a violation of the principle of separation of power due to the binding effects connected with the decision.

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31 PÄRN-LEE, Evelin. Effect of National Decisions on Actions for Competition Damages in the CEE Countries. *Yearbook of Antitrust and Regulatory Studies,* 2017, Vol X, No. 15, pp. 186–187.

32 REPUBLIC OF BULGARIA. Constitution of the Republic of Bulgaria. *National Assembly of the Republic of Bulgaria* [online]. [cit. 3. 9. 2019].

33 *"The power of the State shall be divided between legislative, executive and judicial branches."*

34 "*The judiciary shall be independent. In the performance of their functions, all judges, court assessors, prosecutors and investigating magistrates shall be subservient only to the law."*

35 REPUBLIC OF BULGARIA. Protection of Competition Act promulgated in State Gazette 102/2008. *United Nations Conference on Trade and Government* [online]. [cit. 3. 9. 2019].

5 A Different Solution to Promote Antitrust Damages Actions

Through the model of proportionality test it is possible to assess the constitutional questions raised by the rule of binding effect[36]: the starting point is the definition of the constitutional principles that are involved in this assessment.

The right of action is the first constitutional value influenced by the Article 9(1) of the Directive 2014/104/EU: the rule of binding effect pursues the aim to promote the possibility of actions for antitrust damages. The application of the Article 9(1) involves also two other constitutional principles: Article 9(1) influences the position of the defendant and its supporting arguments, but it impacts also on the civil judge's powers of evaluation. For these reasons, it is important to take into account a second constitutional value, the counterpart's right of defence, and a third one, the principle of independence of the judiciary.

The model of proportionality test has got a first sub-principle, the principle of suitability that implies to verify if the legal measure adopted is capable to satisfy its own objective. It is necessary to determine if the rule of National Competition Authority's decision binding effect is suitable to promote the right of action of a consumer or an undertaking, damaged by an anticompetitive conduct, in the context of civil proceeding.

During the previous analysis, it was underlined the asymmetry of information suffered by the damaged party. There was a problem of lack of instruments that the actor could use to collect data and evidences.

Giving a binding value to the National Competition Authority's decision can be a solution in order to reinforce the right of action. The decision of the Authority is the result of an investigation and of an administrative proceeding. The institutional means of the Authority are useful in order

36 ALEXY, Robert. Constitutional rights and Proportionality. *Revus,* 2014, Vol. XXII, No. 1, pp. 52–57; CARTABIA, Marta. The Principles of Proportionality and Reasonableness in the Italian Constitutional Jurisprudence. In: *Corte Costituzionale – Database* [online]. The Italian Constitutional Court, pp. 4–8 [cit. 19. 7. 2019]; ELLIOT, Mark. Proportionality and Deference: the Importance of a Structured Approach. *University of Cambridge Faculty of Law Research Paper,* 2013, Vol. XV, No. 32, p. 1.

to acquire information. They allow also a deeper assessment of the factual elements and of the economic data. So, the answer to the first part of the test is positive.

Following the model of proportionality test, the second important sub-principle is the principle of necessity: this principle means that, if there are two means to promote a constitutional value, that satisfy the principle of suitability, the one that is less invasive for other constitutional principles has to be chosen.

The question is if the rule of binding effect is a necessary solution, the less invasive possible, in order to make stronger the position of the claimant. The answer is that there is also another hypothesis: it is the rule that the legislator adopted in the Article 9(2), another suitable rule for the aim of the Directive 2014/104/EU (the rule of the value of *prima facie* evidence of National Competition Authority's decisions). Does it fulfil the principle of necessity?

The last part of the proportionality test is the sub-principle of proportionality in the narrow sense: it's relevant to evaluate the relationship between costs and benefits in the context of the constitutional principles that are involved in the application of the rule. It implies a general assessment of the positive effects related to a constitutional value and of the limitation related to another one or more.

The rule of binding effect of the Article 9(1), on the one hand, promotes the claimant's right of restoration and, on the other and, limits both the right of defence of the counterpart, both the independence of the civil judge.

Considering the counterpart right of defence, before the civil court, the party cannot explain its view about the behaviour, its concrete nature and its legal qualification.

These first elements are not sufficient in order to evaluate the dimension of the limitation of the right of defence: previously, it is necessary to take into account another important aspect. In the context of each national legal order, there can be the possibility to appeal the decision of the National Competition Authority before the administrative judge. This possibility can reduce the amount of the restriction of the right of defence.

Considering the civil tribunal, the rule of binding effect of National Competition Authority's decision does not allow the court to evaluate the concrete elements and, most of all, to decide the legal qualification of the infringement.

The civil judge should be able to classify the conduct of the undertaking with an autonomous reasoning. For example, in the *case Attrakt s.r.l. v. Google Ireland l.t.d.*[37] there was a question about the legal qualification of Google's conduct. It was a case of action for damages in which the claimant, Attrakt s.r.l., proposed the qualification of the behaviour as abuse of economic dependence or, in alternative, as abuse of dominant position or, in alternative, as unfair competition. The civil judge analysed the particular agreements between Google and Attrakt and decided that the conduct of Google could be considered as abuse of economic dependence.

It is possible to affirm that the Article 9(1) realizes most of all a complete limitation of the power of assessment of the judge: if the binding value is recognized to the Competition Authority's decision, the civil judge cannot determine the legal qualification of the conduct.

On the other side, the last step of the proportionality test is to apply the sub-principle of proportionality in the narrow sense to the Article 9(2) of the Directive 2014/104/EU. With this rule, the claimant is not penalized during the civil litigation, because he can present the decision of the Authority as a central evidence in the context of his argumentation. At the same time, the counterpart can fully exercise his own right of defence, criticizing the content of the evidence and showing different reconstructions and interpretations. Finally, the civil judge may serve his evaluation without boundaries and can take into account both the point of views of the involved parties.

In conclusion, Article 9(2) can be useful in order to promote actions for antitrust damages and, at the same time, don't produce excessive limitations of the other constitutional values.

It is possible to think about a reform of the Article 9(1) of the Directive 2014/104/EU. The solution can imply to review the actual rule of binding effect, introducing a different asset of the burden of proof: the decision

37 Decision of the Tribunal of Milan, Italy of 17 June 2016, No. 7638/2016. In: *JurisWiki Italia* [online]. [cit. 3. 9. 2019].

of the National Competition Authority can be considered as an evidence before the civil court of the same Member State, a kind of evidence that can be crucial in the judge's evaluation but it is not characterized by absolute value. This could be a definitive solution to the constitutional questions object of analysis in the present research.

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Arbitrability of the EU Antitrust Law

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Abstract

Party autonomy entails the right of individuals to opt out of the national court system and to submit their disputes to arbitration. Party autonomy, however, has limits, and not all disputes are equally capable of being resolved by an arbitral tribunal. Issues of arbitrability may arise with respect to areas of law that involve a strong public interest. Therefore, it is essential to assess whether the parties can submit the EU competition law-related disputes to arbitration and whether the arbitrators have the power to decide them. The problems pertaining to the arbitrability of competition law disputes relate exactly to the public interest character of such disputes. The objective of antitrust law is the safeguarding of effective competition in the market. Private interests, as such, are important to the extent that their protection can be accommodated in the simultaneous protection of the broader public interest. Therefore, the article shall assess the question of the arbitrability of the EU competition law based on case-law, doctrine and the EU law.

Keywords

Antitrust Law; Arbitrability; EU.

1 Introduction

In 1958 the EU adopted set of rules which prohibit agreements and arrangements having as their object or effect the prevention, restriction, or distortion of competition as well as any abuse of a dominant position.[1] These

1 BLACKABY, Constantine, Constantine PARTASIDES, Alan REDFERN and Martin HUNTER. *Redfern and Hunter on International Arbitration.* 6th ed. Oxford: Oxford University Press, 2015, p. 88.

rules incorporated in Articles 101 and 102 of the TFEU are to be directly applicable in all member states and form the EU antitrust law.

The area of antitrust law constitutes a matter of public policy.[2] Therefore, Articles 101 and 102 of the TFEU have historically been enforced primarily by the Commission which is empowered to investigate, to prohibit behaviours, and also to impose heavy fines.[3]

The question thus arises whether arbitrators are entitled to decide the EU competition law-related cases.[4]

In view of the party autonomy, parties themselves are entitled to opt out of the national court system and to submit their dispute to arbitration.[5]

Party autonomy, however, is limited as not all disputes are capable of being resolved in arbitration.[6] *"The 'non-arbitrability' doctrine applies to categories of subjects or disputes which are deemed by a particular national law to be incapable of resolution by arbitration, even if the parties have otherwise validly agreed to arbitrate such matters."*[7] Naturally, where public policy is involved the issue of arbitrability of related disputes arises as such disputes may not be capable of settlement by arbitration.[8] *"It is generally acknowledged that states may set restrictions to the parties' right to enter into an arbitration agreement with respect to certain types of disputes touching upon sensitive public policy issues that the state wishes to remain in national courts' exclusive jurisdiction."*[9] Issues of arbitrability traditionally arise in those areas of law which involve a strong public interest, such as insolvency law,

2 Ibid., p. 89.

3 BORN, Gary. *International Commercial Arbitration*. 2nd ed. Aalphen aan den Rijn: Wolters Kluwer, 2014, p. 960.

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5 GAILLARD, Emmanuel and John SAVAGE. *Fouchard Gaillard Goldman on International Commercial Arbitration*. The Hague: Kluwer Law International, 1999, p. 30.

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9 MOURRE, Alexis. Arbitrability of Antitrust Law from European and US Perspective. In: BLANKE, Gordon and Philip LANDOLT (eds.). *EU and US Antitrust Arbitration: A Handbook for Practitioners*. Kluwer Law International, 2011, p. 3.

employment law, consumer claims, intellectual property rights, criminal law, or questions of personal status.[10]

Thus, states may: (i) impose limitations on types of disputes that may be subject to arbitration seated within their jurisdiction, and (ii) determine that arbitral awards may be refused recognition and enforcement if they concern a subject matter that is not capable of settlement by arbitration under the law of that jurisdiction.[11]

Moreover, in the *American Safety case* the US Court of Appeal for Second Circuit held that: *"A claim under the antitrust laws in not merely a private matter… Antitrust violation can affect hundreds of thousands, perhaps millions, of people and inflict staggering economic damage. We do not believe Congress intended such claims to be resolved elsewhere than the Courts."*[12]

As the Court of Justice recognized the EU competition law to be part of public policy, it is necessary to determine its arbitrability. Therefore, the aim of this article is to assess the question of the arbitrability of the EU competition law. The article shall confirm or refuse the hypothesis that: *"Arbitrators are entitled to decide on the damages and financial rights arising out of the EU antitrust law."*

The question of arbitrability of the EU competition law will be analysed firstly at level of the EU law and secondly at level of national arbitration law. Moreover, Czech position towards arbitrability of the EU competition law will be assessed.

1.1 Arguments against the Arbitrability of the EU Antitrust Law

During the early decades after antitrust legislation was established, courts persistently held that antitrust claims were not arbitrable.[13]

10 MOURRE, Alexis. Arbitrability of Antitrust Law from European and US Perspective. In: BLANKE, Gordon and Philip LANDOLT (eds.). *EU and US Antitrust Arbitration: A Handbook for Practitioners*. Kluwer Law International, 2011, p. 3; see also SENDETSKA, Olga. Arbitrating Antitrust Damages Claims: Access to Arbitration. *Journal of International Arbitration*, 2018, Vol. 35, No. 3, p. 357.

11 SENDETSKA, Olga. Arbitrating Antitrust Damages Claims: Access to Arbitration. *Journal of International Arbitration*, 2018, Vol. 35, No. 3, p. 357.

12 Decision of US Court of Appeal for the Second Circuit of 20 March 1968, *American Safety Equipment Corp. v. J. P. Maguire & Co., Inc.* In: *JUSTIA US Law* [online]. [cit. 17. 03. 2019].

13 BORN, Gary. *International Commercial Arbitration*. 2nd ed. Aalphen aan den Rijn: Wolters Kluwer, 2014, p. 955.

"The orthodox argument against antitrust arbitrability is that the main objective of antitrust is the maintenance of a competitive market environment in pursuit of the public interest and hence the collectivity of consumers (which is a public policy objective to be achieved through litigation in the public courts), and not the protection of the individual commercial interest of private parties, which – in turn – lies at the heart of international commercial arbitration."[14]

The emphasis on need for a uniform application of antitrust rules in European space explains the wariness in allowing the enforcement of the EU competition rules to be left in the hands of private tribunals over which little or no control can be exercised.[15] Moreover, there is a real danger that parties may attempt to avoid the treatment of competition law issues before an arbitral tribunal, especially where they draw a mutual benefit from ignoring antitrust legislation.[16]

Furthermore, US Court of Appeal for First District in its decision *Mitsubishi Motors v. Soler Chrysler-Plymouth* explained the non-arbitrability of competition law-related disputes as follows: *"The reasoning is fourfold: (i) governance of the realm of antitrust law, so vital to the successful functioning of a free economy, is delegated by statute to both government and private parties, the latter being given special incentive to supplement efforts of the former, the work of both being equally the grist of judicial decisions, (ii) the strong possibility that contracts which generate antitrust disputes may be contracts of adhesion militates against automatic forum determination by contract; (iii) antitrust issues are – an understatement – 'prone to be complicated, and the evidence extensive and diverse,' and, we may add, the economic data subject to rigorous analysis dictated by a growing and increasingly sophisticated jurisprudence, with the subject correspondingly ill-adapted to strengths of the arbitral process, i.e., expedition, minimal requirements of written rationale, simplicity, resort to basic concepts of common sense and simple equity; and (iv) the notion, suggestive of the proposition that issues of war and*

14 BLANKE, Gordon. EC Competition Law Claims in International Arbitration. In: KLAUSEGGER, Christian and Peter KLEIN (eds.). *Austrian Arbitration Yearbook*. Bern: Manz'sche Verlags und Universitätsbuchhandlung, 2009, p. 8.

15 MOURRE, Alexis. Arbitrability of Antitrust Law from European and US Perspective. In: BLANKE, Gordon and Philip LANDOLT (eds.). *EU and US Antitrust Arbitration: A Handbook for Practitioners*. Kluwer Law International, 2011, p. 21.

16 BLANKE, Gordon. EC Competition Law Claims in International Arbitration. In: KLAUSEGGER, Christian and Peter KLEIN (eds.). *Austrian Arbitration Yearbook*. Bern: Manz'sche Verlags und Universitätsbuchhandlung, 2009, p. 7.

peace are too important to be vested in the generals, that decisions as to antitrust regulation of business are too important to be lodged in arbitrators chosen from the business community – particularly those from a foreign community that has had no experience with or exposure to our law and values."[17]

2 Arbitrability of the EU Antitrust Law at European Level

"Although the relationship between the EU law and international arbitration has traditionally been described as one of mutual indifference, the two systems interact with each other, rather than simply coexisting. Arbitration may facilitate the EU's goals of ensuring access to efficiently-delivered justice and dispute resolution, but it can also impede the EU's goals of harmonizing law across the Member States and of ensuring the application of specific substantive laws."[18]

The EU itself has historically shown some reluctance to admit that mandatory European rules, i.e. the EU antitrust law, could be referred to arbitral tribunals.[19] The issue of arbitrability has never been directly dealt with by the Court of Justice, but the Commission has expressed concern that arbitration could be used as a means to circumvent the application of the EU law.[20]

The Commission has, for example, subjected the availability of block exemptions to the parties' obligation to notify any arbitration award made in connection thereto to the Commission.[21] This requirement was included in the Regulation 2349/84 on patent licensing agreements[22] and in the Regulation

17 Decision of US Court of Appeal for the First Circuit of 20 December 1983, *Mitsubishi Motors v. Soler Chrysler-Plymouth*. In: *casetext* [online]. [cit. 17. 03. 2019].

18 Directorate General for Internal Policies; Policy Department C: Citizens' Rights and Constitutional Affairs. Legal Instruments and Practice of Arbitration in the EU: Study. *European Parliament* [online]. 2014, p. 13 [cit. 29. 04. 2019].

19 MOURRE, Alexis. Arbitrability of Antitrust Law from European and US Perspective. In: BLANKE, Gordon and Philip LANDOLT (eds.). *EU and US Antitrust Arbitration: A Handbook for Practitioners*. Kluwer Law International, 2011, p. 21.

20 Ibid.

21 Ibid.

22 Article 9 of the Commission Regulation (EEC) No. 556/89 of 30 November 1988 on the application of Article 85(3) of the Treaty to certain categories of know-how licensing agreements. In: *EUR-Lex* [online]. [cit. 17. 03. 2019].

556/89 on know-how licensing agreements.[23] The same requirement was incorporated in relation to individual exemptions.[24]

Furthermore, the Commission has required parties, which had notified a contract in accordance with the then applicable Regulation 17/62,[25] to suppress the arbitration agreement included in said contract.[26]

Additionally, the European Parliament adopted a resolution on arbitration in 1994, in which it expressed its concern that the submission of disputes to arbitration could jeopardize the uniformity of Community law.[27]

What is more, the Court of Justice in 1982 in its decision *Nordsee*[28] ruled that arbitral tribunals are not to be considered as a part of jurisdictional system of Member States and that they cannot refer questions to the Court of Justice. It is not within the scope of this contribution to analyse the details of the case. It is, however, important to mention that the decision has given rise to strong criticism, for it was perceived as an unjustified restriction of the arbitrators' jurisdictional powers. Moreover, this decision contributed to doubts as to arbitrators' entitlement to decide the EU antitrust cases.[29]

Next, Brussels I Regulation[30] has created a uniform European regime dealing with issue of recognition of judgements in civil and commercial matters

23 Article 7 of the Commission Regulation (EEC) No. 2349/84 of 23 July 1984 on the application of Article 85(3) of the Treaty to certain categories of patent licensing agreements. In: *EUR-Lex* [online]. [cit. 17. 3. 2019].

24 MOURRE, Alexis. Arbitrability of Antitrust Law from European and US Perspective. In: BLANKE, Gordon and Philip LANDOLT (eds.). *EU and US Antitrust Arbitration: A Handbook for Practitioners*. Kluwer Law International, 2011, p. 21.

25 Regulation No. 17 of 6 February 1962 First Regulation Implementing Articles 85 and 86 of the Treaty. In: *EUR-Lex* [online]. [cit. 17. 3. 2019] ("Regulation 17/62").

26 MOURRE, Alexis. Arbitrability of Antitrust Law from European and US Perspective. In: BLANKE, Gordon and Philip LANDOLT (eds.). *EU and US Antitrust Arbitration: A Handbook for Practitioners*. Kluwer Law International, 2011, p. 21.

27 EUROPEAN PARLIAMENT. Resolution on Encouraging Recourse to Arbitration to Settle Legal Disputes. Minutes of Proceedings of the Sitting of Friday, 6 May 1994 [online]. In *EUR-Lex* [cit. 17. 3. 2019].

28 Judgment of the Court of Justice of 23 March 1982, *Nordsee Deutsche Hochseefischerei GmbH v. Reederei Mond Hochseefischerei*, case C-102/81. In: *EUR-Lex* [online]. [cit. 9. 1. 2019].

29 MOURRE, Alexis. Arbitrability of Antitrust Law from European and US Perspective. In: BLANKE, Gordon and Philip LANDOLT (eds.). *EU and US Antitrust Arbitration: A Handbook for Practitioners*. Kluwer Law International, 2011, p. 24.

30 Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matter. In: *EUR-Lex* [online]. [cit. 17. 3. 2015].

and it expressly excluded arbitration from its scope. Thus, the enforceability of arbitral awards is regulated by the parallel regime set forth by the New York Convention.[31] Consequently, the Brussels I bis Regulation[32] maintains the arbitration exclusion of its predecessor, but clarifies how it must be interpreted. *"The Regulation also expressly recognizes the prevalence of the 1958 New York Convention, which should in principle always prevail over the Brussels I system."*[33]

The above-mentioned issues did not make the antitrust law-related cases non-arbitrable but there was certainly the sign of a certain distrust towards arbitrators: *"The EU has, therefore, always shown a certain degree of intrusiveness with respect to the possibility of parties to resort to arbitration to resolve antitrust claims… This was the sure sign that, in the EU's eyes, arbitrability of antitrust claims was suspicious or at least that arbitration, if permitted, ought to be strictly monitored."*[34]

The change in the EU's position towards the arbitrability of the EU antitrust law is related to *Eco Swiss* case.[35] In this decision the Court of Justice ruled that Article 81 of the TEC (now Article 101 of the TFEU) constitutes a matter of public policy justifying the annulment or refusal of enforcement of an award that ignores it.[36] The Court of Justice stated that: *"*A *national court to which application is made for annulment of an arbitration award must grant that application if it considers that the award in question is in fact contrary to Article 85 of the Treaty* [now Art. 81 of TFEU], *where its domestic rules of procedure require it to grant an application for annulment founded on failure to observe national rules of public policy."*[37]

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31 Directorate General for Internal Policies; Policy Department C: Citizens' Rights and Constitutional Affairs. Legal Instruments and Practice of Arbitration in the EU: Study. *European Parliament* [online]. 2014, p. 14. [cit. 29. 4. 2019].

32 Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matter (recast). In: *EUR-Lex* [online]. [cit. 17. 3. 2015].

33 Directorate General for Internal Policies; Policy Department C: Citizens' Rights and Constitutional Affairs. Legal Instruments and Practice of Arbitration in the EU: Study. *European Parliament* [online]. 2014, p. 14. [cit. 29. 4. 2019].

34 MOURRE, Alexis. Arbitrability of Antitrust Law from European and US Perspective. In: BLANKE, Gordon and Philip LANDOLT (eds.). *EU and US Antitrust Arbitration: A Handbook for Practitioners*. Kluwer Law International, 2011, p. 21.

35 Judgment of the Court of Justice of 1 June 1999, *Eco Swiss China Time Ltd v. Benetton International NV*, case C-126/97. In: *EUR-Lex* [online]. [cit. 17. 3. 2019].

36 BLACKABY, Constantine, Constantine PARTASIDES, Alan REDFERN and Martin HUNTER. *Redfern and Hunter on International Arbitration.* 6th ed. Oxford: Oxford University Press, 2015, p. 89.

37 Point 41.

The Court of Justice did not explicitly prohibit arbitrators' entitlement to apply Article 81 of the TEC.[38] This decision is, thus, understood in a way that it implicitly entitles arbitrators to decide issues arising out of the EU antitrust law.[39]

Furthermore, the Commission's signs of wariness towards arbitration of the EU antitrust cases are considered to be confined to past times.[40] The EU competition law has become the driving force of modern market economies and is in the best interest of the public that arbitrators apply it rather than shy away because of arbitrability concerns.[41]

To conclude, the EU law has never directly prohibited the arbitrability of the EU antitrust law.[42] As it does not explicitly allow the arbitrability of the EU antitrust law, it is, therefore, suitable to analyse the position of national laws on arbitrability of the EU antitrust law.[43]

3 Arbitrability of the EU Antitrust Law at Level of National Arbitration Laws

In the last three decades, there has been a general trend towards the expansion of the category of arbitrable disputes as international arbitration is progressively characterized by a widespread movement *in favorem arbitrii*.[44]

38 BLACKABY, Constantine, Constantine PARTASIDES, Alan REDFERN and Martin HUNTER. *Redfern and Hunter on International Arbitration*. 6th ed. Oxford: Oxford University Press, 2015, p. 89; see also BORN, Gary. *International Commercial Arbitration*. 2nd ed. Aalphen aan den Rijn: Wolters Kluwer, 2014, p. 978.

39 HERBOCZKOVÁ, Jana. Aplikace evropského soutěžního práva. In: *Dny práva – 2009 – Days of Law: the Conference Proceedings* [online]. Brno: Masarykova univerzita, 2009, p. 5 [cit. 29. 4. 2019]; see also SZOLC, Marek. The EU Competition Law and Arbitration – Is it Really a "War of the Worlds?". In: *Academia* [online]. [cit. 01. 05. 2019].

40 MOURRE, Alexis. Arbitrability of Antitrust Law from European and US Perspective. In: BLANKE, Gordon and Philip LANDOLT (eds.). *EU and US Antitrust Arbitration: A Handbook for Practitioners*. Kluwer Law International, 2011, p. 11.

41 Ibid.

42 HERBOCZKOVÁ, Jana. Aplikace evropského soutěžního práva. In: *Dny práva – 2009 – Days of Law: the Conference Proceedings* [online]. Brno: Masarykova univerzita, 2009, p. 3 [cit. 29. 04. 2019].

43 BLANKE, Gordon. EC Competition Law Claims in International Arbitration. In: KLAUSEGGER, Christian and Peter KLEIN (eds.). *Austrian Arbitration Yearbook*. Bern: Manz'sche Verlags und Universitätsbuchhandlung, 2009, p. 32–33.

44 MOURRE, Alexis. Arbitrability of Antitrust Law from European and US Perspective. In: BLANKE, Gordon and Philip LANDOLT (eds.). *EU and US Antitrust Arbitration: A Handbook for Practitioners*. Kluwer Law International, 2011, p. 4.

In France, the arbitrability of the EU antitrust law-related cases was not accepted by the French Civil Code[45] which stated in its Article 2060 that: *"One may not enter into arbitration agreements in matters of status and capacity of the persons, in those relating to divorce and judicial separation or on controversies concerning public bodies and institutions and more generally in all matters in which public policy is concerned."* The arbitrability of the EU competition cases, however, was acknowledged by the Court of Appeal in *Almira Films v. Pierrel* in 1989.[46] Consequently, it was reaffirmed in the *Mors/Labinal case* in 1995.[47]

In Italy, the Court of Appeal of Milan held that: *"Any doubts [as to the arbitrability of antitrust claims] are now superseded by the evolution of legal thinking, as well as by case law, both at the national and community level: the possibility to arbitrate antitrust claims…, that is to say claims that need, in order to be resolved, that a substantive antitrust rule be applied, is recognised. This is in particular true for disputes between private individuals in which the validity of an agreement is challenged on the basis of Article 81 of the EC Treaty [101 TFEU]."*[48]

In Germany, the Competition Act of 1990 restricted the use of arbitration.[49] The Arbitration Law[50] has, however, repealed these provisions and the arbitrability of antitrust rules is now accepted.

In Sweden, Section 1 of Swedish Arbitration Act of 1999[51] stipulates that: *"Arbitrators may rule on the civil law effects of competition law as between the parties."* It is the only example of an arbitration law containing an express provisions on the arbitrability of competition law.[52]

45 FRANCE. Civil Code. In: *Legifrance* [online]. [cit. 05. 09. 2019].

46 Decision of Cour de cassation, France of 5 February 1991, No. 14-382. In: *Legifrance* [online]. [cit. 17. 03. 2019].

47 Decision of Cour de cassation, France of 17 October 1995, No. 94-18396. In: *Legifrance* [online]. [cit. 17. 3. 2019].

48 MOURRE, Alexis. Arbitrability of Antitrust Law from European and US Perspective. In: BLANKE, Gordon and Philip LANDOLT (eds.). *EU and US Antitrust Arbitration: A Handbook for Practitioners*. Kluwer Law International, 2011, p. 20.

49 Ibid.

50 GERMANY. Code of civil procedure, Book 10. In: *Gesetze im Internet* [online]. [cit. 5. 9. 2019].

51 SWEDEN. 1999 Arbitration Act. In: *Arbitration Institute of the SCC* [online]. [cit. 5. 9. 2019].

52 BLANKE, Gordon. EC Competition Law Claims in International Arbitration. In: KLAUSEGGER, Christian and Peter KLEIN (eds.). *Austrian Arbitration Yearbook*. Bern: Manz'sche Verlags und Universitätsbuchhandlung, 2009, p. 8; see also MOURRE, Alexis. Arbitrability of Antitrust Law from European and US Perspective. In: BLANKE, Gordon and Philip LANDOLT (eds.). *EU and US Antitrust Arbitration: A Handbook for Practitioners*. Kluwer Law International, 2011, p. 12.

Switzerland is another proponent of *in favorem arbitrii* principle. Article 177(1) of Federal Code on Private International Law Act[53] states that: *"All pecuniary claims may be submitted to arbitration."* Refusal of arbitral tribunal to apply the EU antitrust law is perceived as a ground for setting aside the arbitral award.[54] According to Swiss Supreme Court: *"The Swiss judge or arbitrator who has to decide on the validity of a contractual agreement concerning markets in the European Union examines this issue in the light of Art. 81 Rome Treaty [Art. 85 of the former Rome Treaty]. He must do so notwithstanding the fact that the parties agreed on the application of Swiss law to their contractual relationship."*[55]

In England only matters of strong public interest are considered to be non-arbitrable.[56]

Moreover, the arbitrability of the EU competition law-related cases is accepted in the Netherlands, Austria, Belgium and Luxemburg.[57]

To conclude, arbitral tribunals are nowadays entitled to decide issues related to the EU antitrust law in majority of European jurisdictions.[58]

According to some views, however, arbitrators should be monitored when applying the EU law and, thus, there is a need to reinforce the cooperation mechanism between the Commission and arbitral tribunals.[59] It has been considered that: *"Arbitral tribunals should keep the Commission informed of any procedure involving the EU antitrust law in order to allow the Commission to 'monitor' the*

53 SWITZERLAND. Federal Code on Private International Law of 18 December 1987. In: *Der Bundesrat. Das Portal der Schweizer Regierung* [online]. [cit. 05. 09. 2019].

54 HERBOCZKOVÁ, Jana. Aplikace evropského soutěžního práva. In: *Dny práva – 2009 – Days of Law: the Conference Proceedings* [online]. Brno: Masarykova univerzita, 2009, p. 8. [cit. 29. 04. 2019].

55 BORN, Gary. *International Commercial Arbitration*. 2nd ed. Aalphen aan den Rijn: Wolters Kluwer, 2014, p. 979.

56 Article 81(1)(c) of the ENGLAND AND WALES. 1996 Arbitration Act. *Legislation.gov.uk* [online]. [cit. 05. 09. 2019].

57 BORN, Gary. *International Commercial Arbitration*. 2nd ed. Aalphen aan den Rijn: Wolters Kluwer, 2014, p. 956.

58 BLANKE, Gordon. EC Competition Law Claims in International Arbitration. In: KLAUSEGGER, Christian and Peter KLEIN (eds.). *Austrian Arbitration Yearbook*. Bern: Manz'sche Verlags und Universitätsbuchhandlung, 2009, p. 8.

59 BORN, Gary. *International Commercial Arbitration*. 2nd ed. Aalphen aan den Rijn: Wolters Kluwer, 2014, pp. 956-957; see also MOURRE, Alexis. Arbitrability of Antitrust Law from European and US Perspective. In: BLANKE, Gordon and Philip LANDOLT (eds.). *EU and US Antitrust Arbitration: A Handbook for Practitioners*. Kluwer Law International, 2011, p. 23.

proceedings by participating in the hearings 'either as an observer of the arbitral proceedings or as an amicus curiae in its own right', being specified that 'with regard to ordinary EC antitrust arbitrations, the Commission should be allowed to submit amicus curiae briefs at any time during the arbitral proceedings'. Moreover, 'the arbitrator or the arbitral tribunal, in case of doubt or disagreement between the arbitrating parties, should request the Commission to suggest the correct interpretation… of discrete EC law provisions', and such duty would apply 'irrespective of the arbitrating parties' prior consent'."[60]

3.1 Various Situations in which Arbitrators May Face the Application of the EU Antitrust Law

It was stated above that nowadays majority of European jurisdictions accept the arbitrability of the EU antitrust law.

In order to assess the question of the arbitrability of the EU antitrust law under various national jurisdictions properly, it is further necessary to analyse different situations in which arbitrators may deal with the application of the EU antitrust law. Generally speaking, these situation may be divided into two groups.[61]

3.1.1 Arbitrability of the EU Antitrust Law Itself

To begin with, arbitrators deal with matters of arbitrability of the EU antitrust law itself.[62]

"A claimant may bring an action for abuse of dominance, provided the parties enter into a submission agreement to that effect, i.e. an agreement ex post to submit the dispute that has arisen to arbitration. Occasionally, members of a cartel may also submit their disputes to arbitration, which inevitably gives rise to the question as to whether their cartel behaviour is at the origin of their contracting activities and in how far these need to be addressed and

60 MOURRE, Alexis. Arbitrability of Antitrust Law from European and US Perspective. In: BLANKE, Gordon and Philip LANDOLT (eds.). *EU and US Antitrust Arbitration: A Handbook for Practitioners*. Kluwer Law International, 2011, p. 23; see also RUBINO-SAMMARTANO, Mauro. *International Arbitration Law and Practice*. 2nd ed. The Hague: Kluwer Law International, 2001, p. 542.

61 ORGONÍK, Martin. Arbitrabilita sporů vzniklých z porušení soutěžního práva z pohledu soutěžního orgánu. In: *COFOLA 2010: the Conference Proceedings* [online]. Brno: Masarykova univerzita, 2010, p. 4 [cit. 05. 09. 2019].

62 BLANKE, Gordon. EC Competition Law Claims in International Arbitration. In: KLAUSEGGER, Christian and Peter KLEIN (eds.). *Austrian Arbitration Yearbook*. Bern: Manz'sche Verlags und Universitätsbuchhandlung, 2009, p. 19.

assessed in the light of the applicable antitrust rules in the arbitration."[63] Thus, matters of arbitrability of the EU antitrust law itself include issues of prohibition of an agreement which constitutes a cartel, decisions on abuse of dominant position and questions of concentration of undertaking.[64]

First of all, it is undisputed that arbitral tribunals generally lack effective tools to decide these matters.[65] Secondly, depending on the legal regime given these matters are usually not subject of a settlement and as such may not be arbitrable.[66]

Moreover, this category includes the question of nullity of agreement which is breaching the EUlaw.[67] To this date, views on arbitrability of this matter are not united.[68]

Rubino-Sammartano suggests that: *"The nullity of agreements or practices under the EU antitrust law (…), are not issues of which the parties may dispose."*[69] According to *Rubino-Sammartano*, thus, arbitrators are not entitled to decide on the questions of nullity of agreement which is breaching the EU antitrust law.

Contrastingly, *Bridgeman* claims that arbitrators' power to decide on nullity of the parties' agreement arises out of what is known as Kompetenz-Kompetenz, i.e. the jurisdiction of an arbitral tribunal to rule on its own jurisdiction.[70] This principle is reflected in UNCITRAL Model Law which states in its Article 16 that: *"The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause."* According to *Bridgeman*: *"It would appear that*

63 Ibid.
64 RUBINO-SAMMARTANO, Mauro. *International Arbitration Law and Practice.* 2nd ed. The Hague: Kluwer Law International, 2001, p. 541.
65 SZOLC, Marek. The EU Competition Law and Arbitration – Is it Really a "War of the Worlds?". In: *Academia* [online]. [cit. 01. 05. 2019].
66 RUBINO-SAMMARTANO, Mauro. *International Arbitration Law and Practice.* 2nd ed. The Hague: Kluwer Law International, 2001, p. 542.
67 Ibid.
68 Ibid.
69 Ibid.
70 BRIDGEMAN, James. The Arbitrability of Competition Law Disputes. *European Business Law Revien,* 2008, Vol. 19, No. 1, p. 155.

this provision permits an arbitrator to determine his/her own competence to determine an antitrust dispute and in the case of an Article 81 challenge find that the substantive agreement between the parties is null and void without ipso facto undermining his/her own jurisdiction."[71]

This view is further supported by the English Court of Appeal and the House of Lords which confirmed the separability of an arbitration agreement from the main agreement in its decision *Fiona Trust*.[72] *"This essentially confirms the arbitrability of those competition law infringements that go to the validity of the main contract, thus enabling the arbitrator to hear argument on the validity and voidness of that contract."*[73]

In summation, prohibition of an agreement which constitutes a cartel, decisions on abuse of dominant position and concentration of undertaking are not issues of which the parties may dispose. Arbitrators are, thus, usually not entitled to rule on these matters. As for the question of nullity of agreements breaching the EU antitrust law, it remains subject to numerous debates.

3.1.2 Arbitrability of Damages and Financial Rights arising out of the EU Antitrust Law

The entitlement of arbitrators to award damages and financial rights arising out of breach of the EU antitrust law was confirmed by the Court of Justice. It ruled that effective protection of the rights granted by the TEC requires that individuals who have suffered a loss arising from an infringement of Articles 81 or 82 have the right to claim damages in arbitral tribunals.[74]

"Parties may usually dispose of the damages and financial rights arising from them."[75] Thus, arbitrators are usually entitled to decide on damages and financial rights arising out of breach of competition law provisions.[76]

71 Ibid.

72 Decision of the Court of Appeal, England and Wales, of 24 January 2007, *Fiona Trust and Holding Corporation and others v. Privalov*. In: *Swarb.co.uk* [online] [cit. 17. 03. 2019].

73 BLANKE, Gordon. EC Competition Law Claims in International Arbitration. In: KLAUSEGGER, Christian and Peter KLEIN (eds.). *Austrian Arbitration Yearbook*. Bern: Manz'sche Verlags und Universitätsbuchhandlung, 2009, p. 9.

74 Judgment of the Court of Justice of 20 September 2001. Courage v. Crehan. Case C-453/99. In *EUR-Lex* [online]. Paras. 26 and 27 [cit. 17. 03. 2019].

75 RUBINO-SAMMARTANO, Mauro. *International Arbitration Law and Practice*. 2nd ed. The Hague: Kluwer Law International, 2001, p. 542.

76 Ibid.

Therefore, it is today undisputed that arbitral tribunals are recognized to be able to deal with the EU competition law-related disputes.[77] *"The jurisdiction of an arbitral tribunal is generally the same as that of national courts: a competition-related matter will be arbitrable if it may be litigated in court."*[78] Furthermore, the arbitrators may apply the EU antitrust rules in order to award damages and in certain cases to ascertain that a contract is null and void for breach of competition law.[79]

3.2 Arbitrability of the EU Antitrust Law in the Czech Republic

As for the Czech Republic, the arbitrability is regulated by Article 2 of the Czech Arbitration Act.[80] Article 2(1) states that: *"The parties may conclude an agreement that property disputes between them falling within the jurisdiction of courts shall be decided by one or more arbitrators or by a steady court of arbitration (arbitration agreement) except for disputes connected with enforcement of a decision and for disputes provoked by bankruptcy and composition."* Moreover, Article 2(2) stipulates that: *"The arbitration agreement may be validly concluded if the dispute between the parties can be solved by concluding a judicial settlement."*

According to the Czech Arbitration Act, thus, three conditions must be fulfilled in order to invoke an arbitrability of an issue. Firstly, only property disputes (including several exceptions) are arbitrable. Secondly, disputes falling within the jurisdiction of courts are arbitrable. Thirdly, disputes are arbitrable provided that they may be subject to judicial settlement.[81]

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77 BLANKE, Gordon. EC Competition Law Claims in International Arbitration. In: KLAUSEGGER, Christian and Peter KLEIN (eds.). *Austrian Arbitration Yearbook*. Bern: Manz'sche Verlags und Universitätsbuchhandlung, 2009, p. 8; see also BORN, Gary. *International Commercial Arbitration*. 2nd ed. Aalphen aan den Rijn: Wolters Kluwer, 2014, p. 957; see also SENDETSKA, Olga. Arbitrating Antitrust Damages Claims: Access to Arbitration. *Journal of International Arbitration*, 2018, Vol. 35, No. 3, p. 357.

78 SENDETSKA, Olga. Arbitrating Antitrust Damages Claims: Access to Arbitration. *Journal of International Arbitration*, 2018, Vol. 35, No. 3, p. 357.

79 MOURRE, Alexis. Arbitrability of Antitrust Law from European and US Perspective. In: BLANKE, Gordon and Philip LANDOLT (eds.). *EU and US Antitrust Arbitration: A Handbook for Practitioners*. Kluwer Law International, 2011, p. 20.

80 CZECH REPUBLIC. Act No. 216/1994 Coll. on Arbitration and Enforcement of Arbitral Awards.

81 BĚLOHLÁVEK, J. Alexander. *Zákon o rozhodčím* řízení *a o výkonu rozhodčích nálezů*. 2nd ed. Praha: C. H. Beck, 2012, p.

In order to assess the arbitrability of the EU antitrust law, all the three conditions must be fulfilled cumulatively.[82] Firstly, it is undisputed that antitrust disputes fall within the category of property disputes. As for the second condition, the EU antitrust disputes fall within the jurisdiction of courts. This also applies to prohibition of cartel agreements and abuse of dominant position. It is, however, fair to say that only few cases dealing with these two issues were brought to national courts as courts' powers in this field are not comparable to those of Office for the protection of competition. As for the third condition, however, decisions related to prohibition of cartel agreements, abuse of dominant position and concentration of undertaking are definitely not subject to judicial settlement.[83] Therefore, according to the Czech law these matters are not arbitrable. Contrastingly, damages or financial consequences resulting from a violation of the EU competition law may be settled by parties and, thus, are arbitrable.

To conclude, generally speaking matters arising out of the EU antitrust Law are arbitrable in the Czech Republic. It is, however, always necessary to assess each situation individually as not each issue arising out of the EU Antitrust Law may be subject to judicial settlement.

4 Conclusion

In this article the question of arbitrability of the EU antitrust disputes was analysed.

In the first part of this paper, the author was dealing with party autonomy and its limits arising out of public policy. The author emphasized that certain issues are not arbitrable due to strong public interest associated with them. Moreover, it was stated that antitrust law constitutes part of public policy. Consequently, the author described the arguments against the arbitrability of the EU antitrust law.

Furthermore, the author described the development of the EU's stance towards arbitrability of the EU antitrust law. Next, the author described

82 Ibid., p.

83 ORGONÍK, Martin. Arbitrabilita sporů vzniklých z porušení soutěžního práva z pohledu soutěžního orgánu. In: *COFOLA 2010: the Conference Proceedings* [online]. Brno: Masarykova univerzita, 2010, p. 7–8 [cit. 05. 09. 2019].

the attitudes of various national jurisdictions towards arbitrability of the EU competition law. It was concluded that arbitrability of these issues is generally accepted. It is, however, essential to bear in mind that opinions exist, pursuant to which the EU should be allowed to participate and monitor arbitral proceedings where issues of antitrust are at stake.[84] According to the author of this contribution, such a procedure does not correspond to fundamental principles, on which the arbitration is based and ignores the specificities of the arbitral jurisdiction.

Next, the author described various situations in which arbitrators may face the question of arbitrability of the EU law. It was concluded that arbitrators are usually not entitled to decide on questions of prohibition of an agreement which constitutes a cartel, decision related to an abuse of dominant position and concentration of undertaking. Moreover, the author proved that arbitrators may usually apply the EU antitrust rules in order to award damages and in certain cases to ascertain that a contract is null and void for breach of competition law.

Last but not least, the author assessed the position of Czech law towards the arbitrability of the EU competition law.

The aim of this paper was to refuse of confirm the hypothesis that: *"Arbitrators are entitled to decide on the damages and financial rights arising out of the EU antitrust law."* The hypothesis was confirmed.

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Consumer Decision Making Process as a Centre of the Marketplace Effects Rule

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Abstract

The paper focuses on the interpretation of the marketplace effects rule contained in Article 6(1) of the Rome II Regulation and determination of the place where the collision of interests of competitors and consumers takes place.

Keywords

Rome II Regulation; Unfair Competition; Consumer Decision Making Process; Marketplace Effects Rule; Marketplace Principle; Applicable Law; Non-Contractual Obligations; EU Law.

1 Introduction

The EU strives to achieve fully functioning internal market to open competition within its border. Where there is competition, there appear actors whose practices may distort the aims pursued by the EU and be detrimental to the functioning of the internal market. The negative impacts of unfair competition affects not only market as such, but more specifically also other market actors such as other competitors, consumers and the general public. As a protection against such unfair practices, the EU has adopted legal acts against such detrimental actions of market actors. These legal acts are of various nature and regulate the competition from both private law and public law perspective.

In this paper, we will focus on the private international law of the EU which deals with the determination of applicable law to acts of unfair competition. The EU laws pertaining to the applicable law on non-contractual claims

arising out of unfair competition are vested in the Rome II Regulation,[1] specifically in its Article 6(1). The conflict of laws rules stipulated in Article 6 do not pose an independent rule different from the general conflicts of laws rule in Article 4(1) of the Rome II Regulation, but it is rather its clarification[2] and thus, when interpreting and applying Article 6, one should also apply it in conjunction with Article 4(1).[3] We note, that our research, and this paper as such, will be focusing on the first section of the Article 6, thus excluding the material covered by the remainder of the provision. In this context, we will not be dealing with unfair competition acts affecting a specific competitor, nor acts restricting free competition.

This paper will be dealing with the interpretation of the connecting factor vested in Article 6(1) in conjunction with Article 4(1). The connecting factor used in Article 6(1) is the place, where competitive relations or the collective interests of consumers are, or are likely to be, affected, and the connecting factor used in Article 4(1) is the place where the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur. The conjunction of the "affection" of the competitive relations or the collective interests of consumers and the "damage" will be the focal point of the research encompassed in this paper.

Consequently, it is proposed in this paper, that the conclusion on the subject matter of this research paper is that when applying and construing Article 6(1) of the Rome II Regulation, we should aim for identifying the place where the decision making process of consumers is impacted. The argument that we propose is that current construction of Article 6(1), which is that the place where the advertising occurs is the place where the competitive relations or the collective interests of consumers is affected, may be too narrow and does not reflect upon the consumers' decision making process within the framework of functioning of the internal market.

1 Regulation (EC) No. 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II). In: *EUR-Lex* [online]. [cit. 6. 9. 2019] ("Rome II Regulation").

2 Pursuant to Recital 21 of the Rome II Regulation: *"The special rule in Article 6 is not an exception to the general rule in Art. 4(1) but rather a clarification of it."*

3 This also stems from the Common position (EC) No. 22/2006 adopted by the Council on 25 September 2006 with a view to adopting Regulation (EC) No…/… of the European Parliament and of the Council of… on the law applicable to non-contractual obligations (Rome II). In: *EUR-Lex* [online]. [cit. 6. 9. 2019].

This paper will be divided into four chapters. After the first introductory chapter, we will deal in the second chapter with the meaning and interpretation of the "unfair competition" and historical development of the marketplace principle as both are key concepts for this paper. In the third chapter, we will analyse doctrinal and normative interpretation of Article 6(1) of the Rome II Regulation and we will inspect on possible interpretations and uses of connecting factor vested in therein. In the fourth chapter, we will outline our conclusion that the interpretation of connecting factor contained in Article 6(1) should be based on the place where the decision making process of the consumer is impacted.

2 On Unfair Competition and the Historical Development of the Marketplace Effects Rule

Any discussion relating to some subject should begin with discussing the meaning of the terms that are used. In the case of this paper we deem proper to begin with discussing, although briefly, the term "unfair competition", looking from the perspective of the EU law, and, providing some historical background on the development of the marketplace effects rule.

2.1 What Is "Unfair Competition"

Under the EU law the term "unfair competition" is rather problematic. Firstly, it has to be interpreted autonomously, and no national notion of the understanding of "unfair competition" may be relied upon[4] except for the cases where these notions are consistent with the principles of the large majority of the Member States.[5] Secondly, it does not seem to be consistently used across various EU legislative acts. *Honorati* has, for example, suggested, that *"a European and binding definition of what is intended to be covered by unfair competition"*[6] is included in Article 5 of the Unfair Commercial

4 DICKINSON, Andrew. *The Rome II Regulation: The Law Applicable to Non-Contractual Obligations*. Oxford: Oxford University Press, 2010, p. 428 et seq; HUBER, Peter. *Rome II Regulation. Pocket Commentary*. Munich: DeGruyter, 2011, p. 147.

5 Judgment of the Court of Justice of 14 October 1976, *LTU Lufttransportunternehmen GmbH & Co. KG v. Eurocontrol*, case No. 29/76. In: *EUR-Lex* [online]. [cit. 6. 9. 2019].

6 HONORATI, Costanza. The Law Applicable to Unfair Competition'. In: MALATESTA, Alberto (ed.). *The Unification of Choice of Law Rules on Torts and Other Non-Contractual Obligations in Europe*. Milan: CEDAM, 2006, p. 129.

Practices Directive.[7] *Dickinson*, on the other hand, points out that the terms used in Rome II Regulation, specifically term "unfair competition", does not correspond to the terminology employed in the Unfair Commercial Practices Directive, referring specifically to use of term "unfair commercial practices". This terminological discrepancy causes, from the perspective of *Dickinson*, that *"the [Unfair Commercial Practices] Directive cannot possibly claim to provide an exhaustive definition of the non-contractual obligations falling within Art 6(1) or 6(2)".*[8]

In the seeking of the meaning and the scope of the term "unfair competition" as used in the Rome II Regulation we are advised by the Commission to employ teleological approach. The *telos* of the rules against unfair competition is, among others, (i) to protect fair competition by obliging all participants to play the game by the same rules, (ii) to outlaw acts calculated to influence demand (misleading advertising, forced sales, etc.), acts that impede competing supplies (disruption of deliveries by competitors, enticing away a competitor's staff, boycotts), and acts that exploit a competitor's value (passing off and the like), and (iii) to seek to protect not only competitors (horizontal dimension) but also consumers and the public in general (vertical relations).[9]

2.2 The Development of Marketplace Effects Rule

The marketplace effects rule, or simply marketplace principle, is a determination of an applicable law pursuant to place where the interests of competitors and consumers collide. It is widely agreed that the marketplace principle was incorporated into Article 6(1) of the Rome II Regulation.[10] But

7 Directive (EC) No. 2005/29 of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market. In: *EUR-Lex* [online]. [cit. 6. 9. 2019].

8 DICKINSON, Andrew. *The Rome II Regulation: The Law Applicable to Non-Contractual Obligations*. Oxford: Oxford University Press, 2010, p. 403.

9 Proposal for a Regulation of the European Parliament and the Council on the law applicable to non-contractual obligations ("Rome II"). In: *EUR-Lex* [online]. [cit. 6. 9. 2019]. ("Commission Proposal").

10 ALFÉREZ, Francisco G. The Rome II Regulation: On the Way Towards a European Private International Law Code. *The European Legal Forum*, 2007, Vol. 7, No. 1, p. I-85–I-86; DE MIGUEL ASENSIO, Pedro A. The Private International Law of the Intellectual Property and of Unfair Competition Practices: Convergence or Divergence? In: LEIBLE, Stefan and Ansgar OHLY (eds.). *Intellectual Property and Private International Law*. Tubingen: Mohr Siebeck, 2009, p. 156 et seq.

how did it got there? The development of the principle began in the second half of 20th century in continental Europe and almost at the same time also overseas, in the United States.

At the beginning, there was a general tort claim which encompassed also acts of unfair competition.[11] In early 1960's in Switzerland, *Kamen Troller* first formulated concept of collision of interests on the marketplace. He argued, that a separate rule for determining applicable law must be used in case of unfair competition. In his understanding, the unfair competition mainly protected competitors and not consumers. The core of the unfair competition was a violation of an objective rule of market conduct, rather than an infringement of a subjective right of the competitive. Because of this, there does not have to be any damage involved – the focal point is that an objective rule was violated. Therefore, he argues, we shall not determine the applicable law of the place where the damage has occurred, instead, the marketplace where the violation occurred should serve as an attachment for the determination of the applicable law.

Similar concept was formulated at about the same time by a German lawyer *Erwin Deutsch*. His approach was also wrapped around the marketplace rule with a distinction from Toller's approach – *Deutsch* argued, that if the objective rule of the market that was violated also protects consumers, that the proper place of attachment should be the place of the consumer's residence. Finally, the third scholar that should be mentioned is *Jack Rappeport*. One of the main contributions with respect to the unfair competition conflict of laws rule was that he suggested that cross-border unfair competition acts form a single cause of action and that it is not necessary for the claimant to defend her rights in every state where the cross-border unfair competition act took place.[12]

So much for the historical development of the marketplace principle.

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11 This perspective prevails in English common law as there, still, is no specific tort of unfair competition.

12 More on the historical perspective see DORNIS, Tim W. *Trademark and Unfair Competition Conflicts. Historical-Comparative, Doctrinal, and Economic Perspectives.* Cambridge: Cambridge University Press, 2017, p. 190 et seq.

3 Marketplace Effects Rule in the Rome II Regulation and Its Construction

It is now time to shift our attention to current state of law in the Rome II Regulation. The Rome II Regulation is a general legal instrument which contains conflict of law rules pertaining to claims arising out of non-contractual obligations. The primary aim of adoption of this regulation and unification of conflict of laws pertaining to non-contractual obligations was the fact, that possibilities of harmonization of substantive laws of the Member States in the area of torts are very unlikely mainly because of the vast diversity of the relevant substantive laws across the Member States.[13] Notwithstanding the difficulties on the field of harmonization of substantive law, the Member States have achieved certain partial developments on the field of harmonizing conflict of law rules concerning torts, even with respect to marginal areas.[14] It has to be noted, however, that substantive law pertaining to torts was not left without any harmonization, but is only partially harmonized in, for example, Regulations 85/374/EEA, 72/166/EEA, 84/5/EEA and 90/232/EEA. Further harmonization activities concerning substantive law of torts are represented by the project of Draft Common Frame of Reference[15] and Principles of European Tort Law,[16] which are not legally binding (soft law).

One of the delicts covered by the Rome II Regulation is also acts of unfair competition. This term is not defined in the Rome II Regulation and,

13 Conceptual differences concerning substantive law of torts described in more detail in, for example: Van GERVEN, Walter et al. *Cases, Materials and Texts on National, Supranational and International Tort Law. Ius Commune Casebooks for the Common Law of Europe*. Oxford and Portland, Oregon: Hart Publishing, 2000, p. 2 et seq.; Von BAR, Christian and Ulrich DROBNIG. *The Interaction of Contract Law and Tort and Property Law in Europe. A Comparative Study*. Munich: Sellier European Law Publishers, 2004, p. 26 et seq.

14 Van GERVEN, Walter et al. *Cases, Materials and Texts on National, Supranational and International Tort Law. Ius Commune Casebooks for the Common Law of Europe*. Oxford and Portland, Oregon: Hart Publishing, 2000, p. 10.

15 Von BAR, Christian, Eric CLIVE and Hans SCHULTE NÖLKE (eds.). *Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR)*. Munich: Sellier European Law Publishers, 2009.

16 A compilation of guidelines by the European Group on Tort Law aiming at the harmonization of European tort law.

as a rule of the European Union law, must be interpreted autonomously which is also reiterated in Recital 11 of the said regulation.

3.1 The Aim of Article 6(1)

In order to understand the aims of conflict of laws rule in Article 6(1) we shall refer to the preamble of the Rome II Regulation and specifically to Recital 16 pursuant to which the goal of the Rome II Regulation is *"to ensure a reasonable balance between the interests of the parties, i.e. the person claimed to be liable and the person who has sustained damage"*. In relation to Article 6(1) it stems, that the focal point is not direct protection of the interests of the Member States, but primarily the protection of the interests of various market actors, such as consumers and companies (enterprises) engaged in the competition on the internal market. The Preamble sets forth three-fold protection extending to competitors, consumers and the general public which is clearly expressed in Recital 21 pursuant to which the aim of the relevant provisions on unfair competition of the Rome II Regulation is *"to protect competitors, consumers and the general public, and to ensure the proper functioning of the market economy"*. It has to be stated, that the Recital 21 also stipulates the purpose of ensuring proper functioning of the market economy. This poses as an incorporation of protection of certain economic interests, which usually are pursued by the Member States and generally may be perceived as a responsibility of the Member States. Because the Recital 21 deals with three actors of internal market, we may conclude, that the purpose of unfair competition regulation is to balance different economic interests of competitors, consumers and the general public.

3.2 Connecting Factor in Article 4(1) in Connection with Article 6(1) of the Rome II Regulation

Article 4 of the Rome II Regulation contains multiple sections, but for the purposes of this paper and our argument, we are dealing only with connecting factor vested in the general conflict of laws rule for non-contractual obligations set forth in the first section of Article 4. As was stated earlier in this paper, Recital 21 explains, that the special rule vested in Article 6(1) does not pose an exception to general rule in Article 4(1), but clarifies it.

In this chapter we will discuss on how Article 6(1) is to be construed in connection with Article 4(1).

Article 4(1) of the Rome II Regulation is a general rule for determination of applicable law in relation to non-contractual obligations. The connecting factor used is the place where *"the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur"*. The focal point of the provision is the concept of "damage". Hereby we refer once again to Recital 16 of the Rome II Regulation, which provides an explanation of the general rule being to *"ensure a reasonable balance between the interests of the person claimed to be liable and the person who has sustained damage"*.

3.3 The Concept of Damage in Connection with Unfair Competition

The concept of damage in connection with unfair competition is determined by the wording of Article 6(1). The damage is understood as the place where the competitive relations or the collective interests of consumers were affected, irrespective of the place where the event giving rise to the damage occurred and irrespective of the place in which the indirect consequence of that event occur. In the light of above, it must be determined what kind of damage is to be regarded as relevant. In the context of unfair competition it may be an effect on the competitor's position on the market, its status or its market share, it may be an effect on the consumers' process of making transactional decisions, it may be a place where the transaction of the consumer, being influenced by an act of unfair competition, is finalized (i.e. the place where the contract was entered into) or, finally, a place where the contract was ultimately performed.

The unfair competition regulation in the Rome II Regulation aims to ensure proper functioning of the internal market and the balance of the interests of various market actors.

3.4 Brief Outlining of Operation of Consumer Decision Making Process in the Market

Because Article 6(1) of the Rome II Regulation deals with the collision of interests on a market, we shall inquire briefly into how such consumer decision making process on market looks like.

Generally, there are four stages of market transactioning: (i) the first stage is competitor's conduct, which is deemed to determine the place where the advertising takes place, i.e. the advertising market; (ii) the second stage is the impact of the competitor's conduct on the consumer; (iii) the third stage is the transactioning itself, meaning the entering into the transaction (an agreement) between the competitor and the consumer; (iv) the fourth stage is the performance of that agreement. Usually, these stages take place in a single country and there is no problem in identifying the applicable law. But there are situations, where the various stages of market transactioning take place in different states. This is illustrated on a following example - a placement of billboard in the Czech Republic intended for Slovak consumers (the first stage takes place in the Czech Republic); the impact of the competitor's conduct is on passing-by drivers who see the billboard and are affected by it (the second stage also takes place in the Czech Republic); upon returning home to the Slovak Republic the affected consumers enter into an agreement with the competitor (the third stage takes place in the Slovak Republic); and finally, the goods are delivered in the Slovak Republic (the third stage takes place also in the Slovak Republic).

On all of those stages there is some level with interaction between the consumer and the competitor and where there is interaction, there is a potential collision of interests. It is now to be determined, which of the four stages should be relevant for determination of the applicable law pursuant to the marketplace principle.

3.5 The Marketplace Principle

The marketplace principle is a theoretical approach of connecting acts of unfair competition with specific place, which should determine the applicable law pertaining to the act of unfair competition and any possible claims

arising thereto. The difficulties of determination of which place is the most suitable for establishing sufficient connection between the acts of unfair competition and the applicable law to any non-contractual obligations arising out of it does not arise in simple cases such as a situation where, for example, advertising for certain product takes place in one state and the transaction (i.e. the place where the consumer enters into the contract with the competitor) takes place in the same state. In this case, reflecting the connecting factor in Article 6(1) of the Rome II Regulation, the place where the competitive relations or collective interests of consumers are affected, are in the same state. However, as was illustrated above, in the globalised world, the consumer may be influenced by an advertisement in one state and, under the influence of that advertisement, may enter into a contract in a different state. Therefore, the advertising will take place in another jurisdiction than the transaction takes place. The place, where the advertising takes place, is the place of conduct of the competitors, the place where the consumer is actually impacted by the advertisement is the place of impact, and the place where the consumers finalises the transaction by entering into a contract is a place of transaction (meaning the place where the final contract is entered into). The place of performance of the contract, in our view, does not contain sufficient connection between the unfair conduct and the market where it occurred, simply because the goods (as a subject of the contract) may be shipped anywhere.

This presents us with three options on how to construe connecting factor in Article 6(1) – either to the place of conduct, the place of impact, or to the place of contract, corresponding to the first, the second and the third stage described in part 3.4 above.

In the Commission Proposal[17] the Commission has sided with the interpretation that the proper construction of the relevant connecting factor is that the attachment should be made to a market, where *"competitors are seeking to gain the customer's favour"*. In other words, in the place of advertising or, in another words, the place of conduct, which corresponds to the second stage of the market transactioning.

17 Commission Proposal, point 30.

However, as it is argued in this paper, the place where the advertising takes place, may not be suitable in every situation and may need to be reinterpreted due to, mainly, the globalized nature of advertising and its cross-border effects and the way how the consumers make transactional decisions.

For illustration purposes, we present a following scenario. In a simple case, a product is manufactured in Slovakia and is intended for German market where it is also advertised. The product is an imitation of a luxury well known product of another competitor based in Austria. In this case, consumers in Germany. In this case, the place of conduct (advertising) and the place of contracting will be in Germany and so the German law would be applicable. However, in a more complex scenario, the place of conduct attachment may not be so straightforward. For example a situation, where a billboard on Czech territory placed by a Slovak company due to better prices of billboard advertising on the Czech side of the border than on the Slovak side of the border, placed near Czech/Slovak border, is advertising for Slovak products. On the basis of this advertisement, Slovak consumers may then buy the product online from Slovakia. In this scenario, the place of conduct is in the Czech Republic and the place of contracting is in the Slovak Republic. Similar scenario may be rare in physical world, but is omnipresent in an online world, where an advertisement may be uploaded in one country (place of conduct) and may be available globally and the consumers will be able to purchase the goods from anywhere (the place of contract). We have to bear in mind, that in such scenarios we are called to identify a place, where the interests of various actors collide. We argue, that the place where the advertisement is placed, i.e. the place of conduct corresponding to the first stage of the market transactioning, is not necessarily the place where the interests collide.

One of important decisions in this aspect is the *Gran Canaria case*.[18] This case was decided in 1990 but the reasoning of the German court is still applicable today. The case concerned advertising of a German based company. This company was advertising for merino wool products aimed at German tourists in Spain. If the consumer decided to purchase the goods, the

18 Decision of the Bundesgerichtshof, Germany of 3 December 1971, No. BGH 1972 GRUR 367 – Besichtigungsreisen.

contract was prepared in German, entered into in Spain, and the wool products were delivered to the German tourists once their returned to Germany. The consumer contracts contained a clause pursuant to which the Spanish law was governing the contract. The dispute was between the German company, as defendant, and German consumer association. The association asserted, that the contract breached German public law unfair competition regulation and is invalid. The German court has adjudicated, that it needs to be assessed where the collective interests of the consumers collided and that place is the proper place of attachment. With respect to advertising activities the court has specified, that such place would be in a state where the marketing activities were intended to have an effect on the consumers' decision making process, without any regard to a place where the transaction might have occurred or where it may have been perfected (performed). This doctrine was further developed into a marketplace effect doctrine which was ultimately incorporated into Article 6(1) of the Rome II Regulation.

This is also basis for our position which we intend to defend. On the basis of the above, we believe, that the only proper attachment with respect to determination of applicable law to acts of unfair competition pursuant to Article 6(1) of the Rome II Regulation is the place where the decision making process of the consumer is impacted. This will correspond to the third stage of market transactioning as described in the part 3.4 above. This place of impact is the place where the competitor aims its marketing endeavours and it is also the place where the competitor intends to influence the decision making process of the consumers. We are of the opinion, that it is the most reasonable and satisfactory to the objectives of the Rome II Regulation to determine the applicable law pursuant to a market, where the consumers are impacted, as a place where the interests of competitors and consumers collide.

4 Conclusion

In this paper we have focused on the construction of connecting factor contained in Article 6(1) of the Rome II Regulation. Firstly, we have shown what were the aims of the legislator when this provision was introduced.

We have referred to, among others, the Commission Proposal which has declared that the connecting factor present in Article 6(1) should point to a place where the interests of the market actors collide and this should be the place of conduct of advertising. Secondly, we have outlined certain situations in which the abovementioned construction does not provide satisfactory results which may lead to an attachment of the relevant case to a law of the state which is not the most suitable for the dispute. We have also reviewed the doctrinal and normative approaches to interpretation of Article 6(1) of the Rome II Regulation. By summarizing our findings we have came to a conclusion that the place of conduct and the place of contract do not provide for a sound attachment and that the place where the decision making process of the consumer is ultimately affected seems to be more appropriate paradigm. This does not require any revisions of Article 6(1) as such, however, a different approach to its interpretation is needed.

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COFOLA INTERNATIONAL 2019 - Conference Proceedings

Private Enforcement of Antitrust Law
and Unfair Competition with Cross-border Element

JUDr. Klára Drličková, Ph.D. (ed.).

Published by Masaryk University
Žerotínovo nám. 617/9, 601 77 Brno
in 2019

Publications of the Masaryk University
Edice Scientia, No. 675

Print: Point CZ, s.r.o., Milady Horákové 890/20, 602 00 Brno
1st edition, 2019

ISBN 978-80-210-9491-8
ISBN 978-80-210-9492-5 (online ; pdf)
ISSN 2464-8485
www.law.muni.cz

ISBN 978-80-210-9492-5

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