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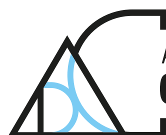

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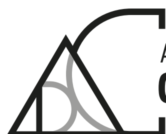

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EDITORIAL/*EDITORIAL NOTE*

Ana Sofia Rodrigues
Miguel Sousa Ferro

Este número da Revista de Concorrência & Regulação é dedicado ao direito da concorrência e publicado inteiramente em inglês, num reconhecimento da internacionalidade dos temas abordados.

Tânia Luísa Faria e Tomás Carvalho Guerra discutem as orientações e regulamentos de isenção categorial da UE sobre restrições verticais e horizontais. Os autores apresentam as suas dúvidas sobre se as recentes reformas merecem tal nome e salientam pontos que vêm como positivos e negativos nos novos enquadramentos.

Eva Oliveira defende que a recusa de acesso a um blockchain privado pode ser considerado um abuso de posição dominante. O blockchain suscita desafios especificos no que respeita à definição de mercados e à

This issue of the Revista de Concorrência & Regulação is devoted to competition law and published entirely in English, in recognition of the international relevance of the topics which are addressed within it.

Tânia Luísa Faria and Tomás Carvalho Guerra discuss the EU vertical and horizontal restrictions block exemption regulations and guidelines. The authors present their doubts on whether the recent reforms truly merit that designation and highlight the points which they view as positive and negative in these new frameworks.

Eva Oliveira argues that a refusal to access a private blockchain may be considered an abuse of dominant position. Blockchain raises specific challenges when it comes to market

dominância, que também são discutidos neste artigo. A autora propõe resolver a tensão entre as forças de mercado e a privacidade com um compromisso recorrendo a soluções técnicas.

Daniel Favoretto Rocha procede a uma análise comparativa dos setores financeiros em Portugal e no Brasil para propor medidas de promoção da concorrência, otimizando o nível de enforcement regulatório, incluindo a sugestão de instrumentos concretos que podem ser utilizados para este efeito.

Joana Tomaz Hilzbrich olha para os recentes e importantes desenvolvimentos na questão das "killer acquisitions" no controlo de concentrações europeias. Com o alargar do âmbito do mecanismo de remessa do artigo 22.º do Regulamento UE de Controlo de Concentrações, e com o acórdão Towercast do TJUE a esclarecer que o artigo 102.º do TFUE ainda pode ser usado para qualificar como abusivas acquisições por empresas dominantes, é um bom momento para uma reavaliação desta matéria.

definition and dominance raise, which are also addressed in this paper. The author proposes to resolve the tension between market forces and privacy via a compromise with resource to technical solutions.

Daniel Favoretto Rocha carries out a comparative analysis of the financial sectors in Portugal and Brazil to propose measures to promote competition, optimizing the level of regulatory enforcement, including suggesting specific instruments which may be used for this purpose.

Joana Tomaz Hilzbrich looks at the recent and important developments on the issue of killer acquisitions in EU merger control law. With the broadening of the application of the referral mechanism under Article 22 of the EU Merger Regulation, and with the Towercast CJEU Judgment pointing out that Art. 102 TFEU can still be used to qualify acquisitions by dominant undertakings as abusive, it is a good time for a reassessment of this topic.

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DOUTRINA

Doutrina geral

REVIEW OF THE EU VERTICAL AND HORIZONTAL BLOCK EXEMPTION REGULATIONS AND GUIDELINES – WHERE WE ARE AT AND WHAT LIES AHEAD

Tânia Luísa Faria, Tomás Carvalho Guerra***

Abstract: *This article outlines the new vertical and horizontal block exemptions and their guidelines. It is worth noting that this reform is part of an ongoing wider reform of the EU competition law framework to adapt EU policy and its enforcement to the digital age and sustainability concerns.*

Table of Contents: 1. Introduction. 2. Brief Context of the Reform of the EU Vertical and Horizontal Framework. 3. Main Changes Introduced by the 2022 VBER and 2022 Guidelines. 3.1 Non-compete clauses. 3.2 Parity clauses. 3.3 Dual pricing and dual distribution. 3.4 Ecommerce. 3.5 Selective distribution. 4. Main Changes Introduced by the 2023 HBERs and 2023 Guidelines. 4.1 R&D agreements. 4.2 Specialisation agreements. 4.3 Joint ventures. 4.4 Sharing of telecommunications infrastructure. 4.5 Joint purchasing agreements. 4.6 Bidding consortia. 4.7 Information exchange. 4.8 Sustainability agreements. 5. Final thoughts.

Key-Words: horizontal agreements, vertical agreements, e-commerce, information exchange, transfer of technology, sustainability.

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1. INTRODUCTION

Since 2019[1], the European Union ("EU") has been reviewing its competition law legal framework and guidelines to accommodate the digital economy, which is characterised by network effects, mobility of intangible and business functions, reliance on data, and multisided markets[2].

One wonders, however, if the constant references that the European Commission ("EC") makes to the digital economy are not a little naive and already outdated. Once used to describe how traditional brick-and-mortar economic activities (production, distribution, trade) are being transformed by the omnipresent use of the internet, digitalisation now spans all economic sectors, so much so that the digital economy overlaps with the societal economy as a whole.

The EC has identified several priorities that have to be achieved by 2024 and that will affect the competition law reform: (a) reaching net zero/climate neutrality; (b) adjusting to the digital age; (c) creating a more attractive environment for investment, the job market and future generations; (d) strengthening the EU's reach in the world; (e) promoting the European way of life; and (f) strengthening the EU's democracy[3].

These objectives seem somewhat optimistic when current data show that a gap in productive investment of 1.5 to 2 percentage points of Gross Domestic Product ("GDP") has opened between Europe and the United States and corporate spending on research and development is also low in the EU compared to international competitors – 1.5% of GDP in the EU in 2020 vs. 2.6% in the United States and Japan[4]. The EU even looks to be unlikely to meet its Green Deal objectives as reports show lingering fossil fuel subsidies and plans to continue to use coal[5].

In any case, even though unexpected external factors such as the COVID-19 pandemic and the Ukraine war had an impact on the EC's priorities, a purposely "once-in-a-generation" reshaping of most aspects of antitrust policy and enforcement is still underway, including regulation for the digital sector

1 https://www.consilium.europa.eu/en/policies/a-digital-future-for-europe/timeline-digital-europe/.

2 See, for example, the OECD 2018 Market Studies Guide for Competition Authorities, www.oecd.org/daf/competition/market-studies-guide-for-competition-authorities.htm.

3 Von der Leyen, 2019.

4 https://www.eib.org/en/publications/online/all/investment-report-2022-2023.

5 8th EAP – indicator-based progress – 2023 (europa.eu).

in the form of the Digital Markets Act[6] and the Foreign Subsidies Regulation, even if there are doubts as to whether this "reshaping" is truly something that should be treated as a competition issue, with some arguing that the antitrust ecosystem is becoming increasingly tainted with industrial policy and exclusively political measures[7].

Other rather ambitious reforms proposed by the EC include a changed approach to market definition, new merger control filing forms, revised guidance on abuse of a dominant position, plus a wide-ranging consultation on the rules governing antitrust enforcement, in particular Regulation 1/2003, December 16 2002, on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty[8], which will certainly warrant our attention in the near future[9].

Other rather ambitious reforms proposed by the EC include a changed approach to market definition, new merger control filing forms, revised guidance on abuse of the dominant position, plus a wide-ranging consultation on the rules governing antitrust enforcement, in particular Regulation 1/2003, which will certainly deserve our attention in the near future[10].

The reform of the vertical and horizontal block exemptions and guidelines was also part of the ongoing reform, even though, as we will see, the changes brought about were, on the whole, underwhelming.

This article reviews the regulations and guidelines, which are very important in terms of getting undertakings to self-assess their conduct, enhancing legal certainty in an uncertain market, strengthening leniency programmes because the self-assessments will enable undertakings to better detect potential infringements, and promoting a more uniform implementation of competition law across the 27 Member States that, further to applying the EU competition framework, also have national provisions that mirror the EU rules[11].

6 http://data.europa.eu/eli/reg/2022/1925/oj. About this Act: Geradin & Bania, 2024; Moreno Belloso, 2023.

7 http://data.europa.eu/eli/reg/2022/2560/oj. About this Regulation: Bungenberg, 2024; Wolski, 2022; Moreno Belloso, 2022; Moreno Belloso & Petit, 2023.

8 https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32003R0001.

9 http://data.europa.eu/eli/reg/2003/1/oj.

10 http://data.europa.eu/eli/reg/2003/1/oj.

11 "*The main findings of the evaluation study support that the R&D BER and Chapter 3 of the Horizontal Guidelines provide an adequate degree of legal certainty. In particular, stakeholders (mainly SMEs) identified as key strengths of the R&D BER that it facilitates self-assessment, encourages a consistent application of EU competi-*

The EC's evaluation of Vertical Block Exemption and of Regulation 330/2010 triggered a consultation process that started on 23 October 2020[12]. According to the EC, given the expanding digital landscape and increased economic activity on virtual platforms, as well as developments in decision practice and case law, the current regulations and the 2010 guidelines had to be re-examined[13].

The EC has also evaluated the two Horizontal Block Exemption Regulations on research and development agreements (Regulation 1217/2010 of 14 December 2010[14]) and on specialisation agreements (Regulation 1218/1010 of 14 December 2010[15]), together with the 2011 Horizontal Guidelines (approved in December 2010, and published on 14 January 2011), again stressing that they need to be adapted to keep abreast of the increasingly technological world and new sustainability goals[16].

This article provides context and explains the main aspects of this review.

2. BRIEF CONTEXT OF THE REFORM OF THE EU VERTICAL AND HORIZONTAL FRAMEWORK

In the early years of EU competition law, particularly during the 1960s and 1970s, the EC and the courts prioritised removing vertical restrictions to promote market integration and dismantle private barriers to trade between EU Member States under the current Article 101 of the Treaty on the Functioning of the European Union ("TFEU"), which prohibits restrictive agreements and concerted practices that affect EU trade[17].

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tion rules and reduces the need for external legal support", Commission Staff Working Document, Evaluation of the Horizontal Block Exemption Regulations, SWD(2021)103 final of 6 May 2021, p. 47.

12 Commission Evaluation of Vertical Agreements Block Exemption Regulation 330/2010. The EC's evaluation identified a range of problems that manifested [themselves] with the change in the market paradigm (Blewett & Kennis, 2023: 2): "[...] *lack clarity in the rules defining agency agreements*"; difficulties in "[...] *applying rules that are no longer adapted to the current business environment*"; gaps in the "[...] *rules, for example, a lack of guidance on how to assess retail parity clauses or restrictions on the use of price comparison websites*"; and scope for "[...] *diverging interpretations of the rules by national competition authorities and national courts*".

13 Mckinsey & Company, 2022: 1, and Blewett & Kennis, 2023: 2.

14 https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32010R1217.

15 https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32010R1218.

16 On this, Schwab, 2017.

17 "*The Commission often failed to recognise the potential pro-competitive effects of vertical restraints on inter-brand competition. The Commission's approach should be viewed in the economic context in which EU*

While vertical block exemptions and guidelines have been in place since 1985, the evolution towards a self-assessment approach, which replaced the *ex ante* authorisation mechanism in place until the 1980s, considerably strengthened the block exemptions and related guidelines. The Block Exemption Regulation[18], applicable to vertical agreements, and the Vertical Guidelines of 25 May 2000[19], significantly changed how vertical agreements were treated[20].

The mentioned Block Exemption Regulation 2790/1999 was replaced by Regulation 330/2010[21] and the 2000 Vertical Guidelines were replaced by the 2010 Vertical Guidelines[22], which included guidance for online sales and clear thresholds for buyer power[23].

On 23 October 2020, the EC published impact assessment reports reviewing Regulation 330/2010 and the 2010 Vertical Guidelines "[...] *exploring a possible revision of the rules in the areas of dual distribution, active sales restrictions, indirect measures restricting online sales and parity (most-favoured nation) obligations* [...]"[24]. On 9 July 2021, the EC published a proposal to revise the 2010 Vertical Guidelines and Regulation 330/2010, opening it up to public consultation and gathering responses between 9 July and 17 September 2021. On 10 May 2022, the EC adopted Regulation 2022/720 ("2022 VBER")[25]

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competition law developed during the 1960s and 1970s, when national markets were very much partitioned. While the primary objective of the Commission in this field has been to protect competition, the objective of market integration and the dismantling of private barriers to trade between EU member states has also played a significant role in shaping the EU competition", Blewett & Kennis, 2023: 1.

18 Commission Regulation (EC) No 2790/1999, OJ 1999 L 336/21. Dabbah, 2006: 134-151 and Goyder & Albors-Llorens, 2009: 221-229.

19 Commission Guidelines on Vertical Restraints, OJ 2000 C 291/1.

20 Bellis, 2011: 25. *"Vertical agreements may produce positive effects, including lower prices, the promotion of non-price competition and improved quality of services. Simple contractual arrangements between a supplier and a buyer which determine only the price and the quantity of a transaction can often lead to sub-optimal levels of investments and sales, as they do not take into account externalities arising from the complementary nature of the activities of the supplier and its distributors. These externalities fall into two categories: vertical externalities and horizontal externalities"*, Communication from the Commission, Commission Notice, Guidelines on Vertical Restraints, 2022/C 248/01, C(2022) 3006.

21 Commission Regulation (EU) 330/2010, OJ 2010 L 102/1.

22 Commission Guidelines on Vertical Restraints, OJ 2010/C 130/01.

23 Gorjão-Henriques & Sousa Ferro, 2010: 126, and Bellis, 2011: 27. The 2000 Guidelines already made some references to online sales (paragraphs 51-53) and the 2010 Guidelines only expand on what was said in 2000.

24 Blewett & Kennis, 2023: 2.

25 https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32022R0720.

to replace Regulation 330/2010 (which expired on 31 May 2022), and the new Vertical Guidelines, which entered into force on 1 June 2022 ("2022 Guidelines")[26].

Broadly speaking, the 2022 Guidelines and the 2022 VBER have maintained the same basic structure, substance and principles as the previous guidelines and, in this regard, are/were/have been rather disappointing for a "once in a generation" reform of antitrust rules[27]. In the wake of the responses to the public consultation carried out to draft the 2022 Guidelines and 2022 VBER, the EC stated that the purpose was to adapt the safe harbour to the digital age[28]; to reduce false negatives and eliminate false positives under the vertical exemption framework[29]; to provide stakeholders with clear, transparent, simple and up-to-date rules so that they can adjust their conduct to Article 101 TFEU[30]; and to adapt the vertical framework to a new market reality that relies heavily on the internet[31].

However, central issues in the legal and economic debate in the past few years, such as resale price maintenance ("RPM") (including minimum advertised price policies), were left unchanged, and the EC did not seize the chance during its 2022 VBER evaluation to align EU laws on RPM with those of the US. This would have given businesses greater flexibility and allowed them to use new technologies in distribution more extensively.

This is particularly unfortunate because the evaluation did bring to light important issues, including the need for additional clarification regarding recommended or maximum resale prices, and the conditions for exempting RPM under Article 101(3) TFEU owing to the efficiencies achieved.

Horizontal agreements/cooperation had been governed by Regulation 2658/2000 of 29 November 2000 on specialisation agreements and Regulation 2659/2000 of 29 November 2000 on research and development agreements, and the Horizontal Guidelines were adopted at the end

26 https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C_.2022.248.01.0001.01.ENG.

27 Heinisch & Hofmann, 2022: 144-159.

28 Mckinsey & Company, 2022:1 and Blewett & Kennis, 2023:2.

29 Explanatory Note on the new VBER and Vertical Guidelines, p. 1.

30 Explanatory Note on the new VBER and Vertical Guidelines, p. 1.

31 Varona & Hernández, 2022: 490.

of 2000[32, 33]. The Horizontal Guidelines replaced and expanded the 1968 Notice on agreements, decisions and concerted practices in the field of horizontal cooperation[34], and the 1993 Notice on the assessment of joint ventures under Article 81[35].

These guidelines, when read in conjunction with the 2004 Guidelines on the application of Article 81(3), recognised that horizontal agreements may have a positive economic impact[36]. This perspective, shaped by globalisation and technological developments, assumed that companies may benefit from collaborating in terms of sharing risks and expenses, and innovating[37]. This approach was expected to help to level the playing field, allowing smaller companies to compete with larger, more established ones. Without collaboration, the market could become dominated by only the largest and most well-resourced companies, possessing large amounts of capital, labour and know-how[38].

The 2011 Horizontal Guidelines "[...] *emphasise the importance of economic analysis focusing on the identification of the parties' market power and other*

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32 Guidelines on Horizontal Agreements, OJ [2001] C 372, [2001] 4 CMLR 819.

33 The 2001 Horizontal Guidelines addressed topics such as a) the classification of undertakings as potential competitors; (b) the analysis of horizontal agreements under Article 81(1); (c) the absence of restrictive effect where the parties did not have a market share of more than 10% or where one of the parties has an insignificant market share; (d) criteria for assessing agreements between undertakings; (d) analysis of the specific aspects of R&D agreements; (e) sustainability agreements; (f) purchasing agreements; (g) commercialisation agreements. We closely follow the [the approach taken in Ritter & Braun, 2004: 225-226 and Whish, 2009: 574.

34 Notice of 1968 on agreements, decisions and concerted practices in the field of horizontal co-operation, OJ [1968] C 75/3.

35 1993 Notice on the assessment of joint ventures under Article 81, OJ [1993] C 43/2.

36 Along the same lines, Moura e Silva (2020: 753).

37 "*Horizontal co-operation agreements can lead to substantial economic benefits, in particular if they combine complementary activities, skills or assets. Horizontal co-operation can be a means to share risk, save costs, increase investments, pool know-how, enhance product quality and variety, and launch innovation faster*", Paragraph 2 of Commission Notice "Guidelines on the application of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements", 2011/C 11/01.

38 On the reasonable need for firms to cooperate to reduce risks, see Jones & Sufrin, 2016: 715. In particular, we are thinking about the *Vacuum Interrupters Decision* (COMP/27.442, (1977) OJ L48/32), where the Commission considered that Associated Electrical Industries Ltd and Reyrolle Parsons Ltd could separately research, produce and commercialise the product, but that both companies had not done so because the risk was too high for each to bear alone. In addition, and as a sign of change in the EC's policy, in the *Optical Fibres Decision* ([1986] OJ L236/30) it considers that there is no restriction of competition, given that neither party had the individual capacity to develop and market the product, and the agreement benefited as well from the exceptional exemption of Article 101(3) TFEU.

elements linked to market structure (paragraphs 5 and 39 to 53). Provided that the cooperation genuinely aims at integrating the economic activities of the parties and is likely to bring relevant efficiencies, horizontal collaboration agreements tend to be analysed from the perspective of their effects on competition"[39]. The EC also adopted Regulation 1217/2010 of 14 December 2010 on the application of Article 101(3) of the TFEU to specific categories of research and development agreements, and Regulation 1218/2010 of 14 December 2010 on the application of Article 101(3) of the TFEU to certain categories of specialisation agreements. The 2010 Horizontal Block Exemption Regulations and 2011 Horizontal Guidelines were set to expire on 30 June 2023.

As such, in 2022, the EC had three options: let the term of the Horizontal Block Exemption Regulations and Guidelines lapse, renew them or revise the legal framework applicable to horizontal cooperation.

The EC went with the third option[40] and the new documents entered into force after they were published in the Official Journal of the European Union. The EC published the Research and Development Block Exemption Regulation 2023/1066 ("R&D BER")[41] and the Specialisation Agreement Block Exemption Regulation 2023/1067 ("Specialisation BER", and together with the R&D BER, "2023 HBERs")[42] on 21 July 2023, and the new Horizontal Guidelines ("2023 Guidelines") on 1 June 2023[43]. According to the EC, they are intended to guide undertakings in determining whether horizontal agreements are lawful under competition law[44]; promote the cohesion of the internal market; guide the environmental and digital transition and beneficial economic cooperation between undertakings[45]; and simplify administrative

39 Moura e Silva, 2020: 782 (our translation).

40 For a comparison of the 2011 Guidelines and the 2001 Guidelines, Morais, 2011: 223-271.

41 http://data.europa.eu/eli/reg/2023/1066/oj.

42 http://data.europa.eu/eli/reg/2023/1067/oj.

43 Annex to the Communication from the Commission, Approval of the Content of a Draft for a Communication from the Commission on Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Co-operation Agreements, paragraph 523.

44 Commission Staff Working Document, Evaluation of the Horizontal Block Exemption Regulations, SWD (2021)103 final of 6 May 2021, p. 13.

45 "*The evaluation showed that the* [...] *Horizontal Guidelines make it easier for companies to cooperate in ways which are economically desirable and without adverse effects from the point of view of competition policy. They promote competition and offer legal certainty to companies in the conception and implementation of their horizontal cooperation agreements*", Paragraph 5 of the Explanatory Note on the Main Changes Proposed for the Horizontal Block Exemption Regulations and Horizontal Guidelines.

supervision by the EC, the national competition authorities and national courts.

Once again, it seems that the new horizontal framework introduces no major changes and reflects the EC's tendency to undertake overcomplicated analyses that create uncertainty, something that is evident from the long list of requirements to be met for a soft safe harbour for sustainability agreements and the complete lack of a safe harbour for the very challenging matter of information exchanges.

3. MAIN CHANGES INTRODUCED BY THE 2022 VBER AND 2022 GUIDELINES

3.1 Non-compete clauses

Non-compete clauses, also known as "single branding", may limit the margin within which buyers may use or resell competing goods and services.[46] These clauses require the buyer to buy over 80% of its total demand for a given product from one provider[47].

The Portuguese Competition Authority (*Autoridade da Concorrência*) ("PCA") considered a non-compete clause in its *Nestlé* decision (PRC/2004/31). After examining the contracts between Nestlé and other companies operating in the "HORECA channel" (hotels, restaurants and cafeterias), the PCA concluded that Nestlé engaged in anti-competitive behaviour because the non-compete clauses it imposed on its clients in coffee supply contracts amounted to exclusivity clauses. According to the PCA, these non-compete obligations limited competition in the market for coffee consumption. The contracts specified a minimum quantity of coffee that clients had to purchase and contained additional provisions to extend the contract if the client was unable to meet the minimum purchase requirements during the five-year exclusive purchasing period[48].

46 "*Non-compete obligations* [...] *are arrangements that cause the buyer to purchase more than 80 % of the buyer's total purchases of the contract goods and services and their substitutes during the preceding calendar year from the supplier or from another undertaking designated by the supplier. This means that the buyer is prevented from purchasing competing goods or services or that such purchases are limited to less than 20 % of its total purchases*", 2022 Guidelines, paragraph 247.

47 Heinisch & Hofmann, 2022: 157.

48 Brice, 2008.

The 2022 VBER and 2022 Guidelines state that "[...] *non-compete obligations exceeding a duration of five years are excluded from the block exemption*", but the real innovation is that it included the possibility of tacitly extending a non-compete clause beyond the five years in the 2022 VBER safe harbour[49]. Unlike the 2010 Guidelines and Regulation 330/2010, under which non-compete clauses could not be tacitly extended, the 2022 Guidelines do, provided that the distributor is not excessively penalised for terminating or renegotiating (e.g. by having to compensate the supplier)[50, 51].

3.2 Parity clauses

Parity clauses, or "Most Favoured Nation Clauses" ("MFNs"), "Most Favoured Customer Clauses" or "Across Platforms Parity Agreements", as they are most commonly known, are often used in the digital environment "[...] *to ensure that business users do not offer their products or services at lower prices or under better terms on other platforms or their own websites*"[52]. These clauses enable the platform to demand, for example, that suppliers refrain from presenting lower prices or better conditions on intermediary sales channels or on their direct sales channels.

Parity clauses can be wide if they hinder suppliers from offering better terms on alternative sales channels in all their sales channels, or narrow if they prevent suppliers from offering better terms on their own websites but allow them to offer better conditions on other sales channels or rival platforms[53, 54].

49 2022 Guidelines, paragraphs 247 and 248.

50 Varona & Hernández, 2022: 491 and Heinisch & Hofmann, 2022: 157-158.

51 "*A significant number of stakeholders across all categories and sectors expressed broad support for the changes made in order to exempt tacitly renewable non-compete clauses beyond 5 years (while nevertheless proposing minor clarifications, such as additional guidance on what constitutes a reasonable period of time and/or reasonable cost and resolving apparent contradictions with some paragraphs of the Vertical Guidelines). A few stakeholders, however, disagreed with this change. Stakeholders representing the Horeca sector argued in particular that non-compete clauses exceeding 3 years should be excluded from the VBER. They further argued that the exception set out in Article 5(2) of the VBER, allowing indefinite non-compete clauses where the contract goods or services are sold by the buyer from premises and land owned or leased by the supplier, should be removed, as this would allow hospitality entrepreneurs to better compete with breweries and drink suppliers*", Summary of the comments received in response to the public consultation on the draft revised rules for the review of the Vertical Block Exemption Regulation (EU) No 330/2010, p. 12.

52 Heinisch & Hofmann, 2022: 156-157.

53 Santos Goncalves, 2019.

54 "*The feedback on the proposals of the draft revised rules relating to parity obligations was mixed. Stakeholders from almost all stakeholder categories welcomed the proposal to exclude across-platform retail parity*

Debate surrounding these types of clauses has been rife, particularly in the hotel sector. In 2015, the German Competition Authority (*Bundeskartellamt*) ("GCA"), along with several other EU competition authorities, prohibited wide parity clauses that prevented hotels from reducing room prices on competing booking platforms. In contrast to the more permissive approach adopted by other competition authorities in Europe to narrow parity clauses[55], the GCA disallowed narrow MFNs[56] that prevent a hotel from offering cheaper room rates on its own booking platform. Although the Dusseldorf Higher Regional Court annulled the PCA's order in 2019, stating that the narrow application of best-price clauses ought to be classified as a material ancillary agreement to an agency contract and therefore not covered by Article 101(1) TFEU, Germany's Federal Court of Justice (*Bundesgerichtshof*) confirmed that the narrow parity clauses applied by online platforms violated competition law.

Also relevant to this point is the 2012 *Apple Books* case, in which the EC investigated Apple and various international ebook publishers in relation to retail price parity clauses and other pricing clauses that Apple introduced in its iBookstore contracts, after transitioning from a wholesale to an agency model. Although the EC expressed concern that these arrangements were part of a strategy to increase ebook prices, the case was resolved through commitments: Apple agreed not to enter into or enforce any retail price MFN clauses in agreements with ebook retailers or publishers for five years[57]. Concerns about Apple's conduct extended beyond the EU: in 2013 the US Department of Justice looked into five prominent e-book publishers, one of which was Apple, and concluded that they employed parity clauses as a

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obligations (often referred to as 'wide retail parity obligations') from the VBER. In particular, among the stakeholders that submitted comments, this proposal was supported by all the distributors and their associations, by half of the stakeholders from the e-commerce sector, as well as by a significant share of business associations that represent both suppliers and distributors and by law firms and their associations. Some of these stakeholders characterised the proposed approach as 'middle-of-the-road' or contrasted it favourably to the UK competition authority's proposal to treat across-platform retail parity obligations as hardcore", Summary of the comments received in response to the public consultation on the draft revised rules for the review of the Vertical Block Exemption Regulation (EU) No 330/2010, p. 4.

55 "*In the UK, the view of the Competition and Market Authority (CMA) to date has been that narrow MFNs do not have an appreciable effect on competition and are likely to be necessary to ensure the benefits that online platforms offer to consumers*", https://www.osborneclarke.com/insights/latest-ruling-on-booking-coms-best-price-clauses-is-narrow-the-new-wide.

56 https://www.osborneclarke.com/insights/latest-ruling-on-booking-coms-best-price-clauses-is-narrow--the-new-wide.

57 Chappatte & O'Connel, 2022.

means to establish a coordinated arrangement aimed at raising prices and harming consumers[58, 59].

Although narrow retail parity obligations will continue to benefit from the safe harbour created by 2022 VBER if they meet the applicable general conditions, the 2022 Guidelines suggest that if these obligations are used to cover a significant proportion of users and there is no evidence of efficiencies, the block exemption is likely to be withdrawn[60]. In fact, the exemption has been narrowed, because retail parity obligations between competing platforms (APPAs) are no longer covered by the exemption (Article 5(1)*(d)* VBER).

In contrast to the EC's more flexible approach, Article 9 of the Portuguese Competition Law ("LDC") suggests that both wide and narrow parity clauses are prohibited under Portuguese law.

Despite objections from the PCA (explained below), the Portuguese text introduces a new subparagraph (Article 9(1)*(f)* LDC) that seems to imply that price parity clauses limit competition within the scope of the supply of accommodation, goods or services in hotels or local accommodation establishments[61].

In fact, the PCA issued an opinion[62] stating that Draft Decree 1120/XXII/2021 (which resulted in Decree-Law 108/2021) should not include that subparagraph, suggesting that the extent to which parity clauses affect competition should be assessed on a case-by-case basis, as is customary in most economic sectors and activities[63].

This asymmetry is undesirable as it may result in different rules being applied to the same type of behaviour, which could furthermore lead to a

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58 *United States v. Apple Inc.*, 952 F. Supp. 2d 638 (S.D.N.Y. 2013). "*After a bench trial, the district 13 court concluded that Apple violated § 1 of the Sherman Antitrust Act, 15 U.S.C. § 1 et seq., by orchestrating a conspiracy among five major publishing companies to raise the retail prices of digital books, known as 'ebooks'. The court then issued an injunctive order, which, inter alia, prevents Apple from signing agreements with those five publishers that restrict its ability to set, alter, or reduce the price of ebooks, and requires Apple to apply the same terms and conditions to ebook applications sold on its devices as it does to other applications*", Case 13-3741, Document 373-1, 06/30/2015, 1543162, p. 2 (https://www.justice.gov/atr/case-document/file/624326/download). Apple appealed before the 2nd United States Circuit Court of Appeals, which upheld the previous judgment. Apple then unsuccessfully appealed that decision before the Supreme Court of Justice of the United States.

59 Explained in: https://www.oxera.com/wp-content/uploads/2018/07/Most-favoured-Nation-clauses_1-1.pdf-1.pdf.

60 About Portuguese law bans on MFNs on booking platforms: Connor, 2022.

61 Oliveira e Costa & Marques de Azevedo, 2021: 1.

62 https://www.concorrencia.pt/sites/default/files/processos/epr/Parecer%20Decreto-Lei%20n.%C2%BA%20108-2021.pdf.

63 Opinion of the Competition Authority on Draft Decree 1120/XXII/2021, Amending the Competition Rules, the Rules on Individual Trade Restrictive Practices and the Rules on General Contractual Clauses, p. 10.

compartmentalisation of the internal market, since the PCA applies both the LDC and Article 101 of the TFEU[64, 65].

3.3 Dual pricing and dual distribution

Dual pricing and dual distribution practices have become more common, particularly after the COVID-19 pandemic, mainly because ecommerce has grown significantly[66]. They play a significant role in the market economy since most transactions among suppliers, distributors and consumers are agreed to on digital platforms.

According to a study conducted by McKinsey & Company, during the pandemic ecommerce as a share of total retail sales grew (compared to pre-pandemic years) more than 3 times in the US, more than 4 times in the United Kingdom, and 1.6 times in China. Online purchases accounted for nearly 20% of total global sales in 2021, and almost a quarter of all global sales are expected to be made online by 2025[67].

Furthermore, following a study by the International Trade Administration, global B2C ecommerce revenue is expected to exceed EUR 5 billion by 2027, growing at a steady average annual rate of 14.4%[68].

On top of that, according to an annual survey on the use of Information and Communication Technologies in households and by individuals, in the EU 91% of individuals aged 16 to 74 have used the internet, of which 75% purchased or ordered goods or services for private use. And the percentage of e-shoppers has increased from 55% in 2012 to 75% in 2022[69].

Dual pricing occurs when the same product is displayed at different prices depending on where (online or offline) it is purchased[70]. Given that dual

64 "*It therefore seems necessary to take into account the possible incompatibility between the Draft Decree and Article 3 of Regulation (EU) No 1/2003, insofar as the provisions of the Draft Decree could lead to the prohibition of parity clauses that may be justifiable, and therefore lawful, within the meaning of Article 101(3) of the TFEU*", Opinion of the Competition Authority on Draft Decree 1120/XXII/2021, Amending the Competition Rules, the Rules on Individual Trade Restrictive Practices and the Rules on General Contractual Clauses, p. 13.

65 Opinion of the Competition Authority on Draft Decree 1120/XXII/2021, Amending the Competition Rules, the Rules on Individual Trade Restrictive Practices and the Rules on General Contractual Clauses, p. 12.

66 Heinisch & Hofmann, 2022: 145 and Ridruejo & Schliephake, 2022.

67 https://www.mckinsey.com/~/media/mckinsey/featured%20insights/mckinsey%20explainers/what%20is%20e%20commerce/what-is-e-commerce_final.pdf.

68 https://www.trade.gov/ecommerce-sales-size-forecast.

69 https://ec.europa.eu/eurostat/web/products-eurostat-news/w/DDN-20230228-2.

70 2022 Guidelines, paragraph 209.

pricing and dual distribution systems are increasingly common and there is a real risk of distributors and suppliers exchanging information[71], the 2022 Guidelines understand that this practice may be justified, provided that the price difference is reasonable and related to the discrepancy between the costs and investments required for online and offline channels[72]. They may fall under the Article 2(1) exemption of the 2022 VBER because they incentivise and reward investments in online or offline channels. Previously, this type of agreement was considered a "hardcore" restriction[73].

Although dual pricing limiting retailers' access to the internet is still clearly prohibited, the truth is that the EC appears to be suggesting that dual pricing will be analysed with a significant degree of flexibility[74] (this "[...] *will enable them to, for instance, determine ex post an aggregate annual discount based on the mix of online/offline sales made throughout the year instead of ex ante applying a different discount to each individual purchase*"[75]).

Dual distribution occurs when a supplier sells goods or services to independent distributors and directly to consumers[76]. Thus, it is clear that there may be a certain degree of intra-group competition between suppliers when they sell directly to consumers and the independent distributors themselves who sell the products or goods of those suppliers.

While vertical agreements between competitors are seemingly excluded from the block exemption, dual distribution agreements are covered by the vertical agreements safe harbour as long as they do not fall foul of the limits set out in the 2022 Guidelines that apply to online intermediation service providers (e.g. ecommerce marketplaces, app stores, price comparison tools and social media services) that also sell goods or services that compete

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71 Ridruejo & Schliephake, 2022.

72 2022 Guidelines, paragraph 209.

73 Commission Guidelines on Vertical Restraints, OJ 2010/C 130/01, paragraph 62.

74 2022 Guidelines, paragraph 209.

75 Varona & Hernández, 2022: 491.

76 "*On the one hand, the review of the old VBER showed that, in view of the increase in the use of dual distribution, the old VBER may exempt vertical agreements where horizontal concerns are no longer negligible, in particular as regards information exchange between suppliers and distributors, and as regards so-called hybrid platforms. On the other hand, that review indicated that extending the dual distribution exemption to wholesalers and importers is appropriate. This extension is reflected in Article 2(4) of the new VBER*", Explanatory Note on the new VBER and Vertical Guidelines, p. 2.

with the companies to which they provide intermediation services, which are excluded from the safe harbour benefit[77, 78, 79].

For instance, the Italian Competition Authority (*Autorità Garante della Concorrenza e del Mercato*)("ICA"), in case 1842, *Amazon/Apple*, imposed a EUR 68.7 million fine on Amazon and a EUR 134.5 million fine on Apple for breaching Article 101 TFEU through Apple's distribution activity on Amazon's online marketplace[80]. In Italy, Apple used a dual distribution approach, selling its products directly to consumers and through resellers. These channels consist of an open distribution system, which is used for most of its products, and a selective distribution system, specifically for Beats Wireless products. Under the open distribution system, Apple had established distribution agreements with designated official resellers, providing them with discounts to encourage them to promote and sell Apple products[81].

The ICA ruled that online intermediation service providers with a hybrid function are not eligible to benefit from Regulation 330/2010[82], and the restrictions related to the conditions for providing online intermediation services to third parties are not covered by Regulation 330/2010. In fact, and to support this claim, "[...] *the ICA referred to both the Commission's proposed new draft of the VBER and to its draft Vertical Guidelines to support its conclusion that: (i) providers of online intermediation services with a hybrid function (i.e., that both provide intermediation services and sell goods/services in competition with the undertakings to which they provide such services) cannot benefit from the dual distribution*

77 Czapracka, Harjula, Kuhn & Citron, 2022.

78 Explanatory Note on the new VBER and Vertical Guidelines, p. 2 and Czapracka, Harjula, Kuhn & Citron, 2022.

79 "*All categories of stakeholders were critical of the threshold introduced in Article 2(4) of the draft revised VBER, which limits the current safe harbour for dual distribution to instances where the parties' aggregated market share in the retail market does not exceed 10%. Some stakeholders argued that this threshold should, as a minimum, be replaced by a higher market share threshold (20%) or by an alternative threshold (relating to the share of direct sales of the manufacturer in relation to its entire sales). In addition, many stakeholders indicated that it is difficult and costly (especially for SMEs) to calculate market shares at retail level, notably where local markets and/or different products are concerned. They also pointed to inconsistencies with Article 3 of the VBER, where the relevant market share threshold for the buyer concerns the purchasing market and not the retail market*", Summary of the comments received in response to the public consultation on the draft revised rules for the review of the Vertical Block Exemption Regulation (EU) No 330/2010, p. 3.

80 The fines imposed by the ICA were subsequently reviewed and lowered to EUR 58.6 million (Apple) and EUR 114.7 million (Amazon).

81 Kmiecik & Gordley, 2021: 15.

82 Heinisch & Hofmann, 2022: 146.

exceptions; and (ii) the VBER does not apply to restrictions relating to the conditions for the provision of online intermediation services to third parties"[83].

3.4 E-commerce

Article 4*(e)* of the 2022 VBER is an innovative rule that reflects the case law of the European Court of Justice[84] regarding measures designed to prohibit distributors or their consumers from using the internet to sell or resell goods or services; these are considered a "hardcore" restriction under the 2022 Guidelines and the 2022 VBER[85].

For example, on 27 June 2006, the French Competition *Authority* (*Autorité de la Concurrence*) ("FCA") initiated an investigation into potential anti-competitive practices in the cosmetics and personal hygiene distribution sector. Following a thorough investigation, the FCA closed the case against ten of the 11 companies involved (Decision 07-D-07, 8 March 2006).

Although *Pierre Fabre Dermo-Cosmétique* argued that its refusal to sell its products on the internet was justified, the FCA nevertheless considered that such an absolute and general ban on internet sales was anti-competitive (we note that the members of Pierre Fabre's selective distribution system could only sell its cosmetics and personal hygiene products in physical stores and in the presence of a trained pharmacist).

As a result, Pierre Fabre was fined on 24 December 2008, a decision it appealed to the Paris Court of Appeal (*Cour d'appel de Paris*), which in turn requested a preliminary ruling on the matter from the European Court of Justice ("ECJ"). Specifically, the national court asked the ECJ if a general and absolute prohibition on the selling of contract goods to end users over the internet, imposed on authorised distributors in the context of a selective distribution network, constituted a "hardcore" restriction of competition by object for the purposes of Article 101(1) of the TFEU.

The ECJ held that a complete and unconditional prohibition on online sales within a selective distribution network constitutes a breach of Article 101(1) TFEU by object, as it significantly curtails the ability of authorised distributors to sell contractual products to consumers outside their designated

83 Kmiecik & Gordley, 2021: 16.

84 *Pierre Fabre Dermo-Cosmétique SAS v. President de L'Autorite de la Concurrence*, [2011] C-439/09, EU:C:2011:649, and *Coty Germany GmbH v Parfümerie Akzente GmbH*, [2018] C-230/16, EU:C:2017:941.

85 For example, vertical agreements aimed at significantly reducing the aggregate volume of online sales of contract products, 2022 Guidelines, paragraph 203. Moreno-Tapia, López Ridruejo & Sement, 2023.

territory or area of activity. The ECJ determined that this limitation could not be justified on the basis of safety or public health concerns. It also found that maintaining a prestigious image could not be considered a legitimate objective that would warrant restricting competition. It also concluded that the measures in question could not benefit from Regulation 330/2010, as a general ban on using the internet limits both active and passive sales within the meaning of Article 4*(c)* Regulation 330/2010[86].

More recently, the FCA fined Rolex France (jointly with Rolex Holding SA, the Hans Wilsdorf Foundation and Rolex SA) more than EUR 90 million[87]. The selective distribution agreements between Rolex and its retailers prohibited Rolex's network of authorised retailers from selling Rolex watches in response to email requests or on the internet. Rolex claimed that the ban on online sales was intended to protect its image and combat counterfeiting and off-network sales[88]. While acknowledging the legitimacy of these objectives, the FCA found that imposing an online sales ban was not a reasonable and proportionate measure. Therefore, the FCA sanctioned Rolex for an anticompetitive agreement.

However, there are important nuances in the 2022 VBER, as it allows certain restrictions on online sales or restrictions on online advertising that are not intended to prevent the overall use of online advertising platforms[89]. Paragraph 210 of the 2022 Guidelines clarifies that online advertising restrictions can benefit from the exemption provided by Article 2(1) 2022 VBER, provided that they do not have the object of preventing the buyer from using an entire advertising channel. In addition, paragraph 208 of the 2022 Guidelines says that online sales restrictions generally do not have such an object when the buyer remains free to operate his own online store and to advertise online, because in reality the buyer is not prevented from making effective use of the internet to sell goods or services.

Finally, the 2022 VBER and 2022 Guidelines adopt a more flexible approach to dual pricing and equivalence. In fact, the EC dismissed the equivalence approach so the criteria imposed by suppliers in relation to online stores will not

86 Paragraph written closely following Mavroghenis & Kolotourou, 2022.

87 https://www.concurrences.com/IMG/pdf/decision_rolex.pdf?119260/a9b7d48a09fcd29f2090f2e-00334d04248574ebb6b6da997e396be300cf6caf1.

88 https://www.autoritedelaconcurrence.fr/en/communiques-de-presse/lautorite-de-la-concurrence--sanctionne-rolex-dune-amende-de-91-600-000-euros.

89 Urlus & Sutherland, 2022: 7–8.

have to be equivalent to the criteria they impose on physical shops[90] because the online sales market has already developed into a mature and strong channel that "[...] *no longer requires special protection relative to offline sales channels*"[91].

3.5 Selective distribution

A selective distribution system is a distribution framework where the supplier agrees to sell goods or services, directly or indirectly, only to selected distributors that meet specific criteria[92], and where these distributors agree not to sell such goods or services to unauthorised distributors within the territory reserved for selective distribution[93].

Well-known companies with strict quality standards, such as L'Oréal[94], Adidas[95], Guess[96], BMW[97], Chanel[98] and Omega[99], have employed selective distribution systems over the years.

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90 2022 Guidelines, paragraph 208.

91 Explanatory Note on the new VBER and Vertical Guidelines, p. 4.

92 "*The criteria used by the supplier to select distributors may be qualitative or quantitative, or both. Quantitative criteria limit the number of distributors directly by, for instance, imposing a fixed number of distributors. Qualitative criteria limit the number of distributors indirectly, by imposing conditions that cannot be met by all distributors, for instance, relating to the product range to be sold, the training of sales personnel, the service to be provided at the point of sale or the advertising and presentation of the products. Qualitative criteria may refer to the achievement of sustainability objectives, such as climate change, protection of the environment or limiting the use of natural resources. For example, suppliers could require distributors to provide recharging services or recycling facilities in their outlets or to ensure that goods are delivered via sustainable means, such as cargo bike instead of by motor vehicle*", 2022 Guidelines, paragraph 144.

93 2022 Guidelines, paragraph 143, Wagner-Von Papp, 2018, and Blewett & Kennis, 2023: 28.

94 *NV L'Oréal and SA L'Oréal ("L'Oréal") v. PVBA De Nieuwe AMCK ("De nieuwe AMCK")*, [1980] 31/80. The *L'Oreal* case, decided in the 1980s, concerns a selective distribution system. The agreement in question included a clause that restricted the distribution of cosmetic products to situations in which an authorised Kérastase hairdresser was present. L'Oreal argued that this requirement was essential to guarantee the appropriate distribution and use of the products. Honório, 2019: 26-27.

95 *Adidas*, *Bundeskartellamt*, 27 June 2017, B3-137/12. Adidas, one of the world's largest sports article manufacturers, implemented a selective distribution system that limits the sale of its products to authorised retailers for final customer purchase. In April 2012, Adidas updated its guidelines for online sales, known as ecommerce conditions, which took effect on 1 January 2013. These conditions included a restriction on the sale of Adidas products through open marketplaces on the internet, among other measures. *Bundeskartellamt*, 27 June 2017, B3-137/12, Case Summary.

96 Commission Decision 17 December 2018, AT.40428, Guess, C(2018) 8455.

97 *Bayerische Motorenwerke AG v ALD Auto-Leasing D GmbH*, [1995] C-70/93, ECLI:EU:C:1995:344.

98 Chanel (OJ1994 C334/11), mentioned in Gauberti, 2016: 40.

99 *Omega* (OJ1970 L242/22), mentioned in Gauberti, 2016: 40. "*In Omega* […] *the European Commission accepted a restriction on the number of dealers because Omega was only physically capable of manufacturing*

Purely qualitative selective distribution systems are not considered to restrict competition if they meet the criteria the ECJ set in the *Metro* judgment. As such, this type of selective distribution system does not require an individual exemption or to qualify for the exemption provided by the 2022 VBER if the nature of the goods or services requires a selective distribution system (this is the case, for instance, of high-quality, high-technology or luxury products); if distributors are chosen on the basis of objective qualitative criteria applied uniformly and not in a discriminatory manner; and if the criteria are not beyond what is necessary.

Even if these conditions are not met, selective distribution agreements can benefit from the exemption under the 2022 VBER if the market shares of the supplier and the buyer do not exceed 30% in their respective markets and the agreement does not contain any "hardcore" restrictions. Also, in addition to the usual examples of qualitative selective distribution criteria that relate to the product range, the training of staff or point-of-sale services, the 2022 Guidelines allow access to the distribution network to be made conditional on achieving sustainability objectives (such as climate change, environmental protection or using natural resources).

While the basic principles of selective distribution have not changed, the 2022 VBER, as in the case of exclusive distribution systems, allows suppliers to restrict buyers of authorised distributors from selling to unauthorised distributors, which was expressly prohibited under Regulation 330/2010.

The 2022 Guidelines also allow suppliers to require distributors to have one or more physical stores or showrooms as a condition to becoming members of their selective distribution system. Suppliers may also impose quality requirements for online sales that are different from those imposed on physical stores, require distributors to make an (absolute) minimum number of sales in physical stores and, in line with the case law of the Court of Justice of the European Union ("CJEU")[100], the 2022 Guidelines expressly provide that distributors may be prohibited from selling products on marketplaces as long as they are allowed to use other online channels and even search engine advertising channels.

a relatively small quantity of its luxury watches and there was only limited demand for such watches", Gauberti, 2016: 40.

100 *Coty Germany GmbH v Parfümerie Akzente GmbH*, [2018] C-230/16, EU:C:2017:941.

4. MAIN CHANGES INTRODUCED BY THE 2023 HBERS AND 2023 GUIDELINES

4.1 R&D agreements

The R&D BER, which focuses on protecting competition in innovation, introduced a number of important changes, albeit not all those discussed during the public consultation phase[101].

Firstly, when two or more of the parties are competing undertakings within the meaning of Article 1(1)(15), Article 101(1) TFEU will not apply to R&D agreements for the duration of the research and development if, at the time the agreement is entered into: *(a)* the combined market share of the parties to the R&D agreements (joint R&D of contract products or contract technologies, or joint exploitation of the results of R&D of contract products or contract technologies carried out pursuant to a prior agreement falling under point Article 1(1)*(a)* R&D BER between the same parties) does not exceed 25% on the relevant product and technology markets; *(b)* the combined market share of the financing party and all the parties with which the financing party has entered into research and development agreements with regard to the same contract products or contract technologies does not exceed 25% on the relevant product and technology markets (this exemption only applies to paid-for R&D of contract products or contract technologies, or joint exploitation of the results of R&D of contract products or contract technologies carried out in accordance with a prior agreement falling under Article 1(1)*(b)* R&D BER between the same parties).

Secondly, Articles 10 and 11 R&D BER allow the EC and national competition authorities to withdraw exemptions in concrete cases, in the wake of Article 29 Regulation 1/2003.

Thirdly, market shares will be calculated based on data relating to the preceding calendar year. If the preceding calendar year is not representative of the parties' position in the relevant market(s), the market share will be calculated as an average of the parties' market shares for the three preceding calendar years (Article 7(3) R&D BER)[102].

Fourthly, the EC states that, in general, the benefits of R&D agreements outweigh the harmful effects on competition only until a certain market

101 On the complex relationship between innovation and competition: Oliveira Pais, 2011.

102 Explanatory Note on the Main Changes Proposed for the Horizontal Block Exemption Regulations and Horizontal Guidelines, paragraph 10.

power threshold is exceeded. Consequently, the R&D BER exemption may only apply to agreements between competing undertakings provided their combined market share does not exceed 25%. Furthermore, the R&D BER simplifies the grace period to two consecutive calendar years (in all cases) following the year in which the threshold was first exceeded (Article 6(5) R&D BER)[103, 104].

Lastly, if the R&D agreement includes any of the excluded restrictions referred to in Article 9(1), Article 101(1) TFEU will not apply to the remaining part of the R&D agreement, provided that the excluded restrictions can be separated from that remaining part and that the other conditions of the R&D BER are met.

4.2 Specialisation agreements

The Specialisation BER harbour certain types of agreements between undertakings that specialise in the production of different goods or services because they can result in efficiency gains for businesses involved and consumers, as it enables them to concentrate on their core competencies and cut costs[105].

In today's climate, particularly in the aftermath of a pandemic, these types of exemptions are extremely important as increasingly more companies look for ways to compete more effectively. Specialisation agreements can enable undertakings to achieve economies of scale, develop new products and services more quickly, and improve their quality and efficiency[106]. Of all the changes made to this type of block exemption, we would note the following.

Firstly, the new Specialisation BER extends the definition of unilateral specialisation agreements to include specialisation agreements entered into by more than two parties active on the same product market ("*Such benefits can arise first from agreements whereby one or more parties fully or partly give up the manufacture of certain goods or the preparation of certain services in favour of another party or parties*", recital 8). This change is likely to be "[...] *important for small and medium-sized enterprises* [...], *as their size may necessitate cooperation with more than one party*"[107].

103 Ovecka & Holinde, 2023b.

104 Explanatory Note on the Main Changes Proposed for the Horizontal Block Exemption Regulations and Horizontal Guidelines, paragraph 10.

105 https://ec.europa.eu/commission/presscorner/detail/en/qanda_23_3014.

106 McKinsey & Company, 2021.

107 Tamke, Bär-Bouyssière, Karagulova-Glantz, & Přerovský, 2023: 4.

Secondly, it simplifies the grace period that applies if the market shares of the parties to the agreement exceed the exemption threshold. If the market shares referred to in Article 3 are initially not more than 20% but subsequently rise above that in one or more of the relevant markets, the exemption established in Article 2 will continue to apply for two consecutive calendar years following the year in which the 20% threshold was first exceeded.

Thirdly, market shares will be calculated on the basis of data relating to the preceding calendar year or, where the preceding calendar year is not representative of the parties' position in the relevant market(s), they will be calculated as an average of the parties' market shares over the previous three calendar years (Article 4*(b)* Specialisation BER, and paragraph 205 of the 2023 Guidelines).

Fourthly, the Specialisation BER clarifies how the market share threshold is calculated in the case of agreements concerning intermediate products. When the specialisation products are intermediary products that are fully or partly used captively by one or more of the parties as inputs for the production of downstream products, which they also sell, the Article 2 exemption will only apply if both of the following conditions are fulfilled: *(a)* the parties' combined market share does not exceed 20% on the relevant market(s) to which the specialisation products belong (Article 3*(a)* Specialisation BER); and *(b)* the parties' combined market share does not exceed 20% on the relevant market(s) to which the downstream products belong (Article 3*(b)* Specialisation BER)[108].

Lastly, the new Specialisation BER empowers the EC and the national competition authorities to withdraw the exemption in specific cases, in line with Article 29 Regulation 1/2003.

4.3 Joint ventures and their parent companies

The 2023 Guidelines cover when Article 101 TFEU applies to joint ventures and their parent companies, in line with the CJEU's case law[109]. In particular, they reflect the *LG Electronics* case, in which the ECJ held that a joint venture

108 Skotki, 2023.

109 It considers that parent companies and their joint ventures form a single economic unit, and that the EC should therefore refrain from applying Article 101 TFEU to agreements and concerted practices between parent companies and joint ventures, provided that they occur in the relevant market where the joint venture is present and for periods during which the parent companies exercise decisive influence over them. In this regard, see *LG Electonics Inc. and Koninklijke Philips Electronics NV*, C-588/15 P, EU:C:2017:679, *The Goldman Sachs Group Inc. v. Commission*, C-595/18 P, EU:C:2021:73, *Viho,* C-73/95 P, EU:C:1996:405.

and its parent company may constitute the same entity in some markets, but in some specific cases they may also be considered separate entities, for example, when they operate in different markets or the parent company does not exercise decisive influence over the joint venture.

In the draft of the 2011 Guidelines, the EC stated that "*Article 101 does not apply to agreements between the parents and such a joint venture, provided the creation of the joint venture did not infringe EU Competition Law*"[110]. By contrast, paragraph 11 of the final version of the 2011 Guidelines did not follow the line of reasoning of previous proposals, stating that: "*Companies that form part of the same 'undertaking' within the meaning of Article 101(1) are not considered to be competitors for the purposes of these guidelines. Article 101 only applies to agreements between independent undertakings*"[111]. Paragraph 12 of the 2023 Guidelines states that the "[...] *Commission will, in general, not apply Article 101 to agreements or concerted practices between parent companies and their joint venture to the extent that they concern conduct that occurs in relevant market(s) where the joint venture is active and in periods during which the parent companies exercise decisive influence over the joint venture*"[112], but, generally, the EC must apply Article 101 to the categories of agreements listed in paragraph 12[113].

Therefore, using "*generally*" to the detriment of the peremptory "*does not apply*" denotes an attempt, in our view, to give some sense and flexibility to the contradiction, for example, between the *Gosme/Martell-DMP* case[114], in which the joint venture and the parent company were considered separate

110 Draft Communication from the Commission – Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Co-operation Agreements, paragraph 11.

111 For a comparison of the two versions: Bretz, 2023.

112 "*The new proposed guidance does not state that Article 101(1) 'does not apply to' agreements between a joint venture and its parents but solely specifies in paragraph 13 that 'the Commission will typically not apply' Article 101(1) to such agreements. This wording [...] suggests that the Commission does not exclude the possibility that Article 101(1) may apply. Indeed, rather than stating that agreements and concerted practices between a joint venture and its parents cannot be challenged, the Commission only signals that it would not challenge them if they concern activities in the markets where the joint venture is active*", Meyring & Venot, 2022.

113 "*(a) agreements between parent companies to create a joint venture; (b) agreements between parent companies to modify the scope of their joint venture; (c) agreements between parent companies and their joint venture concerning products or geographies in which the joint venture is not active; and (d) agreements between parent companies not involving their joint venture, even if the agreement concerns products or geographies in which the joint venture is active*", Horizontal Guidelines 2023, paragraph 12.

114 Commission Decision 15 May 1991, *Gosme/Martell-DMP*, 91/335/EEC (Official Journal L 185, 11/07/1991 P. 0023 – 0030).

entities, and the *El du Pont de Nemours and Company* case[115], in which the joint venture and the parent company were considered entities of the same group as regards liability[116]. The 2023 Guidelines thus appear to introduce an element of discretion to the application of competition rules[117].

Finally, a coordination joint venture may also be justified if it aims to achieve a sustainable goal, once again reinforcing the principle of sustainable development and alignment with the policies of the United Nations and the European Green Deal[118].

4.4 Sharing of telecommunications infrastructure

Mobile network telecom operators often cooperate to maximise the success (and profits) of the network they build[119]. They share the use of portions of telecoms platforms (for example, antennas or power supplies), operating and maintenance costs, and development costs[120]. This enables them to reduce production costs and, by extension, the final price they charge consumers, as well as provide a better service[121].

While some sharing arrangements can be legal, even if they result in higher prices or reduced supply, the EC acknowledges that they may be a restriction by object if they are used as a tool in operating a cartel[122], or a restriction by effect if they reduce consumer choice, service quality and development[123].

This therefore requires a careful case-by-case analysis[124] taking into account the following elements[125]: *(a)* the type and depth of sharing; *(b)* the scope of the shared services and technologies; *(c)* the purpose of the sharing; *(d)* the duration and structure of the cooperation; *(e)* the geographic market; *(f)* the relevant market's characteristics and structure; *(g)* the number of

115 *El du Pont de Nemours and Company*, [2013] C-172/12 P, ECLI:EU:C:2013:601.

116 In this regard, Bretz, 2023.

117 Meyring & Venot, 2022.

118 Horizontal Guidelines 2023, paragraphs 3 and 516.

119 Escudero & Tuit, 2022: 3.

120 Batchelor & Kafetzopoulos, 2023.

121 Horizontal Guidelines 2023, paragraph 260.

122 Tamke, Bär-Bouyssière, Karagulova-Glantz, & Přerovský, 2023: 4.

123 *Network sharing – Czech Republic*, AT.40305, 11 July 2022.

124 *02 (Germany) v. Commission*, T-328/03, EU:T:2006:116, paragraphs 65–71.

125 Horizontal Guidelines 2023, paragraph 264.

sharing agreements in the relevant market; and *(h)* the number and identity of the network operators involved.

4.5 Joint purchasing agreements

The line between a buyer cartel[126] and a joint purchasing agreement[127] is sometimes blurred, and the expert report that the EC requested identifies the omission of criteria to distinguish one from the other (the "[...] *Horizontal Guidelines of 2011 say nothing about what is meant by joint purchasing and how it is distinguishable from a buyer cartel*")[128]. As such, the EC has found itself in need of further guidance on drawing the line between one and the other[129].

In order to distinguish these situations from one another, the EC states that a joint purchasing agreement will not, in principle, be a buyer cartel if: *(a)* the "[...] *joint purchasing arrangement makes it clear to suppliers that the negotiations are conducted on behalf of its members and that the members will be bound by the agreed terms and conditions for their individual purchases, or that the*

126 On the concept of restriction by object: *Allianz Hungária*, C-32/11, EU:C:2013:160, paragraph 45; *Erauw-Jacquery*, P-27/87, ECLI:EU:C:1988:183, paragraph 13; *Binon c. Messageries de la presse,* C-243/83, ECLI:EU:C:1985:284, paragraph 45; Moura e Silva, 2020: 633; Jones & Sufrin, 2014: 203-232. Considering the buyer cartel as restrictive of competition by object: *Campine,* T-240/17, EU:T:2019:778 paragraph 297; *Alliance One v Commission,* T-24/05, EU:T:2010:453; *Deltafina v Commission,* T-29/05, EU:T:2010:355.

127 On the concept of constraint by effect: Jones & Sufrin, 2014: 232–242. On the interconnection between joint purchasing agreements and sustainability agreements: "*A difficult issue of particular importance is whether the pursuit of sustainability objectives by a joint purchasing agreement may influence its characterisation as being restrictive of competition by object or effect. We consider that, in principle, certain joint purchasing arrangements can make a positive contribution to sustainability objectives. Certain agreements between competing purchasers might be regarded as restrictions of competition by object as they amount to a group boycott. We have suggested that a distinction should be made between 'horizontal boycotts' that harm competitors at the same level of the market as the perpetrators of the boycott, on the one hand, and 'vertical purchasing restraints' where purchasers agree not to deal with a supplier or suppliers at a different level of the market, on the other. An example of a vertical purchasing restraint would be what we describe as a sustainable products purchasing agreement, for example where a group of competing purchasers agree to purchase timber only from sustainable sources. We consider such an agreement should not be considered to be restrictive of competition by object, but should instead be analysed on an effects basis*", Whish & Bailey, 2022.

128 Whish & Bailey, 2022: 67. Along the same lines, several "[...] *law firms and associations of competition lawyers and economists consider that legal certainty is lacking due to a perceived difficulty to distinguish between joint purchasing and buying cartels as both involve an agreement on purchase prices. In this regard they point at recent Commission decisions covering buying cartels and the need to clarify the factors that influence the distinction between legitimate purchasing arrangements and by object buying cartels*", Commission Staff Working Document, Evaluation of the Horizontal Block Exemption Regulations, SWD(2021)103 final of 6 May 2021, p. 118.

129 Pree, Gornall, Rijke & The, 2022 and Heinisch & Gerber, 2023.

joint purchasing arrangement purchases on behalf of its members"[130]; and *(b)* the "[...] *members of the joint purchasing arrangement have defined the form, scope and functioning of their cooperation in a written agreement, so that its compliance with Article 101 can be verified ex post and checked against the actual operation of the joint purchasing arrangement*"[131]. But it is important to draw attention to the fact that simply because it is not secret does not rule out the possibility of an agreement being classed as a true buyer cartel. As the 2023 Guidelines acknowledge[132], there are various examples of the EC imposing sanctions on buyer cartels that did not initially operate in secret (*French Beef* decision[133]).

According to the 2023 Guidelines, as the 2001 Guidelines[134] and the 2011 Guidelines[135] did before them, a joint purchasing agreement "[...] *involves the pooling of purchasing activities and can be carried out in various ways, including through a jointly controlled company, through a company in which undertakings hold non-controlling stakes, through a cooperative, by a contractual arrangement or by looser forms of cooperation, for example where a representative negotiates or concludes purchases on behalf of several undertakings* [...]"[136]. Therefore, no distinction is made based on the possible forms of cooperation, i.e. a joint venture can carry out a joint purchasing agreement.

In addition to the fact that this type of agreement may have vertical or horizontal aspects, or both, with the 2022 Guidelines applying to the former and the 2023 Guidelines to the latter, joint purchasing agreements, although capable of harming competition, may also have beneficial effects for it[137].

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130 Horizontal Guidelines 2023, paragraph 282. "*This does not require the joint purchasing arrangement to disclose the identity of its members, in particular where they are small- or medium-sized undertakings and/or account for only a limited share of the joint arrangement's purchases from a supplier. However, it is not the responsibility of suppliers to take steps to find out about the existence of a joint purchasing arrangement* [...]", Horizontal Guidelines 2023, paragraph 282, (a).

131 Horizontal Guidelines 2023, paragraph 282, (b).

132 Van Bael & Bellis, 2023a: 2.

133 Commission Decision 2003/600/EC of 2 April 2003, *French Beef*, OJ L 209, 19.8.2003.

134 Van Bael & Bellis, 2010: 472.

135 Paragraph 195 of the Commission Notice "Guidelines on the application of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements", 2011/C 11/01.

136 Horizontal Guidelines 2023, paragraph 273.

137 "*Joint purchasing arrangements may involve both horizontal and vertical agreements. In such cases, a two-step analysis is necessary. First, the horizontal agreement(s) between the competing undertakings engaging in joint purchasing or the decisions adopted by the association of purchasing undertakings must be assessed according to the principles set out in these Guidelines. If that assessment leads to the conclusion that the joint purchasing arrangement does not give rise to competition concerns, it is necessary to carry out a fur-*

Companies that enter into these agreements are typically small or medium-sized and seek to obtain higher discounts to compete with larger companies. As a result, the positive effects on competition are twofold: it increases competitiveness and reduces prices, which can benefit consumers by giving them greater purchasing power[138] ("*Joint purchasing arrangements generally aim to create a degree of buying power vis-à-vis suppliers, which individual members of the joint purchasing arrangement might not attain if they acted independently. The buying power of a joint purchasing arrangement can lead to lower prices, more variety or better quality products for consumers*"[139]). To go so far as to absolutely restrict these arrangements would potentially be anti-competitive in itself, as it would likely smother the initiative of small and medium-sized entrepreneurs[140] and leave control of the market in the hands of the collective giants, who would be the only ones able to offer quality at attractive prices[141].

4.6 Bidding consortia

For the first time, the 2023 Guidelines address the issue of bidding consortia and dedicate a specific chapter to it (chapter 5.4). A bidding consortium occurs when two or more parties cooperate in a public or private tender to submit a bid[142], with the main concern surrounding them being the possibility that they may result in a bid-rigging cartel (one of the most serious competition law offences).

The alleged cartel case involving two Portuguese undertakings, Aeronorte and Helisul, comes to mind as an interesting decision regarding bidding consortia. The PCA began an investigation after learning from media reports that the National Fire Brigade and Civil Protection Services had cancelled an international public tender for aerial services to fight forest fires owing to suspicions of collusion between competitors. The tender was for the acquisition of six heavy lift helicopters and related services, including piloting,

ther assessment of any vertical agreements between the joint purchasing arrangement and its individual members and between the joint purchasing arrangement and suppliers. Such vertical agreements must be assessed using the VBER and Vertical Guidelines. Vertical agreements that are not covered by the VBER are not presumed to be illegal but require an individual assessment under Article 101", 2023 Guidelines, paragraph 276.

138 Whish, 2009: 593.

139 2023 Guidelines, paragraph 275.

140 On the link between free competition and restrictions imposed by competition law: Masso, 2020: 189–204.

141 On the advantages of horizontal agreements for efficiency and economic integration: Moura e Silva, 2020: 753; Jones & Sufrin, 2016: 715; Brodley, 1982: 1521.

142 2023 Guidelines, paragraph 347, and Tamke, Bär-Bouyssière, Karagulova-Glantz, & Přerovský, 2023: 5.

crewing and maintenance. The PCA's investigation concluded that the two companies in question had made a single bid to artificially reduce competition[143], a conclusion that Lisbon's Court of Commerce later rejected[144]. The court stressed that while the defendants did not provide evidence to support their inability to submit individual tenders, it could not conclude that they were capable of doing so, as the burden of proving this rested with the prosecution and it had failed to do so[145].

In the EC's view, a bidding consortium agreement "[...] *allows the parties to participate in projects that they would not be able to undertake individually*"[146], so that, for there to be an infringement, it must be verified at the individual bid level whether there is a real and effective possibility[147] that the parties "*would be able to*" compete individually, and not just hypothetically[148]. This is justified by the simple fact that if they could carry out the proposed project individually, then they would be competitors; if they cannot, then they would not be competitors and there would be no restriction of competition[149].

143 https://www.concorrencia.pt/pt/artigos/adc-aplica-coima-empresas-por-cartel-em-concurso-publico--para-o-fornecimento-de-meios.

144 Decision available at: https://www.concorrencia.pt/sites/default/files/processos/contencioso/TCL-2008-05-21-IDF_2007_86-PRC_2005_20.pdf.

145 One of the companies even requested clarification of the tender. Furthermore, it is important to mention that the tender was open to both national and foreign companies. It is certain that the defendants, by presenting themselves as a consortium, removed competition between themselves. However, it would be premature to conclude that they prevented, distorted or significantly restricted competition based solely on this. Furthermore, there is no evidence (or even an allegation) that the consortium's participation caused all other technically capable companies to refrain from submitting bids. Moreover, there is no conclusive evidence to suggest that the defendants had any intention of restricting or monopolising sources of supply or reducing the number of competitors for the relevant products or services by submitting a single bid, Decision of the Lisbon's Court of Commerce, 21 May 2008, Case 48/08.7TYLSB.

146 2023 Guidelines, paragraph 352.

147 *Generics (UK) Ltd and Others v. Competition and Markets Authority*, C-307/18, EU:C:2020:52.

148 "*The assessment of whether the parties are capable of competing in a tender procedure individually, and are thus competitors, depends firstly on the requirements included in the tender rules. However, the mere theoretical possibility of carrying out the contractual activity alone does not automatically make the parties competitors: it is necessary to assess whether each party is realistically capable of completing the contract on its own, taking into account the specific circumstances of the case, such as the size and capabilities of the undertaking, the level of financial risk induced by the project as well as the level of the investments required for the project, and the present and future capacity of the undertaking assessed in light of the contractual requirements*", 2023 Guidelines, paragraph 353.

149 Batchelor & Kafetzopoulos, 2023.

But even if the agreement fulfils the requirements of Article 101(1) TFEU, it may still be justified under Article 101(3) TFEU if[150] *(a)* the efficiency gains of a joint bid through a bidding consortium agreement are more easily passed on to consumers and the tendering authority; *(b)* the joint bid allows the parties to submit an offer that is more competitive than the offers they could have submitted individually; and *(c)* awarding the contract does not eliminate competition and other effective competitors take part in the tender procedure.

4.7 Information exchange[151]

An information exchange may be considered a restriction by object (so there is no need to assess the detrimental effects on the market since the conduct is considered sufficiently harmful per se) if the exchange concerns commercially sensitive information and is capable of establishing certainty as to strategic behaviour of undertakings on the market[152]. It may also be considered a restriction by effect in view of[153] *(a)* the nature of the information exchanged (e.g. price and investment information[154]); *(b)* the characteristics of the exchange; and *(c)* the market's characteristics(e.g. degree of concentration and market share stability)[155].

While information exchange agreements, can, in some cases, facilitate collusion and potentially foreclose the market, the 2023 Guidelines[156] recognise that exchanges of information can potentially have beneficial effects on competition[157], as they can directly benefit consumers by, for example,

150 2023 Guidelines, paragraphs 358–359.

151 "*For the purposes of this Chapter, information exchange includes the exchange of (i) raw, unorganised digital content that may need processing in order to make it useful (raw data); (ii) pre-processed data, that has already been prepared and validated; (iii) data that has been manipulated in order to produce meaningful information of any form, as well as (iv) any other type of information, including non-digital information*", 2023 Guidelines, paragraph 367.

152 *Infineon Technologies v. Commission*, T-758/14 RENV, EU:T:2020:307, paragraph 100, *Dole Food and Dole Fresh Fruit Europe v. Commission*, C-286/13 P, EU:C:2015:184, paragraph 122 and 2023 Guidelines, paragraph 413.

153 *Asnef-Equifax*, C-238/05, EU:C:2006:734, paragraph 54.

154 Moura e Silva, 2020: 708.

155 This was also the case in the 2011 Horizontal Guidelines, paragraphs 77–85.

156 Tamke, Bär-Bouyssière, Karagulova-Glantz, & Přerovský, 2023 2–3.

157 2023 Guidelines, paragraph 372.

reducing prices and thereby improving their welfare[158]. "*The access to reliable market information can enable undertakings to effectively plan and forecast their production and commercial activities as well as to invest in new production powers or in R&D, which can, on their part, lead to better quality, more innovations and lower prices of the offered goods and services*"[159].

Compared to the 2011 Guidelines[160], most stakeholders considered that the 2023 Guidelines were flawed by default[161] because they provided few coordinates for undertakings and others to assess with a relative degree of certainty whether they were involved in a horizontal cooperation agreement and there was no fixed market share or safe harbour[162]. As such, and according to those stakeholders, the Guidelines failed to fulfil one of its main goals: to provide stakeholders with simpler, clearer and up-to-date rules and guidance that can help businesses to self-assess the compliance of their conduct with competition law.

The 2023 Guidelines also lack a safe harbour and a fixed market share and the matter remains unclear[163]. Furthermore, despite the EC's efforts to fill the gaps in the 2011 Guidelines, the 2023 HBERs and 2023 Guidelines, in our view, have one shortcoming regarding the marginal treatment of information exchanges in merger settings, even though the 2023 Guidelines briefly mention this situation in paragraph 371 ("*Information may also be*

158 Bulgarian Commission on Protection of Competition & United Nations Conference on Trade and Development, 2013: paragraph 8.

159 Bulgarian Commission on Protection of Competition & United Nations Conference on Trade and Development, 2013: paragraph 7.

160 In the 2011 Guidelines, "[...] *the EU Commission affirms that the exchange of business information between competitors may have a pro-competitive effect and may lead to substantial gains in efficiency. Information exchange may have pro-competitive effects in particular, if it allows companies to collect market data in order to become more efficient and more capable to satisfy customer requests*", CMS, 2011: 2.

161 "*Respondents consider that the chapter contains too little guidance to allow for self-assessment of horizontal cooperation agreements. They consider that there are many pro-competitive forms of information exchange that are currently not addressed in the chapter. Horizontal cooperation mentioned in this regard cover information exchange in mergers and acquisitions projects or the initial stages of horizontal cooperation, in restructuring scenarios, for the purposes of the compilation of industry statistics, in the context of eco-systems and in areas where interoperability is needed. Respondents from the banking, automotive, insurance and agricultural sectors feel that their sectors would benefit from individual guidance. Other respondents requested individual guidance on information exchange in carbon emissions trading, trade associations and joint purchasing cooperation*", Commission Staff Working Document, Evaluation of the Horizontal Block Exemption Regulations, SWD(2021)103 final of 6 May 2021, p. 118.

162 Commission Staff Working Document, Evaluation of the Horizontal Block Exemption Regulations, SWD(2021)103 final of 6 May 2021, p. 118.

163 Tamke, Bär-Bouyssière, Karagulova-Glantz, & Přerovský, 2023: 3.

exchanged in the context of an acquisition process. In such cases, depending on the circumstances, the exchange may be subject to the rules of the Merger Regulation. Any conduct restricting competition that is not directly related to and necessary for the implementation of the acquisition of control remains subject to Article 101. This assessment must be made throughout the acquisition process, as what is directly related to and necessary for the implementation of the acquisition may depend on which stage the acquisition process is at")[164,165].

We believe that the 2023 Guidelines perpetuate a considerable state of uncertainty as to what, if any, information competitors can share, and what are the conditions for that exchange. While they acknowledge that each case must be assessed in light of the specific elements of the framework under discussion, they do not provide clear guidance on assessing the exchange of current and recent information[166].

4.8 Sustainability agreements[167]

Unlike the 2011 Guidelines[168], but similar to the Guidelines published in 2001[169], the 2023 Guidelines seem to present (in chapter 9) specific, albeit residual, coordinates[170] concerning sustainability agreements ("[...] *the term* [...] *refers to any horizontal cooperation agreement that pursues a sustainability objective, irrespective of the forms of cooperation*"[171])[172].

164 Heinisch & Gerber, 2023: 9.

165 Ovecka & Holinde, 2023a: 2.

166 With the same concerns, Van Bael & Bellis, 2023b: 1-2.

167 On the link between competition law and sustainability: Holmes, Middelschulte & Snoep, 2021: 3-15.

168 They did not ignore these agreements altogether. Although there was no specific reference to them, they could be included in other chapters, as was the case with the chapter on R&D agreements, Jones & Sufrin, 2014: 739.

169 On the provisions of the 2001 Guidelines on environmental agreements, see Van Bael & Bellis, 2010: 510-524.

170 In this sense, Little, Berg, Pradille & Aubry, 2022: 403 and Annex to the Communication from the Commission, Approval of the Content of a Draft for a Communication from the Commission on Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Co-operation Agreements, paragraph 523.

171 2023 Guidelines, paragraph 521.

172 "*Some stakeholders suggested that specific guidance should be provided in the Vertical Guidelines in relation to sustainability objectives. They asked, in particular, for reassurance in the Vertical Guidelines about the use of sustainability criteria for the establishment of a selective distribution network. In addition, several stakeholders requested guidance on the assessment of sustainability objectives under Article 101(3) of the Treaty*",

Environmental concerns have garnered increasing weight in the EC's agenda to the point of being considered fundamental, so the resurgence of a chapter dedicated to sustainability agreements is understandable[173, 174]. In fact, in our view, the EU treaties enshrine sustainable development policies as a key principle of the European integration process (Article 3 TEU[175])[176], as the 2023 Guidelines do in terms of the UN's 2030 Sustainable Development Goals[177], which all the Member States adopted in 2015 ("*By adding a new chapter to its guidelines, the Commission acknowledges the increased importance of sustainability agreements and the need for guidance* [...]"[178]). Indeed, it would probably not make sense to seek to promote sustainability on the one hand, and condemn those who follow practices that reduce negative externalities on the other, provided they do not serve to hide agreements with anti-competitive purposes (greenwashing)[179].

It may be advisable to consider a broader definition[180] of sustainability agreements[181] since their object can be the protection[182] of the environment, biodiversity, public health, labour conditions, animal welfare, human rights;

Summary of the comments received in response to the public consultation on the draft revised rules for the review of the Vertical Block Exemption Regulation (EU) No 330/2010, p. 15.

173 "[...] *Horizontal Guidelines are not fully adapted to the economic and societal developments of the last ten years, such as* [...] *the pursuit of sustainability goal*", Paragraph 6 of the Explanatory Note on the Main Changes Proposed for the Horizontal Block Exemption Regulations and Horizontal Guidelines.

174 For an in-depth look at the problem of sustainability in competition law, Holmes, 2020: 354–405.

175 Treaty on European Union.

176 In our view, the concern with sustainable development was already latent in the former Article 2 of the Treaty of Paris: "*The Community shall progressively bring about conditions which will of themselves ensure the most rational distribution of production at the highest possible level of productivity, while safeguarding continuity of employment and taking care not to provoke fundamental and persistent disturbances in the economies of Member States*".

177 Goal 1: no poverty; Goal 2: zero hunger; Goal 3: good health and well-being; Goal 4: quality education; Goal 5: gender equality; Goal 6: clean water and sanitation; Goal 7: affordable and clean energy; Goal 8: decent work and economic growth; Goal 9: industry, innovation and infrastructure; Goal 10: reduced inequalities; Goal 11: sustainable cities and communities; Goal 12: responsible consumption and production; Goal 13: climate action; Goal 14: life below water; Goal 15: life on land; Goal 16: peace, justice and strong institutions; Goal 17: partnerships for the goals.

178 Little, Berg, Pradille & Aubry, 2022: 403.

179 Whish, 2009: 598.

180 Holmes, 2020: 354–405, Comba, 2022: 1–10.

181 This is a much broader definition than the one in the 2001 Horizontal Guidelines, Little, Berg, Pradille & Aubry, 2022: 403 and Comba 2022: 1.

182 2023 Guidelines, paragraph 517, and Comba, 2022: 1.

energy efficiency[183]; quality of life; building lasting and resilient infrastructure; fair trade; available food (i.e. avoiding food waste); food health; and natural resources.

In comparison, the UK's Competition and Markets Authority ("CMA") published draft guidance that, despite following the wider definition of sustainability agreements in the 2023 Guidelines, identifies climate change agreements as a specific subclass of environmental sustainability agreements. Giving more favourable treatment to this subset under the exemption in the Competition Act 1998 enables the UK to meet its climate change targets under both domestic and international law (an example of the use of the framework i*s* the agreed shift, by delivery companies, to use electric vehicles[184]).

In our view, competition law could play a role in combating unsustainable development ("*Given that competition law is an intellectual construct, and climate change is real, one should assume that competition law will be adaptable*"[185])[186]. Heavy is the head that wears the crown because the line between sustainable benefit and benefit in terms of competition may lead to a conflict of values. For example, if two companies enter into a sustainable agreement that is extremely beneficial for the environment but increases the price of a particular product, is that allowed under competition law? The answer is not clear to us, nor does it seem to have been to the EC, as it issued the 2023 Guidelines precisely to help frame the competition rules to cover these hypotheses[187].

Firstly, a sustainable agreement may fall outside the scope of Article 101(1) TFEU if the agreement is compatible with the internal market, for example, because it *(a)* benefits consumers[188] of a particular product on the relevant market[189]; *(b)* only aims to ensure that companies, suppliers and distributors comply with requirements or prohibitions in binding international treaties;

183 Whish, 2009: 598.

184 https://www.algoodbody.com/insights-publications/sustainability-agreements-and-competition-law.

185 Dirk Buschle, Deputy Director, Legal Counsel, Energy Community Secretariat Vienna, Concurrences, "Energy Community Forum", 25 January 2021.

186 Malinauskaite & Erdem, 2023: 1-24.

187 Comba, 2022: 2.

188 For some insightful critical comments regarding the concept of the "consumer welfare standard", Coutinho, 2023: 1-5 and Van Bael & Bellis, 2010: 76-80.

189 2023 Guidelines, paragraph 528.

(c) only concerns companies' internal conduct and not their external economic activity[190]; *(d)* aims to create a database with information on suppliers that follow sustainable rules[191]; or *(e)* aims to organise a campaign promoting environmental impacts and other negative externalities.

Secondly, the exemption from Article 101(3) TFEU may be granted to an agreement that is covered by Article 101(1) TFEU if it complies with the following cumulative conditions[192]: *(a)* it contributes to promoting the production or distribution of goods or to economic and technological progress[193]; *(b)* it is indispensable; *(c)* its benefits outweigh its harm[194]; *(d)* consumer benefits are connected with consuming or using the products it covers; *(e)* there is evidence of how the benefits will manifest and an estimate of their impact; *(f)* it does not promote the elimination of competition, and the market remains competitive to some degree[195].

By contrast, in 2023 the Netherlands Authority for Consumers and Markets (*Autoriteit Consument & Markt*) ("ACM") published a policy rule outlining its approach to sustainability agreements (*Beleidsregel Toezicht ACM op duurzaamheidsafspraken*)[196] to replace its initial two draft guidance documents in this area. This new rule is less complicated and burdensome than the conditions specified in the 2023 Guidelines[197]. Even though the ACM has stated that it will follow the EC's 2023 Guidelines, it has taken the liberty

190 2023 Guidelines, paragraph 529 and Little, Berg, Pradille & Aubry, 2022: 404.

191 2023 Guidelines, paragraph 530 and Little, Berg, Pradille & Aubry, 2022: 404.

192 Little, Berg, Pradille & Aubry, 2022: 404–405, Van Bael & Bellis, 2023a: 6 and 2023 Guidelines, paragraphs 556–596.

193 This was also stated in the 2001 Horizontal Guidelines, paragraph 186.

194 Also, *Asnef-Equifaz*, C-238/05, EU:C:2006:734, paragraph 72. This was already the case in the 2001 Horizontal Guidelines, paragraph 193.

195 "[...] *the elimination of competition for a limited period of time, where this has no impact on the development of competition after that period elapses, is not an obstacle to meeting this condition. For example, an agreement between competitors to temporarily limit the production of one variant of a product, containing a non-sustainable ingredient, in order to introduce to the market a sustainable substitute for the product, with the aim of raising consumer awareness about the characteristics of the new product, will, in general, fulfil the last condition of Article 101(3)*", 2023 Guidelines, paragraph 596.

196 https://www.acm.nl/system/files/documents/Beleidsregel%20Toezicht%20ACM%20op%20duurzaamheidsafspraken%20ENG.pdf.

197 "[...] *the EC approach set out in the draft does not take as liberal approach to exemption on sustainability grounds as the Dutch approach, and there has been limited appetite and engagement by companies to date for approaching the European Commission for informal guidance on sustainability initiatives*", MacLennan & Citron, 2022.

of going further than the EC in certain aspects. For instance, due to the urgent need to prevent harm to the environment and the role that undertakings can play in this area, the ACM considers it inappropriate to conduct further investigations into an environmental damage agreement "[...] *if the initial investigation shows that it is plausible that the agreement is necessary for achieving the environmental benefits and that such benefits sufficiently outweigh the potential competitive disadvantages* [...]"[198]. Furthermore, according to the ACM, agreements that only seek to ensure compliance with sufficiently defined requirements or prohibitions established by legally binding international treaties, agreements or conventions on environmental, social and corporate governance issues or by national law do not fall within the scope of Article 101(1) TFEU[199].

Overall, we believe that the final version of the 2023 Guidelines does not significantly move away from the EC's stance outlined in the draft.[200] Although those who expected a more radical "green" approach to EU competition law may feel a little let down[201], the 2023 Guidelines represent a positive change as they provide reasonably useful guidance for undertakings on the interplay between sustainability projects and the limits of EU competition law ("*Although* [...] *the Commission may not have been as ambitious as it could have been in relation to the fair share criterion for application of the Art. 101(3) exemption*"[202]).

5. FINAL THOUGHTS

Having assessed the new legal framework and guidelines applicable to vertical and horizontal agreements, we are still uncertain whether this is a proper reform or nothing more than a series of changes so everything remains the same.

The EC continues to produce rather long documents, with complex sets of examples and instructions that, ironically, can be difficult to interpret.

198 Kuipers, Beetstra & Van Roosmalen, 2023.

199 Kuipers, Beetstra & Van Roosmalen, 2023.

200 Gassler, 2023.

201 "*The EC's open-door policy creates scope to seek further informal comfort. But, concerned about floodgates opening, the EC has not bowed to pressure to flex the existing rules further (as advocated by the more liberal approach of Dutch and UK competition regulators)*", Ford, Mangiaracina & Cochrane, 2023.

202 Wright & Byrne, 2023: 3.

Also, proposing the economic balance test set out in Article 101(3) TFEU as a plan B for an array of situations in which the impact on competition should be assessed *ad hoc*, as most competition practitioners can attest, is, in our view, far from realistic, as this provision, like equivalent national provisions, are rarely used in practice.

Rather than recognising the digital economy for what it is, an all-pervading phenomenon, the EC clearly still considers it a separate reality and treats it as such. In our view, it is key that the EC acknowledges that ecommerce, price algorithms and artificial intelligence are not confined to a particular industry.

With regard to vertical agreements, the 2022 Guidelines and 2022 VBER have maintained the structure and essence of their previous versions. Some of the VBER's provisions have been clarified and adjusted, such as those on non-compete clauses, parity clauses, dual pricing and dual distribution, ecommerce and selective distribution. The 2023 Vertical Guidelines have clarified small important issues, such as the broadening of the concept of active sales: in addition to the means referred to in the 2010 Guidelines (letters, visits, emails and calls), the Guidelines list various examples of active selling related to targeted advertising and promotion online, but they still avoid critical issues such as resale price maintenance, even within a franchise system.

Nonetheless, it seems that suppliers now enjoy greater flexibility to combine various distribution models and "[…] *wish to oblige their distributors to pass-on sales restrictions to their customers*"[203]. The anticipated surge in enforcement cases at both EU and national levels is likely to offer greater guidance and, hopefully, enhance legal certainty[204].

Regarding the 2023 Horizontal Guidelines and 2023 HBERs, they apply to a variety of agreements, such as joint ventures and their parent companies, purchase agreements and standardisation agreements, sharing of telecommunications infrastructure, production and commercialisation agreements, joint purchasing agreements, bidding consortia, information exchange, sustainability agreements and R&D agreements.

In our opinion, while the EC has made commendable efforts to address the gaps in the 2011 Guidelines, the 2023 HBERs and 2023 Guidelines may still have some limitations with regard to information exchanges. This issue

203 Heinisch & Hofmann, 2022: 159.

204 Heinisch & Hofmann, 2022: 159.

is of particular concern in a context where information is readily available. For example, parties engaging in M&A would have benefitted from more detailed guidance, in particular in relation to information exchange in the period between signing and closing where parties remain independent, but a significant amount of information often needs to be exchanged in order to be prepared for Day 1 as a combined company[205].

Moreover, in relation to sustainability agreements, the 2023 Guidelines and 2023 HBERs appear to offer companies the opportunity to create inventive collaborative initiatives in the sustainability field, notwithstanding the complex framework for such cooperation. Chapter 9 encourages undertakings to seek informal advice on initiatives that require greater case expertise but stops short of adopting the approach of some authorities who have confirmed that they will not impose fines or take enforcement action in relation to sustainability agreements in certain circumstances[206].

BIBLIOGRAPHY

Batchelor, Bill & Kafetzopoulos, Andreas

2023 *New EU Competitors Cooperation Framework: Stricter on Information Exchange. Broader on Joint Sustainability Agreements*, Skadden, available at https://www.skadden.com/insights/publications/2023/06/new-eu-competitors-cooperation-framework [Consulted on 26/07/2023]

Bellis, Jean-François

2011 "The New EU Rules on Vertical Restraints", in *Revista de Concorrência e Regulação*, n.º 5, pp. 25-46

Blewett, Richard & Kennis, Maarten

2023 *EU Vertical Agreements*, Thomson Reuters Practical Law, 06 June 2023, available at https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2023/06/eu_vertical_agreements_June_2023.pdf [Consulted on 25/07/2023]

Bretz, Oliver

2023 *And now? The new Horizontal Guidelines and Joint Ventures*, Euclid Law, 29 June 2023, available at https://euclid-law.eu/what-now-the-new-horizontal-guidelines-and-joint-ventures/ [Consulted on 14/07/2023]

205 Czapracka, Harjula, Kuhn & Citron, 2023: 13.

206 As such, Czapracka, Harjula, Kuhn & Citron, 2023: 12.

Brice, Miriam

2008 *The Portuguese Competition Authority Accepts Commitments of a Leading Food Company in Relation to Vertical Restraints (Nestlé)*, e-Competitions May 2008, Article 26655, available at https://www.concurrences.com/fr/bulletin/special-issues/anticompetitive-object-effect/ententes-3317/the-portuguese-competition-authority-accepts-commitments-of-a-leading-food [Consulted on 04/12/2023]

Brodley, Joseph

1982 "Joint Ventures and Antitrust Policy", in *Harvard Law Review*, vol. 95

Bungenberg, Marc

2024 *Foreign Subsidies Regulation: A Commentary*, Germany: Bloomsbury Academic

Chappatte, Philippe & O'Connell, Kerry

2022 *E-Commerce: Most Favoured Nation Clauses*, Global Competition Review, available at https://globalcompetitionreview.com/guide/digital-markets-guide/second-edition/article/e-commerce-most-favoured-nation-clauses [Consulted on 06/01/2024]

CMS

2011 *Information Exchange between Competitors*, Newsletter Competition, spring 2011, CMS, available at https://cms.law/en/media/local/cms-vep/files/publications/publications/information-exchange-between-competitors [Consulted on 26/07/2023]

Comba, María Campo

2022 "EU Competition Law and Sustainability", in *Erasmus Law Review*, Eleven International Publishing, n.º 2

Connor, Charley

2022 *Portuguese Law Bans MFNs on Booking Platforms*, Global Competition Review, available at https://globalcompetitionreview.com/article/portuguese-law-bans-mfns-booking-platforms [Consulted on 05/12/2023]

Costa, Guilherme Oliveira e & Azevedo, Francisco Marques de

2021 *Olhar para a Floresta, mas focar-se apenas na Árvore: as opções legislativas do Decreto-Lei n.º 108/2021*, Sérvulo Publications, 15 December, available at https://www.servulo.com/en/knowledge/Olhar-para-a-Floresta-mas-focar-se-apenas-na-Arvore-as-opces-legislativas-do-Decreto-Lei-n-1082021/7753/ [Consulted on 09/01/2024]

Coutinho, João Paulo

2023 "Servizio Elettrico Nazionale – Between the "consumer welfare" standard and a unitary theory of abuse: nothing new in the west?", in *OADC,*

Centro de Estudos e Investigação em Direito, Universidade Católica Portuguesa, coordination by Sofia Oliveira Pais, available at https://fd.porto.ucp.pt/pt-pt/asset/12251/file, [Consulted on 19/07/2023]

Czapracka, Katarzyna; Harjula, Marika; Kuhn, Tilman & Citron, Peter

2023 *The New EU Horizontal Cooperation Antitrust Rules*, White & Case, available at https://www.whitecase.com/insight-alert/new-eu-horizontal-cooperation-antitrust-rules [Consulted on 07/12/2023]

Czapracka, Katarzyna; Kuhn, Tilman; Sakellariou-Witt, Strati & Citron, Peter

2022 *New EU Competition Rules for Distribution Agreements, Kluwer Competition Law Blog*, available at https://competitionlawblog.kluwercompetitionlaw.com/2022/05/30/new-eu-competition-rules-for-distribution-agreements/ [Consulted on 08/01/2024]

Dabbah, Maher

2006 *EC and UK Competition Law – Commentary, Cases and Materials*, reprinted, Cambridge: Cambridge University Press

Escudero, Alberto & Tuit, Michael

2022 *New rules on agreements between competitors*, PwC, available at https://periscopiofiscalylegal.pwc.es/wp-content/uploads/2022/06/2.-New-rules-on-agreements-between-competitors-DEFINITIVO.pdf [Consulted on 18/07/2023]

Ford, Jonathan; Mangiaracina, Annamaria & Cochrane, Emma

2023 *Baby steps – European Commission opens the door for positive engagement on sustainability agreements but more can be done*, LinkingCompetition, Linklaters, available at https://www.linklaters.com/en/insights/blogs/linkingcompetition/2023/july/baby-steps_european-commission-opens-the-door-for-positive-engagement-on-sustainability-agreements [Consulted on 09/01/2024]

Gassler, Martin

2023 *The New Sustainability Chapter in the Horizontal Guidelines: Changes in the Final Version Compared to the Draft Version of March 2022*, Kluwer Competition Law Blog, available at https://competitionlawblog.kluwercompetitionlaw.com/2023/06/07/the-new-sustainability-chapter-in-the-horizontal-guidelines-changes-in-the-final-version-compared-to-the-draft-version-of-march-2022/ [Consulted on 07/12/2023]

Gauberti, Annabelle
2016 Why Selective Distribution makes sense for Luxury and Premium Businesses, in *World Trademark Review*, February/March, available at https://crefovi.com/Selective%20distribution.pdf [Consulted on 08/01/2024]

Geradin, Damien & Bania, Konstantina
2024 *The Digital Markets Act: A Guide to the Regulation of Big Tech in the EU*, Germany: Bloomsbury Academic

Goncalves, Santos
2019 *Price Parity Clauses and Online Platforms: Is There a New Way Forward*, LinkingCompetition, Linklaters, available at https://www.linklaters.com/en/insights/blogs/linkingcompetition/2022/april/three-undertakings-two-or-just-one [Consulted on 04/12/2023]

Gorjão-Henriques, Miguel & Sousa Ferro, Miguel
2010 "The Latest Reform of EU Competition Law on Vertical Restraints", in *Revista de Concorrência e Regulação*, year 1, n.º 4, pp. 111-138

Goyder, Joana & Albors-Llorens, Albertina
2009 *Goyder's EC Competition Law*, 5th edition, New York: Oxford University Press

Greber, David
2003 *Law and Competition in Twentieth Century Europe*, reprinted, Oxford: Clarendon Press

Heinisch, Oliver & Hofmann, Michael
2022 "European Union: updated rules on vertical agreements", in *Law Business Review: Europe, Middle East and Africa Antitrust Review*, available at https://globalcompetitionreview.com/review/the-european-middle-east-and-african-antitrust-review/2023/article/european-union-updated-rules-vertical-agreements [Consulted on 21/07/2023]
2023 *European Union: New EC Draft HBERs and UK Draft Horizontal Guidelines Shape Horizontal Agreements*, Global Competition Review, available at https://globalcompetitionreview.com/review/the-european-middle-east-and-african-antitrust-review/2024/article/european-union-new-ec-draft-hbers-and-uk-draft-horizontal-guidelines-shape-horizontal-agreements [Consulted on 05/12/2023]

Holmes, Simon
2020 "Climate change, sustainability, and competition law", in *Journal of Antitrust Enforcement*, 2020, vol. 8, pp. 354-405

Holmes, Simon; Middelschulte, Dirk & Snoep, Martijn

2021 *How sustainability can be taken into account in every area of competition law*, USA: Concurrences

Honório, Mariana Lima

2019 *Os Sistemas de Distribuição Seletiva: As Proibições de Venda em Plataformas de Comércio Online*, Master's Thesis, Nova School of Law

Inderst, Roman & Thomas, Stefan

2022 "Sustainability Agreements in the European Commission's Draft Horizontal Guidelines", in *Journal of European Competition Law & Practice*, vol. 13, issue 8, December 2022, pp. 571-577

Jones, Alison & Sufrin, Brenda

2014 *EU Competition Law – Text, Cases, and Materials*, 5th edition, United Kingdom: Oxford University Press

2016 *EU Competition Law – Text, Cases, and Materials*, 6th edition, United Kingdom: Oxford University Press

Kmiecik, Andrzej & Gordley, Catherine

2021 "Italian Competition Authority condemns Amazon and Apple for discriminatorily limiting access to Amazon Marketplace", in *VBB on Competition Law*, volume 21, n.º 11, available at https://www.vbb.com/media/Insights_Newsletters/VBB_on_Competition_Law_Volume_2021_No._11.pdf [Consulted on 08/01/2024]

Krueger, Birgit & Mühle, Jan

2017 "The EU's Vertical Restraints Rules and E-commerce – A case for continuity, modification or disruption?", in *Competition Law & Policy Debate*, vol. 3, issue 2, May 2017

Kuipers, Pauline; Beetstra, Tialda & Van Roosmalen, Joost

2023 *Sustainability and Competition: From Hot Topic to Business As Usual?*, Kluwer Competition Law Blog, available at https://competitionlawblog.kluwercompetitionlaw.com/2023/10/13/sustainability-and-competition-from-hot-topic-to-business-as-usual/ [Consulted on 05/09/2023]

Le Strat, Ariane & King, Saskia

2022 *The impact of the new VBER and VABEO rules for franchises*, Bird & Bird Insights, 17 November, available at https://www.twobirds.com/en/insights/2022/uk/the-impact-of-the-new-vber-and-vabeo-rules-for-franchises [Consulted on 11/01/2024]

Leucht, Brigitte & Marquis, Mel

2013 "American Influences on EEC Competition Law: Two Paths, How Much Dependence?", in Patel, Kiran Klaus & Schweitzer, Heike (ed.), *The*

Historical Foundations of EU Competition Law, Oxford: Oxford University Press

Little, David; Berg, Werner; Pradille, Clément & Aubry, Axelle

2022 "The European Commission's Draft Guidelines on Sustainability Agreements – a legal analysis and practical implications", in *European Competition Law Review*, vol. 43, issue 9

Louveaux, Bertrand; Jeffs, Claire; Lyle-Smythe, Anna & Yeung, Natalie

2023 *Competition & Regulatory Newsletter: European Commission Adopts New Horizontal Block Exemption Regulations and Guidelines*, Slaughter and May Newsletters, available at https://my.slaughterandmay.com/insights/newsletters/european-commission-adopts-new-horizontal-block-exemption-regulations-and-guidelines [Consulted on 19/09/2023]

Maclennan, Jacquelyn & Citron, Peter

2022 *Recent Guidance on Sustainability Cooperation from the Dutch Competition Authority*, White & Case, available at https://www.whitecase.com/insight-alert/recent-guidance-sustainability-cooperation-dutch-competition-authority [Consulted on 07/12/2023]

Malinauskaite, Jurgita & Erdem, Faith

2023 "Competition Law and Sustainability in the EU: Modelling the Perspectives of National Competition Authorities", in *Journal of Common Market Studies*, pp. 1-24, available at https://onlinelibrary.wiley.com/doi/full/10.1111/jcms.13458#pane-pcw-references [Consulted on 19/07/2023]

Masso, Fabiano Del

2020 "A Livre Concorrência como Princípio da Teoria Jurídica do Mercado", in Pais, Sofia Oliveira & Bagnoli, Vicente (coord.), *Temas Atuais de Direito da Concorrência – Economia Digital, Direitos Fundamentais e Outros Desafios*, Porto: Universidade Católica Editora

Mavroghenis, Stephen & Kolotourou, Christina

2022 *European Union: Restrictions of Online Sales*, Global Competition Review, available at https://globalcompetitionreview.com/guide/digital-markets-guide/second-edition/article/european-union-restrictions-of-online-sales [Consulted on 07/01/2024]

Mckinsey & Company

2021 *The New Digital Edge: Rethinking Strategy for the Postpandemic Era*, Mckinsey Digital, available at https://www.mckinsey.com/~/media/mckinsey/business%20functions/mckinsey%20digital/our%20insights/the%20new%20digital%20edge%20rethinking%20strategy%20for%20

the%20postpandemic%20era/the-new-digital-edge-rethinking-strategy-for-the-postpandemic-era.pdf [Consulted on 26/07/2023]

Meyring, Bernd & Venot, Erik

2022 *Three undertakings, two or just one? Another attempt to increase certainty for agreements between parents and joint ventures*, LinkingCompetition, Linklaters, available at https://www.linklaters.com/en/insights/blogs/linkingcompetition/2022/april/three-undertakings-two-or-just-one [Consulted on 16/07/2023]

Morais, Luís

2009 *Os Conceitos de Objecto e Efeito Restritivos da Concorrência e a Prescrição de Infracções de Concorrência*, Coimbra: Almedina

2011 "The New EU Framework of Horizontal Cooperation Agreements", in *Revista de Concorrência e Regulação*, n.º 6

Moreno Belloso, Natalia

2022 *The EU Digital Markets Act (DMA): A Summary*, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4109299 [Consulted on 18/09/2023]

Moreno Belloso, Natalia & Petit, Nicolas

2023 *The EU Digital Markets Act (DMA): A Competition Hand in a Regulatory Glove*, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4411743 [Consulted on 18/09/2023]

Moreno-Tapia, Irene; Ridruejo, López & Sement, Floriane

2023 *Implications of the New Vertical Block Exemption Regulation for E-Commerce* Operators, Cuatrecasas Competition and EU Law Blog, available at https://www.cuatrecasas.com/en/global/art/implications-of-the-new-vertical-block-exemption-regulation-for-e-commerce-operators [Consulted on 19/09/2023]

Moura e Silva, Miguel

2010 *O Abuso de Posição Dominante na Nova Economia*, Coimbra: Almedina

2020 *Direito da Concorrência*, reimpressão, Lisboa: AAFDL Editora

Ovecka, Matej & Holinde, Sabine

2023a *The New Horizontal Guidelines: Information Exchange*, Norton Rose Fulbright, Antitrust and Competition, available at https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwiwhv-oifiCAxXHbKQEHdzMB9kQFnoECBUQAQ&url=https%3A%2F%2Fwww.nortonrosefulbright.com%2Fen%2Fknowledge%2Fpublications%2F7debe299%2Fthe-new-horizontal-guidelines-information-exchange&us-

g=AOvVaw3O5AdFj7Gpp1HxDOQhteC6&opi=89978449 [Consulted on 05/12/2023]

2023b *The New Block Exemption Regulation and Horizontal Guidelines on Research & Development Agreements*, Norton Rose Fulbright, Antitrust and Competition, https://www.nortonrosefulbright.com/en/knowledge/publications/84128fb7/the-new-block-exemption-regulation-and-horizontal-guidelines-on-research-development-agreements [Consulted on 06/12/2023]

Pais, Sofia Oliveira

2011 *Entre Inovação e Concorrência – Em Defesa de um Modelo Europeu*, Porto: Universidade Católica Editora

Papp, Wagner-von

2018 *Selective Distribution*, Dictionary of Competition Law, Concurrences, Article 12220, available at https://www.concurrences.com/en/dictionary/selective-distribution [Consulted on 04/12/2023]

Pérez, Ramírez & Scheur, Sebastian Van de

2013 "The Evolution of the Law on Articles 85 and 86 EEC [Articles 101 and 102 TFEU]: Ordoliberalism and its Keynesian Challenge", in Patel, Kiran Klaus & Schweitzer, Heike (ed.), *The Historical Foundations of EU Competition Law*, Oxford: Oxford University Press

Pree, Jolling de; Gornall, Helen; Rijke, Bart de & The, Stephanie

2022 *Commission Drafts Revised Horizontal Rules on Cooperation Between Competitors*, De Brauw Blackstone Westbroek, available at https://www.debrauw.com/articles/commission-drafts-revised-horizontal-rules-on-cooperation-between-competitors#experts [Consulted on 22/07/2023]

Ridruejo, María López & Schliephake, Claudia Valdés

2022 *Review of Vertical Restraints regarding Dual Distribution Systems*, Cuatrecasas Competition and EU Law Blog, available at https://www.cuatrecasas.com/en/spain/competition-eu-law/art/eu-review-of-vertical-restraints-regarding-dual-distribution-systems [Consulted on 27/07/2023]

Ritter, Lennart & Braun, David

2004 *European Competition Law: A Practitioner's Guide*, 3rd edition, Netherlands: Kluwer Law International

Rohrssen, Benedikt

2023 *VBER 2022: EU Competition Law for Vertical Agreements – Digital, Dual and Exclusive Distribution Plus Franchising*, Springer

Schrijvershof, Diederik & Van de Hel, Martijn

2016 *Franchise and the Cartel Prohibition*, available at https://www.lexology.com/library/detail.aspx?g=15b0c9b8-db3a-455b-be3b-6dbc79d4de7b [Consulted on 19/09/2023]

Skotki, Lara

2023 *New Block Exemption Regulation on Specialisation Agreements*, available at https://www.taylorwessing.com/en/insights-and-events/insights/2023/07/new-block-exemption-regulation [Consulted on 13/09/2023]

Tamke, Maren; Bär-Bouyssière, Bertold; Karagulova-Glantz, Anara & Přerovský, Adam

2023 *How to play nice with your competitors – new horizontal EU rules*, Dentons, available at https://www.dentons.com/en/insights/articles/2023/june/16/how-to-play-nice-with-your-competitors-new-horizontal-eu-rules [Consulted on 25/07/2023]

Uría Menéndez

2022 *New Vertical Block Exemption Regulation and new Vertical Guidelines*, Uría Menéndez, Client Briefing, 25 May 2022, available at https://www.uria.com/en/publicaciones/newsletter/1533-competition-law#:~:-text=The%20new%20Vertical%20Block%20Exemption,to%20the%20new%20digital%20era [Consulted on 20/07/2023]

Urlus, Hans & Sutherland, Chazz

2022 *The New VBER and Vertical Guidelines Explained: Key Takeaways*, GreenbergTraurig, available at https://www.gtlaw.com/en/insights/2022/6/the-new-vber-and-vertical-guidelines-explained-key-takeaways [Consulted on 18/09/2023]

Van Bael & Bellis

2023a *The New Horizontal Guidelines – What's new for purchasing agreements?*, Van Bael & Bellis, June 2023, available at https://www.vbb.com/media/Insights_Articles/28-6-23_Joint_Purchasing.pdf [Consulted on 25/07/2023]

2023b *The New Horizontal Guidelines – Staking out New Boundaries on Information Exchange*, Van Bael & Bellis, June 2023, available at https://www.vbb.com/media/Insights_Articles/29-6-23_Guidelines_information_exchange.pdf [Consulted on 04/12/2023]

Van Bael, Ivo & Bellis, Jean-François

2010 *Competition Law of the European Community*, 5th edition, Netherlands: Kluwer Law International

VARONA, Edurne Navarro & HÉRNANDEZ, Alberto Pérez
2022 "New Vertical Block Exemption Regulation and Vertical Guidelines", in *European Competition Law Review*, vol. 43, issue 11
WHISH, Richard
2009 *Competition Law*, 6th edition, Oxford: Oxford University Press
WOLSKI, Justyna Smela.
2022 *Legal Basis of the Proposal for a Regulation on Foreign Subsidies Distorting the Internal Market*, Belgium: College of Europe
WRIGHT, Lisa & BYRNE, Helen
2023 *European Commission Clarifies Sustainability Rules in Revised Horizontal Guidelines*, Slaughter and May, available at https://my.slaughterandmay.com/insights/client-publications/european-commission-clarifies-sustainability-rules-in-revised-horizontal-guidelines [Consulted on 07/12/2023]

Official Documents

AUTORIDADE DA CONCORRÊNCIA DE PORTUGAL
2021 *Opinion of the Competition Authority on Draft Decree No 1120/XXII/2021, Amending the Competition Rules, the Rules on Individual Trade Restrictive Practices and the Rules on General Contractual Clauses*, available at https://www.concorrencia.pt/sites/default/files/processos/epr/Parecer%20Decreto-Lei%20n.%C2%BA%20108-2021.pdf [Consulted on 10/01/2024]
AUTORITÉ DE LA CONCURRENCE
2023 *L'Autorité de la concurrence sanctionne Rolex d'une amende de 91 600 000 euros pour avoir interdit à ses distributeurs agréés de vendre en ligne ses montres*, Press Release, December 19th 2023, available at https://www.autoritedelaconcurrence.fr/fr/communiques-de-presse/lautorite-de-la-concurrence-sanctionne-rolex-dune-amende-de-91-600-000-euros [Consulted on 07/01/2024]
BULGARIAN COMMISSION ON PROTECTION OF COMPETITION & UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT
2013 *Guidelines on Information Exchange Between Competitors, Sofia Competition Forum*, available at https://unctad.org/system/files/non-official document/ccpb_SCF_InfoSharing_en.pdf [Consulted on 26/07/2023]
BUNDESKARTELLAMT
2014 *Adidas Abandons Ban on Sales via Online Marketplaces*, Case Summary, 19 August 2017, *Bundeskartellamt*, B3-137/12, available at https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/

Kartellverbot/2014/B3-137-12.pdf?__blob=publicationFile&v=2 [Consulted on 10/01/2024]

EUROPEAN COMMISSION

2019 *Commission Evaluation of Vertical Agreements Block Exemption Regulation 330/2010.*

2021 *Commission Staff Working Document, Evaluation of the Horizontal Block Exemption Regulations*, SWD(2021)103 final of 6 May 2021

2022 *Explanatory Note on the new VBER and Vertical Guidelines*, at

2023 *Explanatory Note on the Main Changes Proposed for the Horizontal Block Exemption Regulations and Horizontal Guidelines.*

Leyen, Ursula Von der

2019 *A Union that Strives for More – My Agenda for Europe*, Political Guidelines for the Next European Commission 2019-2024, available at https://www.europarl.europa.eu/resources/library/media/20190716RES57231/20190716RES57231.pdf [Consulted on 25/07/2023]

ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT

2022 *OECD Handbook on Competition Policy in the Digital Age*, available at https://www.oecd.org/daf/competition-policy-in-the-digital-age/ [Consulted on 13/09/2023]

Whish, Richard & Bailey, David

2022 *Horizontal Guidelines on purchasing agreements: delineation between by object and by effect restrictions – final report*, available at https://competition-policy.ec.europa.eu/system/files/2022-03/kd0722013enn_purchasing_agreements.pdf [Consulted on 24/07/2023]

RESTRICTIONS OF COMPETITION IN PRIVATE BLOCKCHAINS: REFUSAL TO DEAL

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Abstract *This paper will discuss how a refusal to access a Private Blockchain can be considered an abuse of dominant position under 102.º TFEU. For that matter, we will analyze how the EU institutions have distinguished different types of refusals and how they have been qualified as abuses. Additionally, we will go through the specific characteristics of private blockchains that facilitate the emergence of exclusionary abuses and review the concepts of market definition and dominant position applied to the blockchain technology. Finally, we will conceptualize possible refusals to deal in private blockchain systems, inspired by real case uses, and explore "data privacy" as a potential objective justification. We argue that the user's interest in maintaining data privacy should not prevail over the development of a secondary market in the blockchain system and that data privacy may, in principle, be ensured through technical changes. Therefore, data privacy should not be admitted as an objective justification.*

Summary 1. Introduction. 2. Refusal to Deal under EU Competition Law. 2.1. The first cases of Refusal to Deal. 2.2. The late development of the Essential Facility Doctrine in Europe. 2.3. Refusal of Intellectual Property Rights. 2.4. Ladbroke, Bronner and IMS Cases. 2.5. Microsoft Case. 2.6. Preliminary conclusion. 3. Blockchain. 3.1. The Technology behind Blockchain. 3.2. The origin of Blockchain. 3.3. Private Blockchains. 4. Refusal to Deal in Private Blockchains. 4.1. Definition of a Relevant Market and a Dominant Position in the Blockchain Technology. 4.2. Refusal of access to a Private Blockchain as an abuse of dominance under 102.º TFEU. 4.3. Possible objective justifications. 5. Conclusion.

Keywords Competition Law; Refusal to Deal; Refusal of access to a Private Blockchain; Abuse of dominance; Dominant Position; Market Definition; Blockchain; Private Blockchains; Essential Facility doctrine; Objective Justifications; Data privacy; Data Protection.

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1. INTRODUCTION

As Margrethe Vestager[1] once said: "*Digitalisation is reshaping every part of our economy and society, so that today, there are really only two types of business – those that have gone digital, and those that soon will.*"[2].

Recently, the development of technology lead to the creation of Blockchain, a distributed ledger technology that can ensure trust without the need of intermediaries, through a network validation system, while still being able to protect users' identities through cryptographic records[3]. This is a place where fintech companies and traditional companies seek out to improve their businesses, by increasing efficiency, transparency, and security, or create new ones inside the technology where consumers are paying for products and services with digital currency.

Blockchain allows companies to perform tasks such as transfer of money, information storage, execution of contracts and the authentication of property, becoming, thus, useful in many sectors, namely, bank and insurance, energy, transportation, food-chains and health care services[4].

Most competition authorities have, until now, been oblivious (or uninterested) to the capabilities of this technology in establishing competitive environments between undertakings. This "underground" environment creates business opportunities for companies that desire to flourish under the radar, with no market regulation. In response, scholars have developed their studies around the label of "Blockchain Antitrust"[5], where competition issues regarding this technology are being analysed.

Blockchain is originally decentralized, meaning it does not rely on a single person or small group of people, but in the global network of users. However, blockchains can be centralized, especially in private systems, where one can only access with a permission from an administrator or small group of users who dictate the protocols on that digital space. These are called Private Blockchains[6].

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1 Competition Commissioner of the European Commission and Executive Vice-President (2019-2023).

2 Speech on "*Dealing with mergers in a digital age*", 18 June 2019, available on: https://uk.practicallaw.thomsonreuters.com/w-020-8700?transitionType=Default&contextData=(sc.Defau lt)&firstPage=true.

3 Maggiolino & Zoboli, 2021: 5.

4 *Ibidem*; Hileman & Rauchs, 2017: 38; Sharma *et al,* 2021: 673-682.

5 Schrepel, 2019-2020:161.

6 Schrepel, 2021:147.

Given the nature of these systems, many authors have equated the possibility of "refusals to deal" in private blockchains[7]. However, it appears as though no one has addressed this issue extensively.

In this context, this Article aims to take a step further and demonstrate how a refusal to access a Private Blockchain can be considered an abuse of dominance under 102.º TFEU. For that matter, we'll analyse how the EU institutions have distinguished different types of refusals and how they have been qualified as abuses. Additionally, we'll go through the specific characteristics of private blockchains that facilitate the emergence of exclusionary abuses and review the concepts of market definition and dominant position applied to blockchain technology. Finally, we'll conceptualize possible refusals to deal in private blockchain systems, inspired by real case uses, that may qualify as an abuse of dominant position under European competition law and explore "data privacy" as a potential objective justification.

2. REFUSAL TO DEAL UNDER EU COMPETITION LAW

Article 102.º TFEU condemns unilateral conduct of dominant firms which act in an abusive manner within the internal market of the European Union or a substantial part thereof, insofar as it may affect trade between Member States. This Article applies to behaviours susceptible of affecting consumers and other economic agents – such as competitors –, against methods not based on merit and fairness[8].

The pursuit of a dominant position on a market, through fair business strategies, is not condemnable under EU competition law. The prohibition rather lays on the abuse of that position[9]. The notion of abuse has been defined by the ECJ as "*an objective concept*[10] *relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis*

7 E.g.: *Idem*: 145-146; Hutchinson & Egorova, 2020: 94-95; Kim & Justil, 2018:13-15; Schöning & Tagara, 2019:58-60.

8 Moura e Silva, 2018: 879.

9 Korah, 1994: 83, *cit by* Etro & Kokkoris, 2010: 21; Gorjão-Henriques, 2019: 671-679.

10 In which guilt proof is not necessary and the company's non-intention of committing the abuse is irrelevant to the analysis of the existence of an abuse (although it could be relevant to the level of fine). See: Moura e Silva, 2018:914; Whish & Bailey, 2021: 199.

of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition"[11].

Such abuse may consist in: (a) directly or indirectly imposing unfair purchase or selling prices or unfair trading conditions; (b) limiting production, markets or technical development to the prejudice of consumers; (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.[12] This list does not represent an exhaustive catalogue of what amounts to abusive behaviour, rather it endorses a general clause[13]. In particular, this list does not mention "refusal to deal"/ "refusal to supply" as an abuse, although it's an established type of abuse by the EU Institution's practice[14].

Given its ability to eliminate competition, "refusal to deal" is considered an exclusionary abuse[15]. While many exclusionary abuses focus on "horizontal foreclosure" (e.g., exclusive purchasing agreements, rebates and predatory pricing), others are mainly related to the impact of competition in the downstream market[16], which is the case for refusals to supply[17].

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11 C-85/76, *Hoffman-La Roche*, EU:C: 1979:36, §91 ; C-322/81, *Michelin*, EU:C:1983:313, §54; Junqueiro 2012: 90-91; Whish & Bailey, 2021: 197.

12 Article 102.º TFEU.

13 Moura e Silva, 2018: 203; Whish & Bailey, 2021: 198.

14 Other jurisdictions have, instead, expressly predicted it in their national competition legislations, such as Portugal, in Law n.º 19/2012, 08 May 2012, Article 12.º, n.º 2, (e): "*Refuse access to a network or other essential infrastructure controlled by it, against adequate remuneration, to any other company, provided that, without such access, the latter is unable, for factual or legal reasons, to operate as a competitor of the company in a dominant position on the upstream or downstream market, unless the latter demonstrates that, for operational or other reasons, such access is reasonably impossible*" (author's translation). On this matter: Moura e Silva, January/March 2010: 287-292.

15 Abuses can be qualified as exploitative or exclusionary. The former qualification refers to the exercise of market power over clients, consumers or business partners, while the latter focus on the ability to eliminate or discipline one's competitors. See: Moura e Silva, 2018: 918; Oliveira Pais, 2011: 520; Temple Lang & O'Donoghue, July 2005:43-52; Whish & Bailey, 2021: 210-219.

16 The term 'downstream market' is used to refer to the market for which the refused input is needed in order to manufacture a product or provide a service. See: Guidance on Article 102.º, §76.

17 Whish & Bailey, 2021: 205.

The Commission acknowledges that, in principle, any firm, regardless of its position on a market, should have the right to choose its trading partners and to dispose freely of its property[18]. This means that if along the way a firm conquers legitimate competitive advantage, this firm has the right to keep it and use it, even if competitors lack the same conditions and may not have the tools or knowledge to realistically obtain it in the future[19]. Therefore, imposing an obligation to supply is an exceptional intervention on the freedom to conduct one's business and the right of private property, thus only possible if competition issues are at stake.

The reason for this is that the existence of such an obligation, even for a fair remuneration, may discourage undertakings to invest and innovate and, thereby, possibly harm consumers. Besides, competitors may be tempted to free ride on investments made by other firms, instead of investing into their business to become more efficient players[20].

Analysing the following cases will allow us to see patterns in the judgment of EU institutions on the adequate requirements for each kind of refusal to be amounted as an abuse of dominance under 102.º TFEU, which can subsequently be applied in the context of Private Blockchains.

2.1. The first cases of Refusal to Deal

In 1974, the ECJ analysed the Commercial Solvents Case[21], regarding a refusal from a dominant undertaking in the market for aminobutanol (raw material) to supply this product to an existent client, Zoja, that manufactured ethambutol (a derivative of the raw material). The market for the raw material necessary for the manufacture of a product (primary market) was separated from the market on which the derivate is sold (secondary market).[22] Additionally, it was clarified that an abuse of dominant position in a primary market may have restricting effects on competition in a secondary market, and that these effects must be taken into consideration.[23]

The Commission argued that, by interrupting suppliance to Zoja, this refusal could lead to the elimination of this company on the secondary

18 Guidance on Article 102.º, §75.

19 Temple Lang, 1994: 486.

20 Guidance on Article 102º, §75.

21 Joined Cases C-6-7/73, *Commercial Solvents*, EU:C:1974:18.

22 *Idem:* §22.

23 *Ibidem.*

market, since none of the different alternatives offered Zoja real commercial possibilities to overcome this refusal.[24] Because Zoja was one of the main three producers of ethambutol in the Common Market, this would affect the maintenance of conditions of effective competition within the Common Market.

On this basis, the Court concluded that Commercial Solvent's unjustified decision to cease almost all the supply of the raw material to other companies and start manufacturing derivatives in competition with its former costumers, in such a way to eliminate competition would amount to eliminating a key player in the Common Market, thus being deemed as an abuse of dominance under 102.º[25].

The takeaway from this case is that the action of a dominant firm to refuse to supply the raw material necessary for downstream players to manufacture derivatives of that material, in order to fulfil a self-desire of integrating vertically into the downstream market may be against competition law[26]. Efficient dominant firms would, instead, produce the finish product at a cheaper price, while still providing the raw material for its rivals[27]. Naturally, this comes across as competition law's purpose is to protect competitors and not consumers[28]. However, Article 102.º is not only aimed at practices which may cause direct damage to consumers, but also at those which are detrimental to them through their impact on an effective competition structure[29] – which does not mean that dominant firms are obliged to support its competitors[30], since that would demotivate them from providing new, improved or cheaper products or services to their clients, ultimately affecting consumer welfare and the general economy[31].

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24 *Idem*: §235.

25 *Idem*: §25.

26 Craig & Búrca, 2020: 1105.

27 *Idem*: 1105, 1065-1068.

28 Oliveira Pais, 2011: 80.

29 *Idem*: 81; Case 6-72; *Continental Can*, EU:C:1973:22, §26.

30 C-7/97, *Bronner/Mediaprint*, EU:C:1998:569, §9.

31 Opinion of AG Jacobs, delivered on 28 May 1998, C-7-97, *Bronner*, EU:C:1998:264, §58: "(…) *in assessing this issue it is important not to lose sight of the fact that the primary purpose of Article 86 (current 102º TFEU) is to prevent distortion of competition – and in particular to safeguard the interests of consumers – rather than to protect the position of particular competitors*.". According to Wish and Bailey (2012: 175), this has been a frequent complaint against the Commission.

Regarding the possibility of justifying a refusal to supply, the ECJ has presented different approaches whether costumers were long-standing or occasional. On one hand, United Brands[32] Case taught us that an undertaking in a dominant position may not refuse to supply long-standing costumers if the orders are "no way out the ordinary"[33], which can mean not "out of all proportion to those previously sold by the same wholesalers to meet the needs of the market in that Member State"[34]. On the other hand, the ECJ decided in BP Case[35] that, in a period of shortage, in order to guarantee the supply of contractual costumers, a dominant undertaking's decision to refuse to supply occasional costumers could be justified[36].

2.2. The late development of the Essential Facility Doctrine in Europe

The essential facilities doctrine is based on the idea that the owner of a facility that is not replicable by innovation and investment, must share it with a rival who depends on it to compete in a specific market[37]. The origins of this doctrine can be traced back to 1914 when the Case United States v Terminal Railroad Association of St Louis[38] was assessed the Supreme Court of USA[39].

About eighty years later, in 1993, the European Institutions discussed for the first time the concept of "essential facility", after a complaint to the Commission by Sea Containers[40], whose access to port of Holyhead was denied. This port was, at the time, the only British port serving the market for the provision of maritime transport services for cars and passengers on the "central corridor" route between the United Kingdom and Ireland. Thus, the refusal of access by Stena Sealink Ports would leave Sea Containers without

32 Case C-27/76, *United Brands*, EU:C:1978:22. United Brands was found guilty of a series of measures aimed at limiting competition between its distributors and retailers, including price discrimination and threats to de-list distributors who dealt with rival firms.

33 *Idem*: §182.

34 Joined cases C-468/06 to C-478/06, *GlaxoSmithKline AEVE*, ECLI:EU:C:2008:504, §76.

35 C-77/77, *BV*, EU:C:1978:141.

36 Case T-65/89, *BPB Industries*, EU:T:1993:31, upheld on appeal, C-310/93, *BPB Industries*, EU:C:1995:101, §32.

37 Craig & Búrca, 2020: 1107.

38 Case 383, *Terminal Railroad*, US.

39 Although the term wasn't used in this case. See: Moura e Silva, 2008: 337 – 362; Wish & Bailey, 2012: 742.

40 Decision (EC), 94/19/EC – *Sea Containers/Stena Sealink*, §§66-67.

the option to compete since there was no substitute port nor equal substitute route, and building a new port was not a profitable or viable alternative[41].

The Commission issued a decision regarding the behaviour of Stena Sealink Port, where it defined an essential facility as "*a facility or infrastructure, without access to which competitors cannot provide services to their customers*"[42] and proclaimed that the owner of such facility "*which refuses other companies access to that facility without objective justification or grants access to competitors only on terms less favourable than those which it gives its own services, infringes Article 86*", whether the refused company is a "new entrant" or an "established competitor"[43].

2.3. Refusal of Intellectual Property Rights

Then, in 1988, the ECJ acknowledged, in Renault Case, that a refusal to grant intellectual property rights (hereinafter, "IP rights") to third parties, even in return for reasonable royalties, could not, in itself, constitute an abuse of dominance[44]. In the same year, the Court considered, in Volvo Case, that an arbitrary refusal to supply spare parts to independent repairers could be amounted to an abuse prohibited under 102.º[45]. However, it was only 7 years later, in 1995, in Magill Case[46], that the European Court finally defined the specific requirements for a refusal to grant IP rights to constitute an abuse of dominance.

Magill Case concerned a refusal of three television companies (ITP, RTE and BBC) to grant the license of copyrights of daily TV guides to Magill, who intended to publish a weekly magazine containing information on forthcoming television programmes available in Ireland and Northern Ireland. At the time, there was no comprehensive television guide on the market. Each television company was used to publish guides covering exclusively its own programmes. To examine the existence of an abuse of dominance, two

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41 Decision (EC), 94/19/EC – *Sea Containers/Stena Sealink*, §§62-64.

42 *Idem*, §66. More on this matter: Doherty, 2001:397-436.

43 Decision (EC), 94/19/EC – *Sea Containers/Stena Sealink*, §67.

44 C-53/87, *Renault*, EU:C:1988:472, §11,18.

45 C-238/87, *Volvo*, EU:C:1988:477, §9 and 11.

46 Joined cases C-241/91 P and C-242/91 P, *Magill*, EU:C:1995:98. It was an appeal to Case T-69/89, *Magill*, EU:T:1991:39. Magill was first prohibited to publish weekly television listings by national courts, and then lodged a complaint to the Commission which held the existence of an abuse of dominance. The case eventually was reviewed by the General Court and the ECJ which both dismissed the appeals.

separate markets were defined: the market of comprehensive TV guides and the market of general TV programs information. The Commission claimed that there was a factual and legal monopoly held by the television companies regarding their individual programme listings, resulting in a lack of possible competition from third parties, who could meet a "substantial potential demand"[47], given the fact that there was no comprehensive weekly listing available to the consumer "*in a reasonably practical way and without having to pay a considerable amount of money*"[48].

Although this Case was protected by copyright[49], the ECJ gave us three requirements for a refusal of IP rights to be amounted to an abuse under 102.º: (1) the existence of an essential facility ("only source", in this case, an "indispensable raw material")[50]; (2) the refusal would have to prevent the emergence on the market of a new product, with potential consumer demand[51]; (3) there was no objective justification[52]; and (4) the refusal would exclude all competition in the requested market[53]. However, the ECJ didn't clarify whether the requirements were cumulative or alternative, until later cases were assessed.

2.4. Ladbroke, Bronner and IMS Cases

In 1997, in Ladbroke Case[54], the CFI held that "*the refusal to supply the applicant could not fall within the prohibition laid down by Article 86 unless it concerned a product or service which was either essential for the exercise of the activity in question, in that there was no real or potential substitute, or was a new product whose introduction might be prevented, despite specific, constant and regular potential demand on the part of consumers*" (author's emphasis). The expression

47 Decision (EC), 89/205/CEE – *Magill TV Guide/ITP, BBC y RTE*, §23.

48 *Ibidem.*

49 "*The conduct at issue could not qualify for such protection within the framework of the necessary reconciliation between intellectual property rights and the fundamental principles of the Treaty concerning the free movement of goods and freedom of competition*". Case T-69/89, *Magill*, EU:T:1991:39, §75.

50 Joined cases C-241/91 P and C-242/91 P, *Magill*, EU:C:1995:98, §53.

51 *Idem,* §54.

52 *Idem,* §55.

53 *Idem,* §56.

54 Case T-504/93, *Tiercé Ladbroke SA*, EU:T:1997:84, §§131-132.

"or" suggested an alternative nature. From then on, many jurists viewed this as a clarification from the Court that the requirements were alternative[55].

Then, in 1998, the ECJ assessed Bronner Case[56], which was an Austrian newspaper publisher whose access to Mediaprint's nationwide home-delivery scheme was denied. This system could deliver newspaper directly to subscribers in early morning.

Foremost, the Court invited the national court to determine whether the home-delivery schemes constituted a separate market[57], on which, in light of the circumstances of the case, Mediaprint held a *de facto* monopoly position and, thus, a dominant position[58]. To establish if this conduct could represent an abuse of dominance, the ECJ conceptualized three conditions, according to previous court decisions[59]: (i) the refusal should be likely to eliminate all competition; (ii) the service should be indispensable[60] to carrying on the business on the requested market, meaning there was no actual or potential substitute; and (iii) such refusal cannot be objectively justified[61].

On one hand, Bronner argued that "*postal delivery, which generally does not take place until the late morning, does not represent an equivalent alternative to home-delivery, and that, in view of its small number of subscribers, it would be entirely unprofitable for it to organise its own home-delivery service. Oscar Bronner further argues that Mediaprint has discriminated against it by including another daily newspaper in its home-delivery scheme, even though it is not published by*

55 Oliveira Pais, 2011: 559.

56 C-7/97, *Bronner/Mediaprint*, EU:C:1998:569. Some argue that the Bronner Case entails an ex-ante analysis of monopolization rather than an analysis of abuse of dominant position ex-post, explained by the fact that now that markets have been integrated and the main barriers to trade among the Member States have disappeared, EC law is more concerned with monopolization rather than the emergence of power. See: Evrard, 2004:521.

57 C-7/97, *Bronner/Mediaprint*, EU:C:1998:569, §34.

58 *Idem*, §35.

59 Namely, Joined Cases C-6-7/73, *Commercial Solvents*, EU:C:1974:18, §25, C-311/84, *Télémarketing (CBEM)*, EU:C:1985:394, §26 and Joined cases C-241/91 P and C-242/91 P, *Magill*, EU:C:1995:98, §§40, 49, 53-56, as mentioned in C-7/97, *Bronner/Mediaprint*, EU:C:1998:569, §§38-41.

60 Recent cases have developed the topic of indispensability. For example, in Slovak Telekom, the GC claimed that the Commission was no longer required to demonstrate the condition of indispensability, because the legislation relating to the telecommunications sector acknowledged the need for access to the appellant's local loop in order to allow the emergence and development of effective competition in the Slovak market for high-speed internet services. See: C-165/19 P, *Slovak Telekom*, EU:C:2021:239, §§21, 39; Decision (EC), Case AT.39523 – *Slovak Telekom*, §§121, 123-127.

61 C-7/97, *Bronner/Mediaprint*, EU:C:1998:569, §41.

Mediaprint."[62] On the other hand, Mediaprint argued that "*making the system available to all Austrian newspaper publishers would exceed the natural capacity of its system*" and pointed to the fact that, just because Mediaprint holds a dominant position does not oblige it to subsidise competition by assisting its competitors[63].

In this Case, the ECJ considered that the indispensability test was not met because there were other methods of distributing daily newspapers – such as by post or though sale in shops and at kiosks, though they may be less advantageous[64]- and there were no technical, legal or even economic obstacles to make it impossible, or even unreasonably difficult, to establish, along or in cooperation with other publishers, another nationwide home-delivery scheme[65]. The Court, then, clarified that, in order to demonstrate that the creation of such a system is not a realistic potential alternative and that access to the existing system is therefore indispensable, "(…) *it is not enough to argue that it is not economically viable by reason of the small circulation of the daily newspaper or newspapers to be distributed*", but it would be necessary to prove that it is not economically viable to create a distribution system of comparable size[66].

It is important to note that Bronner Case heavily contributed to the construction of the notion of an "essential facility" in the EU as an objective concept, which does not depend on the needs[67] or vulnerability[68] of the competitor who requests access, but on whether the "*duplication of the facility is impossible or extremely difficult owing to physical, geographical or legal constraints or is highly undesirable for reasons of public policy*"[69].

In the case of IP rights, since their purpose is to give its owner an exclusive right to exercise an economic activity, justified by the effort of the inventor or as a counterpart of the public disclosure of the invention[70], Bronner require-

62 *Idem*, §8.

63 *Idem*, §9.

64 *Idem*, §43.

65 *Idem*, §44.

66 *Idem*, §46. Temple Lang, 2000:380.

67 Temple Lang, 2000: 380-381.

68 Opinion of AG Jacobs, delivered on 28 May 1998, C-7-97, *Bronner*, EU:C:1998:264, §51.

69 *Idem*, §65.

70 Sousa e Silva, 2019: 54.

ments appear as non-compatible with an obligation to grant such exclusive right[71]. This matter was further discussed in IMS Case.

In 2004, the ECJ assessed the Case IMS[72], related to the interpretation of Article 102.º in regards to a refusal to grant a licence to use a brick structure for the presentation of regional sales data by an undertaking in a dominant position which has an intellectual property right therein to another undertaking which also wishes to provide such data in the same Member State, but which, because potential users are unfavourable to it, cannot develop an alternative brick structure for the presentation of the data that it proposes to offer.

The ECJ acknowledged, in reference to AG Tizzano's Opinion, that the need to protect free competition can prevail over the need to protect IP rights only where refusal to grant a licence prevents the development of the secondary market to the detriment of consumers[73]. In its Opinion, Tizzano seems to differentiate two realities (intangible assets and tangible assets), which suggest the existence of different treatments for refusals of each kind to amount to an abuse under 102.º[74]. Following the position of the AG, the ECJ invokes the requirements of Magill Case[75], suggesting a cumulative nature[76].

Although the ECJ finally provided confirmation on the adequate requirements in cases of refusals of IP rights, critics claim this decision overly guarded competitors' interests over the own structure of competition and that it didn't clarify the concepts of a "new product", "potential demand", and "objective justifications"[77,78]. Besides, the Court held that it was sufficient that a potential market or even a hypothetical market could be identified,

71 Oliveira Pais, 2011:562; Pinto Monteiro, 2010: 123.

72 C-418/01, *IMS Health*, EU:C:2004:257.

73 *Idem*, §48; Opinion of AG Tizzano, delivered on 2 October 2003, C-418/01, *IMS Health*, EU:C:2004:673, §62.

74 Opinion of AG Tizzano, delivered on 2 October 2003, C-418/01, *IMS Health*, EU:C:2004:673, §66. See also: Oliveira Pais, 2011: 567.

75 Although rephrased in a different way.

76 C-418/01, *IMS Health*, EU:C:2004:257, §49: "(…) *the refusal by an undertaking in a dominant position to allow access to a product protected by an intellectual property right, where that product is indispensable for operating on a secondary market, may be regarded as abusive only where the undertaking which requested the licence does not intend to limit itself essentially to duplicating the goods or services already offered on the secondary market by the owner of the intellectual property right, but intends to produce new goods or services not offered by the owner of the right and for which there is a potential consumer demand.*"; See also, Opinion of AG Tizzano, delivered on 2 October 2003, C-418/01, *IMS Health*, EU:C:2004:673, §66.

77 The ECJ developed the concept of objective justifications in C-53/03, *Syfait*, EU:C:2005:333. See also: Opinion of AG Jacobs, delivered on 28 October 2004, C-53/03, *Syfait*, EU:C:2004:673, §§66-115.

78 Oliveira Pais, 2011: 568-572.

which was contradictory to the practice related to the essential facility doctrine in the EU.

2.5. Microsoft Case

Finally, one of the most relevant recent cases regarding refusals to grant IP rights is Microsoft Case[79], assessed by the CFI in 2007, after the decision of the EC in 2004, concerning, among other actions, a refusal to supply its competitors with interoperability information[80], more precisely, an interruption of suppliance[81].

The Commission found that there was a lack of interoperability that the competing work group server operating system products could achieve with the Windows domain architecture, making the consumers stuck with Window's products, without being able to benefit from the products of Microsoft's competitors. This was viewed as limiting the competitors' ability to develop compatible products[82], ultimately discouraging them from creating new products[83].

To analyse the existence of an abuse under 102.º and justify the appliance of the essential facility doctrine, the Commission did not expressively mention that Microsoft's refusal prevented the appearance of a new product[84]. Instead, the Commission based its decision on a "balance test"[85], which resulted in the conclusion that "*the possible negative impact of an order to supply on Microsoft's incentives is outweighed by its positive impact on the level of innovation of the whole industry*"[86], and ultimately contrary to the "general public good"[87].

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79 Case T-201/04, *Microsoft*, EU:T:2007:289. See also: Decision (EC), COMP/C- 3/37.792, *Microsoft*.

80 Case T-201/04, *Microsoft*, EU:T:2007:289, §36 and Decision (EC), COMP/C- 3/37.792, *Microsoft*, §§546-791. According to Wegner (1996: 285), "*Interoperability is the ability of two or more software components to cooperate despite differences in language, interface and execution platform*". Many authors expose the lack of interoperability inside the Blockchain technology and propose technical solutions: Pillai *et al*, 2020:1-17; Schulte *et al*, 2019: 1-8; Belchior *et al*, 2021:168:1-168:41.

81 Decision (EC), COMP/C- 3/37.792, *Microsoft*, §§578-584. Which was not the case in Magill.

82 *Idem*, §572.

83 *Idem*, §694.

84 Although it mentioned Magill's requirements. See: *Idem*, §551.

85 Without even providing criteria to define this apparent "new test". Pinto Monteiro, 2010:149-151.

86 Decision (EC), COMP/C- 3/37.792, *Microsoft*, §783.

87 *Idem*, §711.

In the appeal, the CFI clarified that the Commission's decision did not entail a new test and reaffirmed the Magill's requirements on refusals of IP rights[88]. Moreover, the Court confirmed that there is the need to distinguish two markets[89] to analyse a duty of granting a licence and added that the requested market could be potential or even hypothetical if the circumstances identified in IMS Health Case were present in the case[90]. These are the positions of the ECJ that prevail until today.

2.6. Preliminary conclusion

The essential facility doctrine was originally designed for tangible assets, such as infrastructures related to transport. However, since Magill's Case in 1995, the Commission and the EU Courts have agreed upon the applicability of this doctrine on intellectual property rights[91]. However, these require a different treatment given the characteristics of exclusive rights[92]. Only a case-by-case analysis focused on the balance between competition and the protection of innovation, may be adequate for the assessment of these type of refusals[93]. In conclusion, the EU Institutions have been more demanding when applying the essential facility doctrine to cases of refusals to grant IP rights, compared to cases in which tangible assets are in stake.

3. BLOCKCHAIN

3.1. The Technology behind Blockchain

In general, Blockchain is a distributed database technology, that uses network validation as a substitute to traditional intermediaries (e.g., banks), in which trust is ensure by conditions of security, anonymity and immutability. All information is encrypted into "nodes", which can record user's belongings (e.g., quantity and value of items) and financial transactions with each

88 Case T-201/04, *Microsoft*, EU:T:2007:289, §§319, 331-335, 691, 1336. Pinto Monteiro, 2010:152-154.

89 "*Namely, a market constituted by that product or service and on which the undertaking refusing to supply holds a dominant position and a neighbouring market on which the product or service is used in the manufacture of another product or for the supply of another service.*"; Case T-201/04, *Microsoft*, EU:T:2007:289, §335.

90 *Idem*, §§335-336.

91 Oliveira Pais, 2011: 593.

92 *Idem*: 593.

93 *Idem*: 597.

other[94]. Users can track data records, digital identities, financial assets and physical items[95].

The advantages of this technology include the reduction of the need to trust between stakeholders, a secure value transfer system, a streamline business process across multiple entities and an increase record transparency and ease of auditability[96].

Through this technology users can transfer money to each other, store information, execute contracts and obtain the authentication of property (e.g., NFTs[97]). Because of this, Blockchain is useful in many sectors, namely, bank and insurance, energy, transportation, food-chains and health care services[98].

3.2. The Origin of Blockchain

Some believe that the ideology of Blockchain can be traced back to the 1960's "cypberpunk" movement, started by Stewart Brand and his wife, who created the "Whole Earth Catalog", which consisted in a collection of data that would allow anyone on Earth to "*find out the complete information on anything*", starting the DIY culture based on a personal liberation purpose[99].

However, Blockchain's technological origins can be found in David Chaum's 1982's dissertation, named "*Computer Systems Established, Maintained, and Trusted by Mutually Suspicious Groups*", where the author addresses the problem of establishing and maintaining computer systems that can be trusted by those who don't necessarily trust one another, and provides solutions through cryptographic algorithms and privacy-preserving techniques[100]. He is also known for being the inventor of digital cash through "Ecash", in 1990, an electronic cash application that aimed to preserve users' anonymity.

Following Chaum's legacy, Satoshi Nakamoto[101] introduced the basis of Blockchain technology as we know now, in his famous article called "*Bitcoin:*

94 Maggiolino, & Zoboli, 2021:5.

95 Hileman & Rauchs, 2017:39.

96 *Idem*:15.

97 Non-Fungible Tokens.

98 Maggiolino & Zoboli, 2021:5; Hileman & Rauchs, 2017:38; Sharma *et al,* 2021:673-682; OECD, 2022:9.

99 Schrepel, 2021:2-5.

100 Chaum, 1982.

101 Whose identity is, until today, unknown.

A Peer-to-Peer Electronic Cash System", published in 2008, where the author proposed a solution to prevent double-spending in electronic cash through a peer-to-peer network, using digital signatures and a proof-of-work model, making it unnecessary for financial institutions to interfere in monetary transactions[102]. A year later, Bitcoin was publicly released in an open source, being one of the most popular digital coins ever to exist, with over 500 million transactions[103].

3.3. Private Blockchains

Although the original concept of Blockchain was based on a decentralized system with no single authority, the evolution of this technology resulted in the creation of private systems where a more centralized governance paves the way.

A Private Blockchain is a network system usually ruled by a user or group of users who have the power to select and verify participants to enter into the group, and decide the protocols for that blockchain, including the consensus mechanisms[104] in which decisions are taken. As far as benefits, with a reduced number of participants, transactions can be faster and have lower fees[105] than they would in public blockchains[106].

Private blockchains can be further segmented, depending on the permission models to read (who can access to the ledger and the transactions records), write (who generate transactions and send them to the network) and commit (who can update the state of the ledger). There are two types to be differentiated: the Consortium and the Private permissioned[107].

In a Consortium, there is a restricted access to the ledger and the transactions records to a set of participants and only authorised participants can generate transactions and send them to the network. Regarding the update the state of the ledger, all or subset of authorised participants have the right

102 Nakamoto, 2008:1-6.

103 Data from April, 2020, available on: available on: https://perma.cc/ZB5X-CPHL.

104 For further details on consensus mechanisms, see: Maggiolino & Zoboli, 2021:6-7; Freire, 2022: 31-45; Zhang *et al*, 2019: 185-193.

105 Takyar.

106 Generally speaking, *Public Blockchains* are open and permissionless, meaning that anyone can join the network and start transacting without needing approval from other members, and see read the (encrypted) data. Bitcoin operates in such system. More on this matter: Hileman & Rauchs, 2017:20; Schrepel, 2021:145-146.

107 Hileman & Rauchs, 2017:20.

to in a consortium system. As an example of a consortium, think of multiple banks operating a shared ledger[108].

In a Private permissioned, the access to the ledger and transactions records is fully private or restricted to a limited set of authorised nodes and only network operators can generate transactions and include them in the chain. Besides, only network operators are allowed to update the ledger. As an example of a private permissioned, think of an internal bank ledger shared between a parent company and its subsidiaries[109].

Hereinafter, we'll refer to the term "private blockchain" as including both types, since our focus is on the ability to refuse access to other members of the blockchain reality and, in both cases, only authorised parties can access the system.

Overall, in private blockchains, there is a certain level of trust due to the real identities of the users of such systems being usually known to the group, which is not the case in public blockchains. Therefore, in private systems, there is no need for a good behaviour incentivisation through a token reward[110] and security issues are unlikely to happen[111]. Nevertheless, participants are held liable usually through off-chain legal contracts[112] or smart contracts, which can self-execute if certain conditions are met (e.g., if one user misbehaves, a smart contract can self-execute to expel that user from the private blockchain) [113].

108 *Ibidem.* There are many companies that develop their businesses around the concept of helping other companies manage private permissioned blockchains. A real example is "Quorum", a fully managed ledger service that provides "*unified control for both infrastructure management as well as blockchain network governance*", so that enterprises "*can choose to develop in a private, permissioned context*". See: Quorum, available on: https://consensys.net/quorum/qbs/.

109 Hileman & Rauchs, 2017:20.

110 *Idem:*21.

111 Mohan, 2019:405.

112 Hileman & Rauchs, 2017:21.

113 According to Szabo *cit by* Schrepel, 2021:41, available on https://perma.cc/5NF3-R6N3: "*A smart contract is a set of promises, specified in digital form, including protocols within which the parties perform on these promises.*"; For an overview of how smart contracts work, see: Freire, 2022: 47-66, 115-119; Mohanta *et al*, 2018: 1-4; Cong & He, 2019.

4. REFUSAL TO DEAL IN PRIVATE BLOCKCHAINS

4.1. Definition of a Relevant Market and a Dominant Position in the Blockchain Technology

Prior to assessing whether a behaviour of a dominant undertaking amounts to an abuse, it is essential to define the relevant market(s), to identify the competitive environment in which firms operate, so that authorities can assess competition issues[114]. The method chosen by the EU Institutions is based on the identification of a relevant product market and a geographic area.

A relevant product market comprises all products that consumers regard as being reasonably substitutable by dint of their characteristics, price or intended use[115], while the relevant geographic market comprises the area in which the conditions of competition are similar or homogeneous enough to be distinguished from neighbouring areas. [116] The basic principles for market definition lay on demand substitutability[117], supply substitutability and potential competition[118].

In the case of a refusal to give access to a product or service indispensable to the exercise of a particular activity, let's recall Microsoft Case, in which it was held that: "(…) *it is necessary to distinguish two markets, namely, a market constituted by that product or service and on which the undertaking refusing to supply holds a dominant position and a neighbouring market on which the product or service is used in the manufacture of another product or for the supply of another service*." [119]

To define relevant markets in the blockchain technology, one must identify the type of the blockchain (monocentric or platform), the layer impacted by the anticompetitive practice[120] and the product/service provided by the blockchain.

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114 Commission Notice on the definition of relevant market (C/2024/1645), §6.

115 *Idem*, §7.

116 *Idem*, §8. Case C-27/76, *United Brands*, EU:C:1978:22, §11.

117 Through the SSNIP test it is possible to analyse whether a hypothetical monopolist would profit with a small but permanent increase of prices by 5-10% of a specific product. The reactions of consumers to that increase would determine whether a product is in the same market of another, based on the elasticity of demand. This test was originally developed by the USA for merger cases. Oliveira Pais, 2011: 375.

118 Commission Notice on the definition of relevant market (C/2024/1645), §23.

119 Case T-201/04, *Microsoft*, EU:T:2007:289, §335.

120 As suggested by Schrepel, 2021:40-41 and 185.

In monocentric blockchains, one has two layers to distinguish: the layer 1 (lower layer), the constitutional layer composed by hardware and base applications, and the layer 2 (higher layer), where the application software runs. As an example, Bitcoin operates in a monocentric blockchain.[121] Monocentric blockchains can be used for only one application[122]. In this case, the product market is defined by that application's product/service. We can apply this reasoning in the case of Bitcoin, a monocentric blockchain that provides crypto-payment services, in which, in a competitive dispute with another company, the relevant market could be the payment services through crypto money or, potentially, the payment services in general if there was substitutability found between payments with government owned money and payments with decentralized owned money.

In platform blockchains, an unlimited number of applications can be added on top of the constitutional layer[123]. Melanie Swan believes there are three types of layers: blockchain 1.0 (cryptocurrency), blockchain 2.0 (smart contracts) and blockchain 3.0 (all other blockchain uses, e.g., social media)[124]. Inside each layer, multiple applications can be created, providing a wide variety of products/services. Regardless of layer classification, Schrepel and Hutchinson commonly believe that there is no substitutability between layers[125]. Moreover, since decentralization is generally embedded in lower layers, the relevant product market is decided according to the "core activities" of the companies involved in the competition dispute[126]. In relation to the geographical market definition, some blockchains may be focused on a local market, for example, a local food distribution, while others may compete globally, for example, regarding financial transactions[127].

In this approach, we don't divide markets depending on a blockchain's public or private nature, because if "*an open-source platform can compete with a proprietary platform*", then, *mutatis mutandis*, a private blockchain can compete in

121 *Idem*: 40.

122 *Idem:* 185.

123 *Ibidem*.

124 Swan, 2015: 1–8 *cit by* Schrepel, 2021: 40.

125 Schrepel, 2019: 304; Hutchinson & Egorova, 2020: 90-95.

126 Schrepel, 2021: 185.

127 Schrepel, 2019: 305.

the same market as a public blockchain[128]. However, we acknowledge that in a refusal to deal with a private blockchain, it may be easier to define markets, since these systems are often created to develop a specific product/service, although there are ones with general purposes (i.e., Hyperledger, Corda)[129].

An undertaking enjoys a dominant position on a market when its economic strength enables it to "*prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently*[130] *of its competitors, customers and ultimately of its consumers*"[131]. Companies in this position hold an especial responsibility of not disturbing the maintenance or development of competition[132].

In order to examine the market power between blockchains, one may consider various factors, such as the number of users, the number of transactions recorded, the number of blocks or the amount of revenues. We suggest a case-by-case analysis since every blockchain is different, and some blockchains involve revenue, while others don't. Some authors argue that the method chosen in Google Shopping Case[133], where the Commission decided to establish market shares by volume, may be applied in the blockchain context, since, similarly, services may be provided free of charge to the users[134]. In fact, the draft of the revised Market Definition Notice focuses, among other things, on the "*greater emphasis on non-price elements such as innovation and quality of products and services*"[135]. Others argue that, as in Google Shopping Case[136], where online sales were integrated into the general sales market (including physical sales), the blockchain market power could be analysed

128 *Idem*: 304.

129 Schrepel, 2021: 185.

130 Azevedo and Walker (2002: 366) argue that the definition of dominance could be more economically coherent by replacing "behave to an appreciable extent independently" with "not restrained by the independent actions". See: Azevedo & Walker, 2002: 366, *cit by* Etro & Kokkoris, 2010: 21.

131 Case C-27/76, *United Brands*, EU:C:1978:22, §65; Case 85/76, C-85/76, *Hoffman-La Roche*, EU:C: 1979:36, §38; Junqueiro, 2012: 59-85; Van Bael & Bellis, 1994: 78-81; Bermann *et al.*, 1993: 803 – 805.

132 C-322/81, *Michelin*, EU:C:1983:313, p. 3461. See also: C-280/08, *Deutsche Telekom*, EU:C:2010:603, §176; C-52/09, *Konkurrensverket*, EU:C:2011:83, §24; Moura e Silva, 2008: 547.

133 Case T-612/17, *Google*, EU:T:2021:763.

134 Hutchinson & Egorova, 2020: 90-95.

135 See: Press release, 8/11/2022, available on https://ec.europa.eu/commission/presscorner/detail/en/ip_22_ 6528.

136 Case T-612/17, *Google*, EU:T:2021:763.

"*in comparison with other digital products or services, and potentially, non-digital alternatives*"[137].

In the light of the above, a private blockchain may be considered to have a dominant position according to the number of users involved in its system, compared to the number of users in other blockchains inside the same market. Furthermore, challenges may surface regarding market power in public blockchains, since it is "*tied to the absence of central power, and the need to ask the majority of blockchain users to adopt changes, which greatly mitigate the idea of 'power.'*"[138]. Overall, since "*decentralization is generally embedded in lower layers*"[139], the higher the layer, the easier it may be to define a dominant position.

In essence, the methodology chosen for assessing relevant markets in the blockchain technology is based on the layer where the application is placed and the products/services involved, while the market dominance may be defined by various criteria yet to be tested.

4.2. Refusal of access to a Private Blockchain as an abuse of dominance under 102.º TFEU

Assuming the existence of a dominant position, we'll suggest examples of possible refusals regarding private blockchains, with presumed market definitions, to outline the adequate legal assessment of such behaviours according to EU Case Law on abuse of dominance under 102.º.

The first example will lay on the most known business sector for this technology: the financial industry. In this regard, assuming a dominant position on the relevant market, imagine that:

> Financial institution X decides to create a private blockchain that can reduce the transactional costs by creating a more efficient trade settlement process, for its own use, benefiting its direct clients in their businesses (in the case of companies) or normal daily purchases/transactions (in the case of individuals). Other financial institutions request access to this private system, since there is no other blockchain that can provide this service, being then refused by the owner company. Hereby, these financial institutions have no alternative than to keep providing transactions with higher costs to its clients. Is this refusal anti-competitive[140]?

137 Schrepel, 2019: 304.

138 *Idem:* 306.

139 Schrepel, 2021: 58.

140 This example was inspired by: Kim & Justil, 2018: 13-15.

This case concerns a refusal to supply a service that has never been available on the market, namely a type of trade settlement process created by X for its own use and that was never provided to any of its competitors.

The European Courts have been cautious in determining whether a product/service that was never available on a market is indispensable to the competitiveness of markets, to the point of obeying an undertaking to contract with another, given that a company's decision to keep their created, acquired or developed products/services for own exclusive use is part of the freedom to conduct a business, which is protected as a fundamental right under the Charter of Fundamental Rights of the EU[141].

The EU Institutions have developed three conditions for this type of refusal to amount an abuse of dominance under 102.º: (i) the refusal should be likely to eliminate all competition; (ii) the service should be indispensable to carrying on the business on the requested market (no actual or potential substitute); and (iii) such refusal cannot be objectively justified[142].

In this case, two markets can potentially be identified, assuming there is no demand substitutability between them, and that financial institution X has a monopoly over the mentioned process: the market for the supply of access to a more efficient trade settlement process, and the market of regular trade settlement process, both markets related to the financial industry inside the blockchain reality.

Following the ECJ's judgment in Bronner Case, if there are other methods to trade settlement, though less efficient, this indicates that this system is not indispensable for the refused companies[143]. Additionally, to demonstrate that the creation of such a system is not a realistic potential alternative, the refused companies would have to prove the existence of technical, legal or economic obstacles[144].

According to the ECJ, an essential facility is a "*a facility or infrastructure, without access to which competitors cannot provide services to their customers*"[145]. In this case, there are other alternatives on the market that would potentially substitute this private blockchain, which means the condition of "essential

141 Marrapodi, 2018: 14-18.

142 C-7/97, *Bronner/Mediaprint*, EU:C:1998:569, §§38-41.

143 *Idem*, §48.

144 *Idem*, §49.

145 Decision (EC), 94/19/EC – *Sea Containers/Stena Sealink*, §66. More on this matter: Doherty, 2001: 397-436.

facility" is not verified. Therefore, this refusal to access a private blockchain would probably be considered as a legitimate behaviour of the dominant undertaking.

Now let's imagine the following situation:

> Company A develops a software compatible with blockchain technology that uses Artificial Intelligence to ensure security and compliance through regular vulnerability scans to help prevent informatic attacks. Company A gets a patent on this software and then decides to open a private blockchain for authorized companies to use its software to protect their businesses. Company B asks company A to grant its IP rights over the software so that company B can develop a unique game on blockchain where players (typically, software engineers) can battle AI-based opponents in solving informatic attacks to earn cryptocurrency. Company B argues that without Company A's software patent's rights, Company B can't succeed in the building of its game. Is this refusal anti-competitive[146].

This case concerns a refusal to grant patent rights to another company. Patents give an exclusive right to exercise an economic activity, justified by the effort of the inventor or as a counterpart of the public disclosure of the invention[147]. Under the European Patent Convention[148], a computer software isn't, in itself, regarded as an invention, unless it has a "*technical effect which goes beyond the normal physical interactions between the program and the computer*"[149].

Intellectual property may represent a way of regulating economy, in which national laws define its limits[150]. The ECJ has claimed that a refusal

146 This example was inspired by IBM, a software company that leads as having the most blockchain-related patent applications in 2021, according to: https://www.kramerlevin.com/en/perspectives-search/top-holders-of-blockchain-patents.html. Among its products, IBM offers AI for business and security scans. See: https://www.ibm.com/products/blockchain-platform-hyperledger-fabric; and https://www.ibm.com/software. This example was also inspired by GameFi, a blockchain-based gaming company that financially rewards gamers for their time and effort. See: https://gamefi.org/. Some authors have equated the possibility of refusals of IP rights in the blockchain context. E.g.: Schrepel, 2021: 193-197.

147 Sousa e Silva, 2019: 54.

148 Article 52.º, n.º 2, (c) and n.º 3, EPC of 5 October 1973.

149 Guidelines for the Examination of the EPO; Sousa e Silva, 2019: 50-52.

150 Sousa e Silva, 2014: 969. It may be noted that national rules on intellectual property themselves impose limits in certain circumstances through rules on compulsory licensing. See: Opinion of AG Jacobs, delivered on 28 May 1998, C-7-97, *Bronner*, EU:C:1998:264, §63.

to grant IP rights does not, in principle, constitute an abuse of dominance[151]. It is only when an IP right overpasses the necessary scope of protection or creates unnecessary barriers of enter, that competition on a market may be wrongfully restricted[152].

According to EU Case law, a refusal to grant IP right may constitute an infringement of 102.º if: (i) the refusal is likely to eliminate all competition; (ii) the service is indispensable to carrying on the business on the requested market; (iii) the refusal prevents the emergence of a new product/service, (iv) such refusal cannot be objectively justified[153].

In this case, we can potentially identify two markets: the market for computer security software on blockchain and the market for AI-based games focused on solving informatic attacks designed for blockchain (the requested market).

Since company B claims that its invention is unique, we assume this game would be a new product on the industry of blockchain games and that, because of this refusal, all competition for this new market would be eliminated. One must question if there is actual demand for this kind of game on the blockchain reality, since on Magill's Case, that was an important factor in considering the potential effects of the refusal on competition[154].

Regarding the indispensability test, company B would have to explain exactly how this refusal is affecting the production of this new game and if there were no alternative companies that would provide a service that would help B develop its game without the A's IP rights.

In closing, the behaviour of company A may be considered as an abuse of dominant position if company B could prove that this game is a new product on blockchain reality – which constitutes a new market with potential demand – and that A's IP rights are indispensable for the creation of this game.

Among the types of refusal analysed, we believe that refusals to deal regarding IP rights will be popular in the blockchain reality, since blockchain-based

151 See, e.g., C-53/87, *Renault*, EU:C:1988:472, §§11, 18, and C-238/87, *Volvo*, EU:C:1988:477, §§9, 11.

152 Moura e Silva, 2008: 327.

153 Namely, Joined Cases C-6-7/73, *Commercial Solvents*, EU:C:1974:18, §25, C-311/84, *Télémarketing* (CBEM), EU:C:1985:394, §26 and Joined cases C-241/91 P and C-242/91 P, *Magill*, EU:C:1995:98, §§40, 49, 53-56, as mentioned in C-7/97, *Bronner/Mediaprint*, EU:C:1998:569, §§38-41.

154 Decision (EC), 89/205/CEE – *Magill TV Guide/ITP, BBC y RTE*, §23.

applications to Intellectual Property Authorities have increased in the last few years, especially in countries like the U.S.A. and China[155].

Overall, the assessment of cases like these will depend significantly on the market definition and the ability of companies to prove the EU's requirements.

4.3. Possible objective justifications

Up until now we have focused on how a refusal of access to a private blockchain can be amounted to an abuse of dominance under 102.º. However, as in any case of abuse, if it is justified, no competition penalties will be imposed. This is a responsibility incumbent upon the dominant undertaking, which must support its plea with arguments and evidence[156]. It then falls to the Commission to show that the arguments and evidence cannot prevail, and, because of that, the justification cannot be accepted[157].

With regards to possible justifications, the Commission has acknowledged that a dominant undertaking may take reasonable steps to protect its commercial interests under threat, as long as the purpose was not to strengthen the dominant position and thereby abuse it[158]. For example, when a customer transfers its central activity to the promotion of a competing brand, a dominant producer is entitled to review its commercial relations with that customer and on giving adequate notice to terminate any special relationship[159]. Furthermore, the ECJ has admitted that a refusal to deal could be justified by technical or commercial requirements relating to the nature of the service provided[160]. It is noteworthy that the Commission has held that administrative boundaries may be technical constraints to the development of new structures[161].

Over the decades, many companies have unsuccessfully tried to justify refusals to deal. The EU institutions have rejected arguments related to loss

155 Jiang *et al*, 2021: 562-574.

156 Guidance on Article 102.º, §31. Case T-201/04, *Microsoft*, EU:T:2007:289, §688. Regarding the burden of proof in objective justifications: Vijver, 2014: 183-188.

157 Case T-201/04, *Microsoft*, EU:T:2007:289, §1144.

158 C-27/76, *United Brands*, EU:C:1978:22, §190. Decision (EC), COMP/38.096, AT.38096, *Clearstream*, §132.

159 Decision (EC), 87/500/EEC, IV/32.279, *BBI/Boosey & Hawkes*, §19.

160 C-311/84, *Télémarketing (CBEM)*, EU:C:1985:394, §26.

161 Decision (EC), COMP D3/38.044, *IMS Health*, §131.

of revenue/market share[162], capacity limits, exclusivity of property right, freedom of business strategy, historical rights that resulted into the reservation[163], among others. In the specific case of a refusal to grant IP rights, the Court did not accept arguments with reference to the exclusivity of its IP rights and the great value behind the license[164].

In the case of private blockchains, we suggest a more technological approach related to the characteristics and purpose of this kind of system in creating a private environment where sensitive data can be stored[165]. In this context, can an objective justification of refusal lay on data privacy[166]?

The current General Data Protection Regulation[167] is a European legislation that concerns how businesses, organisations, and governments, should utilise "personal data"[168]. One of the principles of this regulation relating to processing of personal data is the principle of "integrity and confidentially", in which companies must process data in a manner that ensures appropriate security of the personal data, including protection against unauthorised or unlawful processing and against accidental loss, destruction or damage, using appropriate technical or organisational measures[169].

The Commission has previously acknowledged that privacy can be taken into account in the competition assessment of digital markets as a non-price parameter[170]. For example, in Facebook/WhatsApp, the Commission revealed that one of the main drivers of competitive interaction between consumer communications apps is the functionality of privacy and security, and

162 Decision (EC), IV/33.544, *British Midland/Aer Lingus*, §25.

163 Decision (EC), 98/190/EC, IV/34.801, *FAG/Flughafen Frankfurt/Main AG*, §§74-98; Joined cases C-241/91 P and C-242/91 P, *Magill*, EU:C:1995:98, §23.

164 Case T-201/04, *Microsoft*, EU:T:2007:289, §§691-695.

165 Ncuve et al, 2020: 1.

166 As suggested by Schoening, on https://www.youtube.com/watch?v=QR1yAQsV5ow&list=PLyBGv yEYBNlrT56bYYgtWibQ_Nm51VpX-&index=9.

167 Regulation (EU) 2016/679, of 27 April 2016 (hereinafter, *GDPR*). This Regulation applies to the processing of personal data in the context of the activities of an establishment of a controller or a processor in the EU, regardless of whether the processing takes place in the Union or not. See Article 3.º GDPR.

168 According to Article 4.º GDPR, "personal data" means "*any information relating to an identified or identifiable natural person ('data subject'); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person*".

169 Article 5.º, (f) GDPR.

170 Unekbas, 2022: 139-143; Volmar & Helmdach, 2018: 207.

that the "*importance of which varies from user to user but which are becoming increasingly valued*"[171]. Also, in Microsoft/LinkedIn, the Commission revealed that privacy is an important parameter of competition and driver of customer choice in the market for PSN services[172].

However, the EU Institutions' position has been clear: any privacy-related concerns must be assessed by EU data protection rules and not competition rules[173]. This can be explained by the fact that, while data protection rules aim to protect individuals' fundamental rights and freedoms, namely their right to data privacy, competition law protects the structure of competition and consumer welfare[174].

In respect to Private Blockchains, one could argue that an obligation to give access to such system would be against its characteristics and the whole purpose of its existence which is, among other things, to control who enters the space where private information may be stored or exchanged. However, as in non-technological facilities, if a private blockchain is found to be an "essential facility" to competition – meaning it is not replaceable and there are no alternatives to it – we believe that the user's interest in maintaining data privacy should not prevail over the development of a secondary market, which ultimately benefits consumers. Besides, since private blockchains may be designed to restrict the number of members that can see specific information, data privacy may, in principle, be ensured through technical changes. Therefore, we believe that data privacy should not be admitted as an objective justification to a refusal of access to a private blockchain.

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171 Decision (EC), M.7217, *Facebook/WhatsApp*, §87. As an example, "*after the announcement of WhatsApp's acquisition by Facebook and because of privacy concerns, thousands of users downloaded different messaging platforms, in particular Telegram which offers increased privacy protection*". See Decision (EC), M.7217, *Facebook/WhatsApp*, p. 24, footnote 79.

172 Decision (EC), M. 8124, *Microsoft/LinkedIn*, p. 77, footnote 330.

173 Decision (EC), M.7217, *Facebook/WhatsApp*, §164; Decision (EC), M.7813, *Sanofi/Google/DMI JV*, §70. Nevertheless, it is important to note that the control of personal data may be relevant for the appraisal of mergers and may be used as a way for dominant firms to exploit "economies of aggregation" and create barriers to entry. See: Hustinx, 2014: 29-31.

174 At the same time, Margrethe Vestager has stated that competition and data protection may have different tools, but have common goals, such as "innovation". See: Margrethe Vestager's Speech, available on https://www.youtube.com/watch?v=410PoVsq6SQ&t=913s. More recently, in Meta Platforms' Case (C-252/21, *Meta Platforms*, EU:C:2023:537), the ECJ held that "*(…) in the context of the examination of an abuse of a dominant position by an undertaking on a particular market, it may be necessary for the competition authority of the Member State concerned to examine whether that undertaking's conduct complies with rules other than those relating to competition law, such as the rules on the protection of personal data laid down by the GDPR*".

5. CONCLUSION

Given its potentialities, Blockchain technology is capable of hosting digital markets in various sectors such as finance and entertainment (e.g., games), in which crypto currency is used as a way of paying for products or services.

To define relevant markets, factors such as the type of the blockchain (monocentric or platform), the layer impacted by the anticompetitive practice and the product/service provided by the blockchain should be taken into account. Moreover, to define the market power between blockchains, one may consider various factors, such as the number of users, the number of transactions recorded, the number of blocks or the amount of revenues.

Although the original concept of Blockchain was based on a decentralized system with no single authority, the evolution of this technology lead to the creation of private systems, which can be designed in a centralized way where a ruler(s) might have the power to select and verify participants who desire to enter into the group.

Since private blockchain's main characteristic is the ability to restrict its participants, competition issues regarding refusals to access this private system may occur. In such case, if the ruler of the private blockchain is a dominant firm, such refusal may amount to an abuse of dominant position if the requirements of Article 102.º TFEU are verified and the conditions developed by the EU Institutions regarding the essential facility doctrine are met, which differ whether the object of refusal was a tangible asset or an IP right.

In the case of tangible assets, the refusal may be considered an abuse if: (i) the refusal should be likely to eliminate all competition; (ii) the service should be indispensable to carrying on the business on the requested market, meaning there was no actual or potential substitute; and (iii) such refusal cannot be objectively justified. In the case of IP rights, the refusal might be amounted to an abuse if: (1) there is an essential facility; (2) the refusal would have to prevent the emergence on the market of a new product, with potential consumer demand; (3) there was no objective justification; and (4) the refusal would exclude all competition in the requested market.

Among the types of refusal analysed, we believe that refusals to deal regarding IP rights will be popular in the blockchain reality, especially regarding software IP rights, since blockchain-based applications to Intellectual Property Authorities have increased in the last few years, especially in countries like the U.S.A. and China.

Lastly, we analysed if data privacy could be alleged as an objective justification to a refusal to access a private blockchain. We argue that the user's

interest in maintaining data privacy should not prevail over the development of a secondary market in the blockchain system, which ultimately benefits consumers and that data privacy concerns may, in principle, be solved through technical changes, by restricting the number of members that see such sensitive information. Therefore, data privacy should not be admitted as an objective justification to a refusal of access to a private blockchain.

BIBLIOGRAPHY

BIBLIOGRAPHY

Azevedo, Joao Pearce & Mike Walker

2002 "Dominance: Meaning and Measurement", in *ECLR* vol. 23, n.º 7, pp. 363-367

Belchior, Rafael *et al*

2021 "A Survey on Blockchain Interoperability: Past, Present and Future Trends", in *ACM Computing Survey* 54, 8, Article 168 (October 2021), available on: https://dl.acm.org/doi/pdf/10.1145/3471140 [consulted on 01.04.2023]

Bermann, George A. *et al*

1993 *Cases and materials on European Community Law*, USA: American Casebook series, West Publishing Co

Chaum, David

1982 *Computer Systems Established, Maintained, and Trusted by Mutually Suspicious Groups*, dissertation for the degree of Doctor of Philosophy in Computer Science, Berkeley, in the graduate division of the University of California

Cong, Lin & Zhiguo, He

2019 "Blockchain Disruption and Smart Contracts", in *The Review of Financial Studies*, vol. 32, n.º 5, May 2019, pp. 1754–1797

Craig, Paul & Gráinne De Búrca

2020 *EU Law: Text, Cases and Materials*, 7th edition, USA: Oxford University Press

Doherty, Barry

2001 "Just what are essential facilities?", in *Common Market Law Review*, Kluwer Law International, vol. 38, n.º 2, pp. 397-436

Etro, Federico & Ioannis Kokkoris
2010 *Competition Law and the Enforcement of Article 102.º*, USA: Oxford University Press

Evrard, Sébastien J.
2004 "Essential Facilities in the European Union: Bronner and Beyond", in *Columbia Journal of European Law*, vol. 10, n.º 3, pp. 491-526

Freire, João Pedro
2022 *Blockchain e Smart Contracts – implicações jurídicas*, Portugal: Almedina

Gorjão-Henriques, Miguel
2019 *Direito da União: História, Direito, Cidadania, Mercado Interno e Concorrência*, 9th ed., Portugal: Almedina

Hileman, Garrick & Rauchs, Michel
2017 *Global Blockchain Benchmarking study,* Cambridge Centre for Alternative Finance, University of Cambridge Judge Business School, available on: https://ssrn.com/abstract=3040224 or http://dx.doi.org/10.2139/ssrn.3040224 [consulted on 01.04.2023]

Hutchinson, Christophe S. & Egorova, Maria A.
2020 "Potential legal challenges for Blockchain Technology in Competition Law", in *Baltic Journal of Law & Politics*, vol. 13, n.º 1, pp. 81-107

Jiang, Nan *et al*
2021 "Evaluating Blockchain technology and related policies in China and the USA", in *Science and Public Policy*, Oxford: Oxford University Press, vol. 48, n.º 4, pp. 562-575

Junqueiro, Ricardo Bordalo
2012 *Abuso de Posição Dominante*, Portugal: Almedina

Kim, Kevin & Justil, Jonathan M.
2018 "Potential Antitrust Risks in the Development and Use of Blockchain", in *Journal of Taxation & Regulation of Financial Institutions*, vol. 31, n.º 3, pp. 5-17

Korah, Valentine
1994 *An Introductory Guide to EC Competition Law And Practice*, 5th ed., UK: Sweet & Maxwell

Maggiolino, Mariateresa & Zoboli, Laura
2021 "Blockchain governance: the missing piece in the competition puzzle", *in Computer Law & Security Review*, vol. 43, pp. 1-12

Marrapodi, Armando

2018 *Freedom to Conduct Business and Abusive Refusal to Deal: Do dominant undertakings enjoy limited contractual freedom?*, Master Dissertation, Faculty of Law, University of Lund

Mohan, C.

2019 *State of Public and Private Blockchains: Myths and Reality*, SIGMOD '19: Proceedings of the 2019 International Conference on Management of Data, June 2019, Amsterdam, Netherlands, pp. 404-411, available on: https://dl.acm.org/doi/10.1145/3299869.3314116 [consulted on 03/04/2023].

Mohanta, Bhabendu *et al*

2018 *An overview of smart contracts and use cases in Blockchain Technology*, 2018, 9th international conference on computing, communication and networking technologies (ICCCNT), Bengaluru, India, IEEE, pp. 1-4, available on: https://ieeexplore.ieee.org/document/8494045 [consulted on 03.12.2022]

Moura e Silva, Miguel

2008 *O Abuso de Posição Dominante na Nova Economia*, Doctoral Thesis in Law, Lisboa, Faculty of Law, University of Lisbon

2010 "A tipificação da recusa de acesso a infra-estruturas essenciais como abuso de posição dominante na lei da concorrência", in *Revista de Concorrência e Regulação*, vol. 1 (January/March 2010), pp. 269-295

2018 *Direito da Concorrência*, reprinting 2020, Portugal: Associação Académica da Faculdade de Direito de Lisboa Editora

Nakamoto, Satoshi

2008 *Bitcoin: A Peer-to-Peer Electronic Cash System*, available on: https://bitcoin.org/bitcoin.pdf. [consulted on 15.11.2022]

Ncuve, Tyron *et al*

2020 *Private Blockchain Networks: A Solution for Data Privacy,* 2nd International Multidisciplinary Information Technology and Engineering Conference (IMITEC)

Oliveira Pais, Sofia

2011 *Entre Inovação e Concorrência – Em defesa de um modelo europeu*, Portugal: Universidade Católica Editora

Pillai, Babu *et al*

2020 "Cross-chain interoperability among blockchain-based systems using transactions", in *The Knowledge Engineering Review*, Cambridge University Press, vol. 35, 1-17

Pinto Monteiro, Luís
2010 *A recusa em licenciar direitos de propriedade intelectual no direito da concorrência*, Portugal: Almedina

Schöning, Falk & Tagara, Myrto
2019 Can your blockchain attract the attention of competition authorities to open an investigation, in *Competition Law & Policy Debate*, vol. 5, n.º 3, pp. 57-62

Schöning, Falk
2018 *Falk Schoening on private blockchains and competition law*, OECD Blockchain Policy Forum, which took place on 4 and 5 September 2018 in Paris, available on: https://www.youtube.com/watch?v=QR1yAQsV5ow&list=PLyBGvyEYBNlrT56bYYgtWibQ_Nm51VpX-&index=9 [consulted on 15.11.2022]

Schrepel, Thibault
2019 "Is blockchain the death of antitrust law? The Blockchain Antitrust Paradox", in *Georgetown Law Technology Review*, Vol. 3, n.º 2, pp. 281-338
2019-2020 "Libra: a concentrate of blockchain antitrust", in *Michigan Law Review Online*, Chicago, vol. 118, pp. 160-169
2021 *Blockchain + Antitrust: The Decentralization Formula*, UK, USA: Edward Elgar publishing

Schulte, Stefan *et al*
2019 *Towards Blockchain Interoperability*, Business Process Management: Blockchain and Central and Eastern Europe Forum: BPM 2019 Blockchain and CEE Forum, Vienna, Austria, September 1–6, 2019, Proceedings 17, Lecture Notes in Business Information Processing 361, Springer International Publishing, pp. 1-8

Sharma, Luv *et al*
2021 "How Blockchain will transform the healthcare ecosystem", in *Business Horizons*, Kelley School of Business, Indiana University, vol. 64, pp. 673-682

Sousa e Silva, Nuno
2014 "What if IP is abolished? – Does the Charter of Fundamental rights of the EU make any difference?", in *Revista O Direito*, year 146, IV, pp. 961-970

Sousa e Silva, Pedro
2019 *Direito Industrial: Noções Fundamentais*, 2ª edição, Coleções Manuais Universitários, Portugal: Almedina

Swan, Melanie
2015 *Blockchain: Blueprint for a New Economy*, USA: O'Reilly Media
Szabo, Pedro
1994 *Smart Contracts,* Universiteit Van Amsterdam, available on: http://www.fon.hum.uva.nl/rob/courses/informationinspeech/cdrom/literature/lotwinterschool2006/szabo.best.vwh.net/smart.contracts.html; https://perma.cc/5nf3-r6n3 [consulted on 15.01.2022]
Takyar, Akash
2023 *How to create private blockchains,* available on: https://www.leewayhertz.com/how-to-create-a-private-blockchain/#Why-should-you-create--a-private-blockchain? [consulted on 07.03.2023]
Temple Lang, John
1994 "Defining Legitimate competition: companies' duties to supply competitors and access to essential facilities", in *Fordham International Law Journal*, vol. 18, n.º 2, pp. 437-524
2000 "The Principle of Essential Facilities in European Community Competition Law – The Position since Bronner", in *Journal of Network Industries*, vol. 1, pp. 375-405
Temple Lang, John & O'donoghue, Robert
2005 "The Concept of an Exclusionary Abuse under Article 82 EC", GCLC Research Papers on Article 82 EC, in *Global Competition Law Centre*, College of Europe, Belgium, July 2005, pp. 38-64
Unekbas, Selcukhan
2022 "Competition, Privacy, and Justifications: invoking privacy to justify abusive conduct under Article 102.º TFUE", in *Journal of Law, Market & Innovation*, vol. 1, n.º 2, pp. 124-161
Van Bael, Ivo & Bellis, Jean-François
1994 *Competition Law of the European Community*, UK: CCH Europe
Vestager, Margrethe
2019 Speech on *Dealing with mergers in a digital age*, 18 June 2019, available on: https://uk.practicallaw.thomsonreuters.com/w-020-8700?transitionType=Default&conte xtData=(sc.Default)&-firstPage=true [consulted on 19.04.2023]
2022 *16 June – Keynote Speech 1 – Margrethe Vestager*, keynote speech at the EDPS Conference 2022 on the Future of Data Protection: Effective enforcement in the digital world, 16 June 2022, available on: https://www.youtube.com/watch?v=410PoVsq6S Q&t=913s [consulted on 19.04.2023]

Vijver, T.D.O. van der

2014 *Objective Justification and Prima Facie anti-competitive unilateral conduct: an exploration of EU Law and beyond*, Doctoral Thesis in Law, University of Leiden

Volmar, Maximilian & Helmdach, Katharina

2018 "Protecting consumers and their data through competition law?: Rethinking abuse of dominance in light of the Federal Cartel Office's Facebook investigation", in *European Competition Journal*, vol. 14, n.ºs 2-3, pp. 195-215

Wegner, Peter

1996 "Interoperability", in *ACM Computing Surveys*, vol. 28, n.º 1, pp. 285-287

Whish, Richard & Bailey, David

2012 *Competition Law*, 7th edition, USA: Oxford University Press

2021 *Competition Law*, 10th Edition, USA: Oxford University Press

Zhang, Peng *et al*

2019 "Consensus Mechanisms and Information security technologies", in *On Advances in Computers*, vol. 115, chapter 7

OFFICIAL DOCUMENTS

European Commission

2009 *Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings* (2009/C 45/02), Official Journal of the European Communities *(Guidance on Article 102º)*

2022 Press release, 8/11/2022, Brussels, *Competition: Commission seeks feedback on draft revised Market Definition Notice*, available on: https://ec.europa.eu/commission/presscorner/detail/en/ip_22_6528 [consulted on 15.03.2023]

2024 *Commission Notices on the definition of relevant market for the purposes of Community competition law* (C/2024/1645), Official Journal of the European Communities

European Data Protection Supervisor

2014 Hustinx, Peter – *Preliminary Opinion of the European Data Protection Supervisor, Privacy and competitiveness in the age of big data: the interplay between data protection, competition law and consumer protection in the Digital Economy*, European Data Protection Supervisor, March 2014

European Patent Office

2023 *Guidelines for the Examination of the EPO*, Part G, Chapter II-15, Rule 3.6 Programs for Computer, Legislative Implementation of Flexibilities, available on: https://www.wipo.int/ip-development/en/agenda/flexibilities/details.jsp?id=8706 [consulted on 31.03.2023]

OECD

2019 *The OECD Blockchain Primer*, available on: https://www.oecd.org/finance/OECD-Blockchain-Primer.pdf [consulted on 20.11.2022]

Websites

Blockchain.com

2023 *Total Number of Transactions: the total number of transactions on the blockchain,* available on: https://perma.cc/ZB5X-CPHL [consulted on 01.04.2023]

Game fi.com

2023 Available on: https://gamefi.org/ [consulted on 01.04.2023]

Ibm.com

2023 *Products,* available on: https://www.ibm.com/products/blockchain-platform-hyperledger-fabric and https://www.ibm.com/software [consulted on 01.04.2023]

Kramer levin.com

2023 *Hot Holders of Blockchain Patents*, available on: https://www.kramerlevin.com/en/pe rspectives-search/top-holders-of-blockchain-patents.html [consulted on 01.04.2023]

Quorum

2023 Available on: https://consensys.net/quorum/qbs/ [consulted on 01.02.2023]

USA Case Law

Judgment of the U.S. Supreme Court of 22 April 1912, *Terminal Railroad Association of St Louis*, Case 383

EU Case Law

Judgment of the Court of 21 February 1973, *Europemballage Corporation and Continental Can Company Inc.*, Case 6-72, EU:C:1973:22

Judgment of the Court of 6 March 1974, *Istituto Chemioterapico Italiano S.p.A. and Commercial Solvents Corporation*, Joined Cases C-6-7/73, EU:C:1974:18

Judgment of the Court of 14 February 1978, *United Brands Company and United Brands Continentaal BV*, Case 27/76, EU:C:1978:22

Judgment of the Court of 29 June 1978, *Benzine en Petroleum Handelsmaatschappij BV and others*, Case 77/77, EU:C:1978:141

Judgment of the Court of 13 February 1979, *Hoffman-La Roche*, C-85/76, EU:C: 1979:36

Judgment of the Court of 9 November 1983, *NV Nederlandsche Banden Industrie Michelin*, C-322/81, EU:C:1983:313

Judgment of the Court of 3 October 1985, *Centre belge d'études de marché – Télémarketing (CBEM) v SA Compagnie luxembourgeoise de télédiffusion (CLT) and Information publicité Benelux (IPB)*, C-311/84, EU:C:1985:394

Judgment of the Court of 5 October 1988, *Consorzio italiano della componentistica di ricambio per autoveicoli and Maxicar v Régie nationale des usines Renault*, C-53/87, EU:C:1988:472.

Judgment of the Court of 5 October 1988, *AB Volvo v Erik Veng (UK) Ltd.*, C-238/87, EU:C:1988:477

Judgment of the Court of First Instance of 10 July 1991, *Radio Telefis Eireann [Magill]*, Case T-69/89, EU:T:1991:39

Judgment of the Court of First Instance of 1 April 1993, *BPB Industries Plc and British Gypsum Ltd*, Case T-65/89, EU:T:1993:31

Judgment of the Court of 6 April 1995, *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) [Magill]*, Joined cases C-241/91 P and C-242/91 P, EU:C:1995:98

Judgment of the Court of 6 April 1995, *BPB Industries plc and British Gypsum Ltd*, C-310/93, EU:C:1995:101

Judgment of the Court of First Instance of 12 June 1997, *Tiercé Ladbroke SA*, Case T-504/93, EU:T:1997:84

Judgment of the Court of 26 November 1998, *Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG, Mediaprint Zeitungsvertriebsgesellschaft mbH & Co. KG and Mediaprint Anzeigengesellschaft mbH & Co. KG.*, C-7/97, EU:C:1998:569.

Judgment of the Court of 29 April 2004, *IMS Health GmbH & Co. OHG v NDC Health GmbH & Co. KG.*, C-418/01, EU:C:2004:257

Judgment of the Court of 31 May 2005, *Synetairismos Farmakopoion Aitolias & Akarnanias (Syfait) and Others v GlaxoSmithKline plc and GlaxoSmithKline AEVE*, C-53/03, EU:C:2005:333

Judgment of the Court of First Instance of 17 September 2007, *Microsoft Corp.*, Case T-201/04, EU:T:2007:289

Judgment of the Court of 16 September 2008, *Sot. Lélos kai Sia EE and Others v GlaxoSmithKline (GSK) AEVE Farmakeftikon Proïonton, formerly Glaxowellcome AEVE*, Joined cases C-468/06 to C-478/06, ECLI:EU:C:2008:504

Judgment of the Court of 14 October 2010, *Deutsche Telekom AG*, Case C-280/08 P., EU:C:2010:603

Judgment of the Court of 17 February 2011, *Konkurrensverket v TeliaSonera Sverige AB*, Case C-52/09, EU:C:2011:83

Judgment of the Court of 25 March 2021, *Slovak Telekom*, C-165/19 P, EU:C:2021:239

Judgment of the General Court of 10 November 2021, *Google LLC, formerly Google Inc. and Alphabet, Inc.*, Case T-612/17, EU:T:2021:763

Judgment of the General Court of 4 July 2023, *Meta Platforms Inc., Meta Platforms Ireland Ltd and Facebook Deutschland GmbH*, C-252/21, EU:C:2023:537

Advocate General's Opinions

Opinion of the AG Jacobs, delivered on 28 May 1998, *Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG, Mediaprint Zeitungsvertriebsgesellschaft mbH & Co. KG and Mediaprint Anzeigengesellschaft mbH & Co. KG*, C-7/97, EU:C:1998:264

Opinion of the AG Tizzano delivered on 2 October 2003, *IMS Health GmbH & Co. OHG v NDC Health GmbH & Co. KG.*, C-418/01, EU:C:2004:257

Opinion of the AG Jacobs delivered on 28 October 2004, *Synetairismos Farmakopoion Aitolias & Akarnanias (Syfait) and Others v GlaxoSmithKline plc and GlaxoSmithKline AEVE*, C-53/03, EU:C:2004:673

European Commission

Decision of 29 July 1987, 87/500/EEC, IV/32.279 – *BBI/Boosey & Hawkes*

Decision of 21 December 1988, 89/205/CEE, IV/31.851 – *Magill TV Guide/ITP, BBC y RTE*

Decision of 26 February 1992, IV/33.544 – *British Midland/Aer Lingus*

Decision of 21 December 1993, 94/19/EC, IV/34.689 – *Sea Containers/Stena Sealink*

Decision of 14 January 1998, 98/190/EC, IV/34.801 – *FAG/Flughafen Frankfurt/Main AG*

Decision of 3 July 2001, COMP D3/38.044 – *NDC Health/IMS Health: Interim measures*

Decision of 24 March 2004, COMP/C- 3/37.792 – *Microsoft*

Decision of 2 June 2004, COMP/38.096, AT.38096 – *Clearstream*

Decision of 3 October 2014, M.7217 – *Facebook/WhatsApp*
Decision of 15 October 2014, AT.39523 – *Slovak Telekom*
Decision of 23 February 2016, M.7813 – *Sanofi/Google/DMI JV*
Decision of 6 December 2016, M. 8124 – *Microsoft/LinkedIn*

FROM FINTECHS TO INSTANT PAYMENT: A COMPARATIVE APPROACH TO FOSTERING COMPETITION IN THE FINANCIAL SECTOR*

*Daniel Favoretto Rocha***, ***

Abstract *This paper proposes a framework of three categories to qualify policy implementation challenges in regulated sectors: path dependence, unseen development and big bang approach. While path dependence is a phenomenon in which policy objectives are not reasonably fulfilled due to a previous set of persistent reinforcing mechanisms, unseen development occurs when policy objectives are reasonably achieved under a discreet and slow manner. The big bang approach means to reasonably achieve policy objectives by an unprecedented policy intervention, capable of shifting the status quo. Based on this framework along with an unprecedented dataset, the paper analyses Portugal's recent efforts to enhance competition in its financial sector, argues that Portugal is in a position of unseen development, and provides a comparative perspective from Brazil. To avoid both overenforcement and underenforcement, suggested measures include enhanced institutional dialogue between competition, data protection and financial sector regulators, with multi-layered remedies, updates of existing rules on data portability, regulatory sandboxes, creation of think-thanks,*

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*** The author clarifies that the law firm to which he was once associated advised players of the electronic payments industry before the Brazilian Competition Authority, in some of the proceedings mentioned in this paper. However, this paper was exclusively based on publicly disclosed information and it only describes these cases, with no opinion issued on their merit whatsoever, so the author has not verified any conflict of interests. Additionally, this paper reflects the author's own opinion and independent judgment, and it has not received any form of funding from third parties.

as well as a mix of regulatory strategies, such as settlements, third-party interventions, occasional quick blocking injunctions, and wide-reaching discovery measures.

Table of Content 1. Introduction. 2. Fostering competition in the Portuguese financial sector: path dependence, unseen development or a big bang approach? 2.1. Categories of policy implementation challenges. 2.2. Portugal's competition policy in the financial sector. 3. Comparative perspective from Brazil. 3.1. CADE's competition policy. 3.2. Brazilian Central Bank's role in fostering competition. 4. Concluding remarks.

Keywords Financial sector, Competition policy, Digital innovation, Regulatory challenges, Comparative law.

JEL K21, K22, K23.

1. INTRODUCTION

This paper analyses how Portugal's competition authority (*Autoridade da Concorrência* – "AdC"), under European Union ("EU") law, has been attempting to foster competition and innovation in the financial sector, comparing its policy strategies with Brazil, a jurisdiction that has been adopting key initiatives over this topic. Open banking and fintechs are just a few examples of how digital innovation has taken a crucial role in the financial sector and, as the pandemic impacted national economies, the digitalization of financial services has boosted to compensate social distancing and facilitate consumer access to these services[1].

Despite this importance, Portugal has admittedly been facing challenges to boost competition in its financial markets. Besides the AdC's own ascertainment in this sense[2], the concern with the financial sector as one that has

1 Regarding the EU, according to the European Commission's communication on digital finance strategy for the EU (24 September 2020), "*digital finance has helped citizens and businesses tackle the unprecedented situation created by the Covid-19 pandemic*" and "*fintech solutions have helped to broaden and speed up access to loans, including loans supported by government in response to the Covid-19 crisis*". Regarding Brazil, according to a survey conducted by the Brazilian State of São Paulo and the Brazilian Federation of Banks (locally known as "Febraban"), 58% of the interviewed citizens declared that, during the Covid-19 pandemic, they increased the use of digital tools for the consumption of banking services. Page 28 of the research report, available in https://cmsportal.febraban.org.br/Arquivos/documentos/PDF/OBSERVAT%C3%93RIO%20FEBRABAN%20-%20DESTAQUES%202020%20E%20EXPECTATIVAS%202021%20DEZEMBRO%202020_V1_iD%20-%20FINAL%20v3.pdf>.

2 AdC, 2018: 4: "*Contudo, Portugal tem tido uma resposta lenta na adaptação aos desenvolvimentos do mercado face a outros países. Em Portugal, os novos entrantes associados a estas tecnologias têm enfrentado barreiras à entrada e à expansão que condicionam a sua capacidade para oferecer serviços que apelam*

particular struggle with competition in Portugal was also raised in the Portuguese parliament, during the recent hearing of the new president of the AdC[3]. Although these challenges may result from factors other than the country's competition policy, its design and strategies of implementation undoubtedly play a role in enhancing competition and innovation in this sector.

For the purposes of this paper, the broad term "financial sector" comprises a wide range of financial services, including banking, underwriting, investment intermediation, insurance and payment services. Although these segments are not necessarily subject to the same rules and regulators, their basis on credit and financial transactions lead to similar regulatory challenges, reason why this paper will provide an overview of this sector, notwithstanding the peculiarities of each specific segment. As for the terms "competition" and "innovation", this paper considers both to be reasonably interchangeable, although a sector could experience innovation without significant competition (more on section 2 below).

The strategies and challenges of implementing policy objectives analysed in this paper can transpose to other regulated sectors and jurisdictions. A comparative analysis on competition policy for digital innovation in the financial sector provides an interesting interface between sector regulation, competition defence and new technologies, aiming for useful lessons about weighting different policy objectives in the context of fast-paced innovation and heavy information asymmetry. Thus, this paper should not be misunderstood as destined exclusively for financial sector regulators or practitioners, neither as applicable only to Portugal.

The comparative approach adopted in this paper focuses on Portugal and Brazil, as well as the EU in what concerns its influence over Portuguese law. A comparative approach on Brazilian strategies may add to this debate for the two following reasons. Firstly, a lot has been written about competition in the financial sector from U.S., United Kingdom and European perspectives, but few under a comparative approach between Portugal and Brazil.

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aos consumidores." Author's translation: "*However, Portugal has been experiencing a slow response in the adaptation of the market in comparison to other jurisdictions. In Portugal, the entrants that make use of such technologies have been facing entry and expansion barriers that limit their capacity to supply their services to consumers*."

3 On 24 January 2023, during the hearing of Nuno Cunha Rodrigues for the position of president of the AdC at the Commission of the Economy, representative Hugo Carvalho, from the PSD party, declared that, different from other market segments in Portugal, financial services lack competition and suffer from heavy fees (e.g., "*não temos uma prática de concorrência aberta, como temos em outros setores, nas transações financeiras* (…)"). Recording available in https://www.youtube.com/watch?v=xG1Fyw9XleE [21:30]

Secondly, given that social sciences do not enjoy the possibility of comparison under controlled environments such as those in laboratories (Dimoulis *et. al.*, 2013: 9), Brazil suits as an ideal midway position between distance and proximity from Portugal for a comparative approach[4]. On one hand, both jurisdictions have been historically close in terms of culture, diplomacy and international trade. On the other hand, Brazil is a large-scale developing economy and, as such, it can provide a comparative perspective distant enough from Portugal and the EU. Thus, the comparison of different policy initiatives under closer cultural, political and economic contexts may provide better applicable solutions[5].

Moreover, a comparative approach should avoid a mere legal transplant of a certain framework, which would disregard the social, political, and economic peculiarities of each jurisdiction, thus, diminishing the effective outcome of comparative law (Mota Prado, 2010: 1; Berkowitz *et. al.*, 2003). Applying this notion to the subject at hand, every recommendation raised along this paper should consider the differences of regulators' institutional constraints and enforcement capacity, cultural resistance or acceptance to State intervention, the size of the economy of each country, and their level of integration with a regional supranational regulatory framework, for example.

This paper's object of study (competition in the financial sector) is a trending topic in both of these jurisdictions. In Portugal, the AdC has clearly made effort to study this sector and recommend pro-competitive arrangements. In late-2018, the AdC issued a paper to recommend measures on mitigating entry barriers for innovation in the financial sector ("2018 paper")[6]. Three years later, the AdC issued a follow up report on the status of the financial sector in relation to its 2018 paper's pro-competitive recommendations ("2021 follow up report")[7]. Additionally, in 2021, the AdC published its comments on the Bank of Portugal's bill of Banking Activity Code, encompassing not only suggestions

4 Considering that financial services tend to be heavily regulated and competition tends to be among the sector's policy objectives, regulatory and competition issues are easily interfaced. Considering this inevitable interface, to focus on the competition aspect of the public policies addressing digital innovation in the financial sector, this paper will encompass both competition and sector-specific regulation in Brazil.

5 The use of a comparative approach toward closely related jurisdictions results from the concern that competition policies vary due to political choices and different policy objectives in each jurisdiction, since "*there is no one size fits all standard to competition policies*", while "competition policy is not an exact science solely focused on maximizing consumer welfare" (Lancieri, 2018: 10-11).

6 See at https://extranet.concorrencia.pt/PesquisAdC/EPR_Page.aspx?Ref=EPR_2018_33.

7 See at https://extranet.concorrencia.pt/PesquisAdC/EPR_Page.aspx?Ref=EPR_2019_2.

of conformity to EU competition law, but, also, measures of fomenting competition in the Portuguese financial sector[8].

In Brazil, differently from the Portuguese context, the financial sector has been experiencing intense innovation, along with numerous antitrust investigations and merger review cases by the Brazilian competition authority ("CADE") and key regulatory initiatives by the Brazilian Central Bank ("BCB"), such as regulatory sandboxes for market players, open banking regulation, partnerships with universities and fintechs to discuss innovation, and an instant payment system operated by BCB itself.

Finally, in the case of the EU, the European Commission ("Commission") has taken an important role of debating and proposing key regulatory initiatives to enhance innovation in the financial sector and protect consumers under a digital-friendly context. Distinctively, key initiatives on this subject are the 2018 Fintech Action Plan[9] and the 2020 Digital Finance Package[10], which included a digital finance strategy for the EU and legislative proposals on cryptocurrency and retail payments' regulation. Though focused on innovation and not necessarily on competition issues, the instant payment system launched by the European Central Bank (Target Instant Payment Settlement – TIPS) also reveals the commitment of European authorities to accompany the fast-paced transformation of this sector.

In addition to being a trending topic in these jurisdictions, this object of study is also of great relevance to consumer welfare and economic development. Given its impact on peoples' wealth and income, financial services are essential to provide legal certainty in the exchange of goods and services in any society. The financial sector, including the securities market, provides capital to entrepreneurs, thus, creating jobs and driving innovation (CVM, 2022: 15).

The financial sector has also been considered key for the promotion of sustainable development and defence of social and environmental values[11], as the mainstream term "ESG" expresses in the corporate world. In relation to Portugal, fostering competition in the financial sector becomes even more relevant in the context of the economy's recovery from the Covid-19 pandemic, as a mean of

8 See at https://extranet.concorrencia.pt/PesquisAdC/EPR_Page.aspx?Ref=EPR_2021_7.

9 See at https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52018DC0109&from=EN.

10 See at https://ec.europa.eu/info/publications/200924-digital-finance-proposals_en.

11 "*Financial institutions will play a key role in contributing to sustainable development through promoting responsible business conduct amongst their clients and financing projects that can have positive sustainability impacts*." (OECD, 2019: 7).

promoting sustainable growth (AdC, 2021*a*: 4-6). Considering that barriers to access resources for economic activity is among the main reasons for Portuguese companies' low competitiveness compared to other European players (Lourenço, 2022), competition in the financial sector can play a key role in Portugal.

Given this context, the question this paper seeks to respond is: what lessons can the Brazilian competition policy provide to Portugal in regard to promoting competition and innovation in the financial sector? To address this question, it is necessary to qualify Portugal's enforcement challenges before identifying potential solutions under a comparative approach. Categorizing each jurisdiction according to their challenges of achieving competition policy objectives was chosen as the applicable methodology, based on the categories of path dependence, unseen development and the big bang effect.

As further detailed below, path dependence is a phenomenon where the policy objectives are not reasonably fulfilled due to a previous set of persistent reinforcing variables, diminishing attempts of reform. Unseen development, on the other hand, is a phenomenon where, despite non-evident policy outcomes, the policy objectives are reasonably achieved over time, under a discreet and slow manner. The third category is the big bang approach, where the policy objectives are reasonably achieved by an unprecedented policy intervention, capable of shifting the status quo.

Thus, this paper has been structured in three sections, besides this introduction. Section 2 will firstly explain the three categories of policy challenges proposed by this paper – path dependence, unseen development and the big bang approach – and then apply them to Portugal's competition policy in the financial sector. Qualifying an agency's effort according to these categories is key to identify possible solutions, since, as detailed below, a matter of path dependence demands deeper changes of policy, unseen development usually demands an enhancement or emphasis on the ongoing policy strategy, and a big bang approach calls for policy designed to preserve the achieved developments against strong backlashes.

Based on these challenges, section 3 will provide a comparative perspective of Brazilian policies related to the same issue, by a description of antitrust cases and regulatory initiatives, to identify rules and strategies that can help Portugal address its challenges. As argued in this paper, Portugal appears to face a challenge of unseen development, reason why Brazil's policy strategies can serve as additional benchmarking for a diversified Portuguese policy intervention. Finally, section 4 concludes this paper, with a summary of the analysis and an indication of relevant remaining research agenda to study the topic at hand.

2. FOSTERING COMPETITION IN THE PORTUGUESE FINANCIAL SECTOR: PATH DEPENDENCE, UNSEEN DEVELOPMENT OR A BIG BANG APPROACH?

2.1. Categories of policy implementation challenges

Competition is knowingly an essential element to promote incentives to lower prices, better quality of goods and services and higher innovation on a free market (Whish and Bailey, 2011: 4-5). In the financial sector, these benefits would translate into lower service fees and lower interest rates, as well as innovative products, for example. However, competition is hardly the only policy objective of any sector's regulation. When studying challenges of fostering competition in a given market, one should always avoid an obsession with competition as if it were the only goal, disregarding other important elements that provide consumer welfare and a due functioning of the market, such as addressing externalities and information asymmetry. Otherwise, one's work risks being detached from the concrete dynamics and multifactorial variables of the studied market.

The financial sector illustrates this concern. For example, even if a market of financial services had perfect competition, the information asymmetry between consumers and service providers would lead to probable adverse selection (consumers would not adopt plainly informed decisions due to insufficient information about the offered products and services). On the other hand, if a market had a *quasi* monopoly, the incumbent might still be highly innovative and use its information pool in favour of better risk assessment, despite the lack of effective competition.[12] In summary, competition is not an universal solution to all concerns of the financial sector, but, nonetheless, it is an essential element for a consumer-friendly market (Claessens, 2009), especially after the 2008 U.S. crisis[13].

In relation to Portugal, it is initially important to identify what challenges it faces in attempting to foster competition in financial services and whether such challenges are persistent. The analytical tools used in this paper to approach

12 A similar concern is addressed by Kahn (2017).

13 The apparent ineffectiveness of gatekeepers' reputational concern to prevent fraud in the capital markets in the U.S. 2008 sub-prime crisis shed light to the importance of competition to pressure for better rating services in this sector, while, on the other hand, it has also shown that too much competition in some financial segments may lead to lower lending standards and excessive risk-taking (Claessens, 2009: 4, 6). Therefore, the U.S. 2008 crisis "*reopens the question of what is the role of competition policy in this sector*" (OECD, 2009: 3).

these challenges are the concepts of path dependence, unseen development and the big bang approach. In simple terms, to qualify challenges as persistent or not demands looking into the past and comparing it with the regulator's strategies[14].

Path dependence is a longstanding concept in the academic literature of the Law & Development field, particularly in regard to institutional reforms for development[15]. A matter of path dependence is one in which every attempt of reform is limited due to a previous set of economic, political and social variables that, while having shaped the current framework, have created self-reinforcing mechanisms and switching costs, leading to the persistence of a certain situation (Prado and Trebilcock, 2009: 350-2).

Applying this concept to Portugal's financial sector, a matter of path dependence would be verified if financial services' markets remain predominantly unsensitive to innovation and competition while Portuguese authorities have attempted different policy reforms to foster these qualities in this sector. Self-reinforcing mechanisms could be, hypothetically, the lobby of an interest group (*e.g.*, dominant financial institutions) over enforcement agencies or protectionist policies that increase entry costs.

On the other hand, unseen development is the situation in which the policy objectives are reasonably achieved, though discretely and slowly. Unseen development would be verified in Portugal if policies have significantly, though discreetly and slowly, lead to better conditions of innovation and competition in the financial sector. Contrary to path dependence, the term "unseen development" and its concept are particular to this paper, since they do not come from previous academic literature and have, at most, been mentioned rarely, in different contexts[16].

The third category is the big bang approach, in which an attempt of reform is achieved through an intensive process of policy intervention.

14 This choice of analysis – *i.e.*, looking into the past along the regulator's strategies – is inspired in the Law & Development literature, according to which path dependence analysis is a backward-looking activity that may fail in guiding future reforms if no lesson is taken from the past. Mota Prado and Trebilcock (2009: 353, 366): "*path dependence studies are largely backward looking. The concept helps us understand what has happened in the past and is particularly useful in clarifying events that are otherwise hard to explain, but these mechanisms do not allow us to make predictions about the future, because we do not know which arrangements or self-reinforcing mechanisms will prevail. (…) Thus, in addition to being backward looking, the concept has no direct normative implications, and it might therefore be thought to be of limited value in informing future reforms. (…) Path dependence theory should encourage those concerned with development to take seriously the importance of time and history in designing future institutional reforms.*".

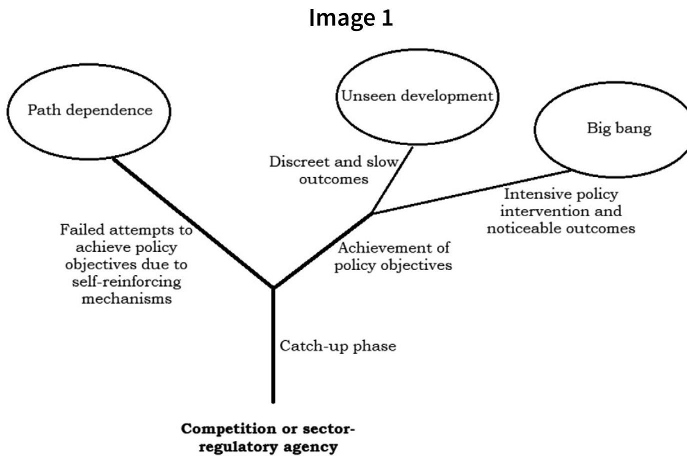
15 *E.g.*, Prado and Trebilcock (2009), Davis and Trebilcock (2008), North (1991), Evans (2005).

16 In research at scholar online platforms, the term "unseen development" was found only in Rajkovic (2008).

Different from path dependence, a big bang approach achieves a shift in the status quo and, different from unseen development, the policy objectives are achieved in a noticeable and profound way. The concept of a big bang approach used herein is inspired in the anticorruption literature[17]. An example of a big bang approach is Brazil's anticorruption movement known as *Operação Lava Jato* ("Operation Car Wash"), which consisted of a multifront anticorruption effort (criminal, antitrust, administrative anticorruption, federal accounting, among other policies) that lead to convictions and indictments of major politicians and businesspeople in only a few years' time, producing cross-border effects[18].

These three categories enable an observer to identify the challenges of achieving policy objectives in a certain regulated market. Since categorizing demands a backward-looking approach, new regulated issues do not allow the use of these categories. New regulated issues should fall under a "catch-up" phase. It is the earliest stage of an enforcement process, in which the agency is familiarizing itself with the regulated subject and trying to catch up to the social and economic phenomena that are usually more dynamic than the law. To illustrate this framework, image 1 below systematizes these categories:

Image 1



Source: Author's creation

17 Specifically, Rothstein (2011).

18 *Lava Jato*'s effects included money-laundering investigations by Swiss authorities, class action lawsuits by U.S. investors and imprisonment of Peru's former presidents. For more on *Lava Jato*, including backlashes and controversies, see Jones and Pereira Neto (2021).

Categorising the challenges of an enforcement or regulatory agency is key to determine what steps it needs to take to achieve its policy objectives. In a case of path dependence, one needs to identify the self-reinforcing mechanisms that result in the failed attempts of reform and overturn them by policy strategies that either shift the status quo or accommodate new outcomes with the support of the sustaining interest groups. In a case of unseen development, one needs to maintain the successful policies and adopt complementary strategies that can enhance the outcomes. Finally, in a big bang effect, one needs to protect the outcomes from backlashes of interest groups from the previous status quo and intensify democratic accountability to promote a stabilised and legitimate post big bang scenario.

Given that Portugal is admittedly facing challenges of implementing competition and innovation in the financial sector, the big bang approach is hardly applicable. In summary, defining the challenges of fostering competition in Portugal's financial sector as a matter of path dependence or unseen development is an attempt to measure how persistent are these challenges, whether there are self-reinforcing mechanisms, and how successful have Portuguese policies been to foster competition. Though relevant to assert policy effectiveness and to define the next steps of a policy agenda, differentiating path dependence from unseen development in a concrete case preferably demands empirical research, notwithstanding alternative forms of gathering evidence-based assertions, as done below.

2.2. Portugal's competition policy in the financial sector

Based on Portugal's 2021 follow up report, there appears to be (i) numerous recommendations from the 2018 paper still pending to be implemented and (ii) significant barriers to entry in several financial services' markets. As for the pending recommendations, there are, for example, alternative forms of fintechs accessing clients' banking data for competition purposes, a regulatory sandbox program, and net neutrality in public procurements (AdC, 2021*b*: 4), where the Portuguese banking authority may play an important role.

As for standing barriers to entry, there is significant concern on anti-competitive discrimination of fintechs or other third-party providers that necessarily have to access the inter-banking compensation system (in Portugal, known as SICOI) through incumbents (AdC, 2021*b*: 10-13). With the SICOI being considered an essential input for fintechs to compete with incumbent banks in Portugal, this leads to a known antitrust discussion of

vertical discrimination – *i.e.*, incumbent financial institutions could refuse to deal or elevate entrants' costs to access an essential input in order to gain competitive advantage.

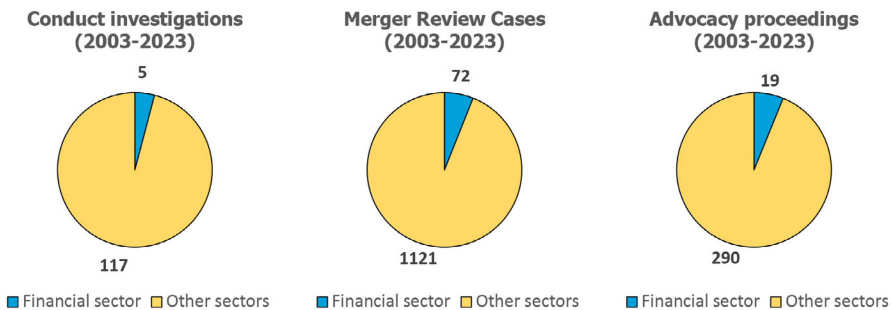
According to a 2020 survey carried out by the AdC, through the issuing of requests for information to 130 fintechs, where 88 of them provided the requested information and 70 of these already operated in Portugal, the conditions most commonly referred by the interviewees as entry barriers to the Portuguese financial sector were incumbents' position, the reduced size of the Portuguese market, elevated entry costs, difficulty in gaining initial capital funds, and too demanding or too unclear regulatory framework (AdC, 2021*b*: 7-8).

Thus, the competition scenario of the Portuguese financial sector appears resilient to entrants and innovation, suggesting some self-reinforcing mechanisms to the current scenario of weak competition – for example, incumbents who may resist policy attempts to open the market. From a backward-looking perspective, the AdC has made some effort to change this scenario in previous years. This effort may be analysed under a quantitative approach – *e.g.*, through the number of cases where the AdC acted in this sector and the number of occasions in which the AdC interacted with financial sector regulators – and under a qualitative approach – *e.g.*, how deep were AdC's discovery in its investigations in this sector or how impactful has AdC's policies been to competition and innovation in the sector.

Since the AdC's creation in 2003, in the financial sector, the competition agency has initiated only four proceedings on anticompetitive conduct, analysed 73 merger review cases, including ongoing cases, and launched 14 advocacy proceedings, such as market studies. The numbers are significant, but they should be compared to the total amount of cases in the same timeframe, so one could assert the proportion of cases related to the financial sector and, thus, the importance of the financial sector among the agency's policy priorities. The numbers are set below, based on the AdC's database[19]:

19 Research made in AdC's online database, on 14 June 2022 and 21 January 2023, based on a comparison of search results without filters per sector and with the filter per sector "banking, financial markets and insurance" ("*Banca, Mercados Financeiros e Seguros*"). Database available at https://extranet.concorrencia.pt/PesquisAdC/SearchNew.aspx?IsEnglish=False

Graph 1



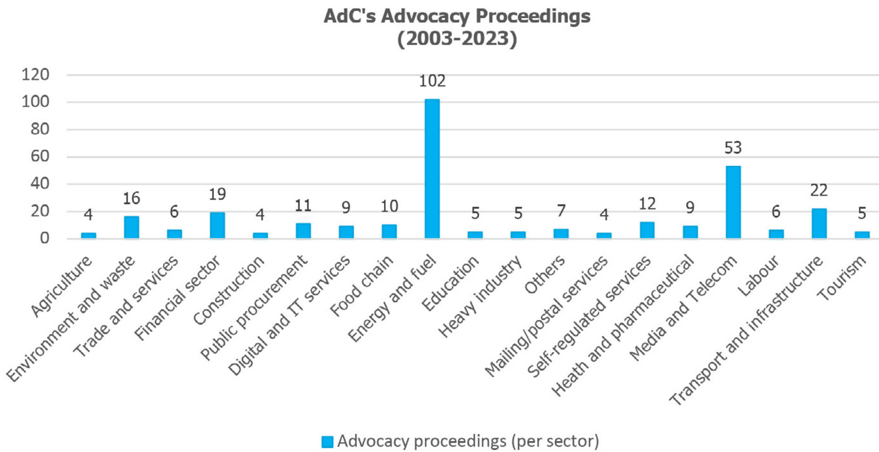
Source: Author's creation

The graphs above show that the financial sector is only a small portion of the AdC's daily work: roughly, only 4% of antitrust investigations, 6% of merger review cases and 6% of advocacy proceedings. These numbers could suggest that the institutional efforts toward enhancing competition and innovation in the financial sector could have been greater, diminishing the chances of a path dependence diagnosis (*i.e.*, the lack of the desirable competition could be due to a lack of enforcement focus in this particular sector rather than to self-reinforcing mechanisms).

However, it is natural and even desirable that a competition agency does not dedicate most of its resources on a single sector, given that competition defence is a trans-sectoral policy (Marrara, 2015: 249). In addition, when comparing the number of cases in each sector – thus, giving a step forward from the graphs above, where non-financial sectors were bundled for comparison purposes –, one can notice that the financial sector is actually among the sectors with greater advocacy activity by the Portuguese competition authority (in fourth place, in terms of quantity)[20], as the graph below demonstrates:

20 The choice to analyze advocacy proceedings specifically is based on methodological rationale, which is the fact that advocacy proceedings are initiated by the agency's own initiative (differently from merger review cases) and tend to have relevant policy implications (differently from conduct investigations, that regard case-specific elements). In addition, it is worth remarking that there is some overlap of data in Graph 2, due to some advocacy proceedings approaching more than one sector, thus appearing repeatedly among the search results per sector. This overlap, however, does not relatively change the distribution of advocacy priority between the sectors.

Graph 2



Source: Author's creation

These data indicate that the financial sector received significant attention by the AdC since the agency's creation, but this sector is far from being among the authority's policy priorities, since the two sectors with the highest quantity of advocacy proceedings (energy and fuel, and media and telecommunications) have from triple to nearly six times the number of proceedings.

An additional quantitative criterion to measure the efforts of an agency to foster competition and innovation in a given sector is the number of interactions with other policy-relevant actors, such as requests for sector-specific opinions and policy implications. In the Portuguese institutional framework, these actors are the Bank of Portugal, which supervises credit, banking and payment institutions,[21] and the Securities Market Commission ("CMVM", for its Portuguese acronym), which regulates the Portuguese securities market.

Since 2003, when the AdC was created, the competition agency had four interactions with the Bank of Portugal in conduct investigations, 16 in merger review cases, and five in advocacy proceedings, while, with the CMVM, the AdC had no interactions whatsoever in conduct investigations,

21 Jurisdiction based on articles 14 to 16 of Portuguese Law n.º 5/1998.

nine interactions in merger review cases, and three in advocacy proceedings.[22] Considering the total amount of cases involving the financial sector, as exposed in Graph 1 above, these interactions are significant, but, when the timeframe is taken into consideration (20 years of competition policy), these numbers show little institutional dialogue between the Portuguese competition authority and the Portuguese financial sector regulators.

Finally, as for a qualitative approach, considering that numbers do not show all the aspects of a certain policy, a look at the decisions taken by the AdC in those cases can also reveal its effort in the financial sector. Analysing each case individually would overrun this paper's scope, so a landmark case to look at is the 2019 market study launched by the AdC[23]. This market study is precisely the proceeding that led to the 2021 follow up report mentioned above, demonstrating a close accompany of the competition authority to the sector's development.

However, a closer look into the situation of the advocacy proceedings related to the financial sector shows that all 19 of them are currently closed, meaning they have allegedly fulfilled their purposes and are, thus, archived. Although the 2021 follow up report concluded that relevant measures to foster competition and innovation in financial services are under the jurisdiction of other institutions, like the Bank of Portugal, the AdC should still have an ongoing advocacy proceeding related to this sector, given the challenges referenced in the 2020 survey. Additionally, in its statement of policy priorities for 2023[24], the AdC did not reference the financial sector, preferring issues such as competition in the labour market.

Despite these standing concerns, some relevant development took place in Portugal, since the 2018 paper. For example, as mentioned in the 2021 follow up report, incumbents are currently required to provide at least a secure interface to communicate with third-party providers, having most financial institutions chosen to provide such interface in the form of application programming interface access to new entrants (AdC, 2021*b*: 16). In addition, the

22 These numbers were found in the AdC's online database, on 14 June 2022 and 21 January 2023, through the search filter of cases per AdC's interaction with sector regulators ("*articulação com reguladores setoriais*"), available at https://extranet.concorrencia.pt/PesquisAdC/SearchNew.aspx?IsEnglish=False.

23 The 2019 market study was initiated *ex officio* by the AdC and is registered as proceeding EPR/2019/2. The case records are available at https://extranet.concorrencia.pt/PesquisAdC/EPR.aspx?Ref=EPR_2019_2&isEnglish=False. Accessed 14 June 2022.

24 Available at https://www.concorrencia.pt/sites/default/files/Prioridades%20de%20política%20de%20concorrência%20para%202023_0.pdf

creation of a unit specialised in digital markets at the AdC, in 2020, brings expectations of greater achievements, since the financial sector is part of the digital economy, meaning this unit tends to provide faster and expert discovery in cases concerning financial services, through profound knowledge of players' incentives and market transformations.

More importantly, the recent European Payment Services Directive (Directive EU 2015/2366), which provides a normative framework to foster competition through, *e.g.*, the oversight of payment initiation service providers and asymmetric third-party access requirements to closed property payment systems, has been incorporated to Portugal's national legislation through the decree-law n.º 91/2018.

As a supranational and intergovernmental legal sphere where Portugal is inserted in, the EU must not be overlooked. The EU has implemented policies of competition and innovation in the financial sector as a mean of strengthening European economic and monetary union[25]. Although the policies are applicable to all Member-States, their effects are not necessarily the same in every jurisdiction. This reveals the importance of an effective national policy.

At the EU level, among recent initiatives in this field are the European banking authority's Single Rulebook[26], which harmonized rules for financial institutions across Member-States. However, the Single Rulebook was principled-based and left some uncertainty as to digital operational resilience. This perception was among the factors that lead the Commission to propose a regulation on digital operational resilience for the financial sector[27].

25 According to the European Commission, in its digital finance package communication, "*As digital finance accelerates cross borders operations, it also has the potential to enhance financial market integration in the banking union and the capital markets union, and thereby to strengthen Europe's economic and monetary union. A strong and vibrant European digital finance sector would strengthen Europe's ability to reinforce our open strategic autonomy in financial services and, by extension, our capacity to regulate and supervise the financial system to protect Europe's financial stability and our values.*" See at https://ec.europa.eu/info/publications/200924-digital-finance-proposals_en.

26 The Single Rulebook is an online tool that bundles relevant directives and regulations regarding capital markets and banking activity at the EU. See at https://www.eba.europa.eu/regulation-and-policy/single-rulebook.

27 European Commission, 2020: "*While the post-crisis changes to the EU financial services legislation put in place a Single Rulebook governing large parts of the financial risks associated with financial services, they did not fully address digital operational resilience. (…) For example, they were often devised as minimum harmonization directives or principled-based regulations, leaving substantial room for diverging approaches across the Single Market.*"

Other relevant initiatives include the FinTech Action Plan[28], which updated the EU regulatory framework for financial service providers, both to favour innovation and enhance cyber security, as well as the TIPS for the development of instant payments. Whether these initiatives had a significant impact to Portugal's financial sector and why were they insufficient to tackle competition in Portugal are issues that go beyond this paper's scope.

Thus, although it may still be early to provide an assertive answer to the question of whether Portugal lives in a condition of path dependence or unseen development, the Portuguese effort to foster competition in the financial sector has been considerable and harvest some positive outcomes, although there is no consolidated experience in this sector, discrete institutional dialogue between competition and sector-specific authorities, and no policy priority to this sector in the competition agency's advocacy activity. Therefore, Portugal appears to face unseen development, rather than a situation of path dependence.

3. COMPARATIVE PERSPECTIVE FROM BRAZIL

Over the last years, Brazil had numerous events in regard to digital innovation in the financial sector, one of the reasons why, contrary to the scenario seen decades ago, various segments are experiencing intense competition and digital transformation. To address this topic, this section will encompass the competition policy promoted by both CADE and the BCB[29].

3.1. CADE's competition policy

Regarding CADE, pursuant to the Brazilian Competition Act (Law n.º 12,529/2011), the competition authority has jurisdiction for merger control, administrative persecution and punishment of anticompetitive conduct (*ex post* conduct control), and a cooperative role with other bodies to improve public policies under an antitrust perspective (advocacy

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28 European Commission, *FinTech Action plan: For a more competitive and innovative European financial sector*, 08 March 2018, https://ec.europa.eu/info/publications/180308-action-plan-fintech_en

29 Although CADE is the cross-sector competition authority in Brazil (under the terms of Law n.º 12,529/2011), the BCB has jurisdiction to "*regulate the competition conditions between financial institutions, refraining abusive conduct through the application of sanctions*", pursuant to article 18, §2nd, of Law n.º 4,595/1964. This is an overlapping jurisdiction between CADE and the BCB, both of which must defend and promote competition in the Brazilian financial sector.

activity). Thus, CADE's performance in the financial sector involves these three roles.

Although CADE has approached various segments of financial services, noticeably, its main policy focus in this sector is the electronic payments' segment. At a first glance, one may have the impression that Brazil faces a situation of path dependence, given that, over the years, numerous antitrust investigations come up, suggesting an everlasting pattern of anticompetitive conducts in this segment. According to then commissioner João Paulo Resende's opinion in the Itaú/Ticket case, "there seems to be an eternal and tormenting cycle of players finding a new way to foreclose the market every time we believe to have closed a settlement to assure clean competition in this sector"[30].

However, policy goals have been reasonably achieved. Over the last decade of regulatory interventions and competitive pressure from innovating entrants, the Brazilian electronic payments industry has become increasingly competitive, with new acquirers gaining market share – for example, in 2018, 28% of the market belonged to recently entered players like *Stone*, *Getnet*, *Safrapay*, and *Pagseguro* (Mckinsey & Company, 2019: 115). In addition, the use of electronic payment methods has increased significantly during the last years in Brazil (Perez and Bruschi, 2018: 11; Mckinsey & Company, 2020: 6; CADE, 2019*c*: 22).

These policy outcomes result from various measures, the main of them being CADE's settlements in the late 2000s. CADE shaped the electronic payment methods segment in Brazil through settlements with *Visa* and *Visanet*, in 2009[31]. With these settlements, the Brazilian market moved from a single payment scheme-acquirer model to a full acquirer model, considering that the major payment scheme owners, *Visa* and *Mastercard*, had exclusivity practices with their vertically integrated acquirers.

Before diving in CADE's policy approach, considering how electronic payments are particularly subject to digital innovation and public policies in Brazil, a brief explanation of how this market works seems adequate[32].

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30 Author's translation from the excerpt: "(...) *parece haver um ciclo eterno e atormentador de que, toda vez que acreditamos ter fechado um acordo para garantir uma concorrência limpa nesse setor, as empresas encontram uma outra forma de fechar o mercado.*" CADE, 2019*c*.

31 Settlement procedures n.º 08700.003240/2009-27 and n.º 08700.003900/2009-70, Reporting Commissioner Olavo Chinaglia, ruled on 16 December 2009.

32 Electronic payment methods are types of payment methods that can be used by market agents to intermediate the exchange of value in transactions for goods and services. In other words, while payment his-

To attend to, on one hand, greater security for transactions and, on the other hand, greater efficiency in increasing trades, the Brazilian segment of electronic payments is structured by a set of organizing rules commonly known as a payment scheme. Payment schemes compete to attract more transactions into their environment.

Regarding the agents that participate in these schemes, firstly, there are merchants and consumers. Merchants (sellers) provide goods and services in a free market, demanding a value through a generally accepted payment method in return. To pay merchants in return of demanded goods and services, consumers (buyers) hold cards or digital devices through which they authorize the transfer of their corresponding funds to the merchants.

In this process of transferring funds to merchants, there are basically three main intermediaries: issuers, acquirers, and payments scheme owners[33]. Issuers (known in Brazil as "*emissores*") are institutions that issue payment cards for consumers and oversee their payment ability and financial obligations (CADE, 2019*c*: 12). Examples of issuers are banks, such as *Itaú Unibanco* (major private bank) and *Banco do Brasil* (major State-owned bank), and payment institutions, such as the digital payment service provider *Nubank*.

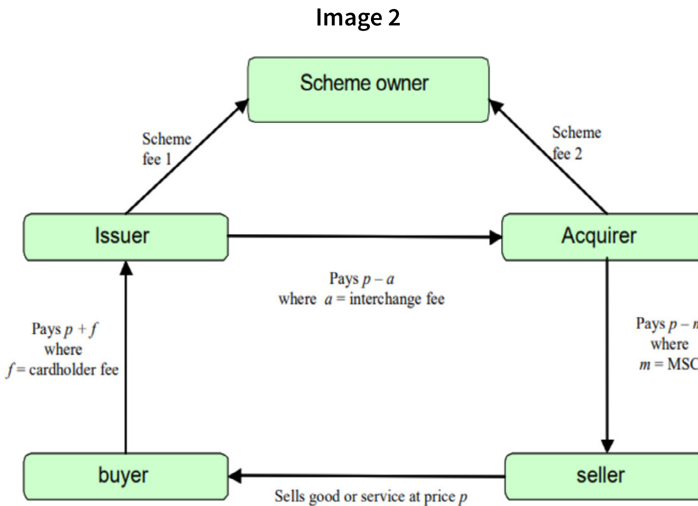
Acquirers (known in Brazil as "*credenciadoras*") are institutions responsible for integrating merchants into payment schemes and, in each specific payment transaction, requesting issuers to confirm the consumer's corresponding funds for the transaction's conclusion (CADE, 2019*c*: 11). Examples of these institutions are *Cielo*, *Rede*, and *Stone*. Finally, payment scheme owners (known in Brazil as "*bandeiras*") are the institutions that own the payment card brand and define the rules and procedures that govern the payment scheme (CADE, 2019*c*: 10-11). Each payment scheme has its own internal regulation, defined by its owners. Examples of such companies are *Visa*, *Mastercard*, and *American Express*.

torically began with customers trading rice, cattle, salt or metal for goods and services (Estrela, 2011: 14), society's technological development and mass consumption lead to a more complex and efficient framework of intermediation between customers and merchants.

33 On some occasions, there is a fourth intermediary in payment schemes, namely, the subacquirers (known in Brazil as "*subcredenciadoras*" or "*facilitadores*"). These institutions generally operate in e-commerce and act as acquirers, integrating merchants into the schemes (CADE, 2019*c*: 11). However, contrary to how acquirers operate, these market agents do not liquidate transactions before issuers, acting only as intermediates between some merchants and acquirers (CADE, 2019*c*: 12). Examples of subacquirers in Brazil are *PicPay*, *B2W*, and *Linx Pay*.

To systematize this transactional framework, referred to as the "Brazilian Payments System" in article 6 of Law n.º 12,865/2013, the image below provides a basic model (although, in some schemes, one agent may perform both the roles of issuer and acquirer):

Image 2



Source: Brazilian Central Bank, 2010: 02.

As to its merger control role, CADE has reviewed leading transactions involving electronic payment methods. Based on a proceeding launched in 2020, CADE and the BCB analysed the partnership between Facebook and Cielo for the creation of WhatsApp Pay[34]. Due to this partnership, WhatsApp users in Brazil can pay for goods and services through the digital messaging application, after a cautious analysis by both authorities.

The authorities' concern was whether the transaction, not filed by the parties, was subject to mandatory *ex ante* review. However, in order to understand the transaction in detail before the parties began to operate, the partnership was quickly barred by the BCB and CADE, which later reversed its blocking

34 CADE, 2023.

injunction and recently dismissed the investigation[35], while the BCB unconditionally cleared the deal.

This case demonstrated CADE's and BCB's symmetric approach, since both authorities simultaneously barred the partnership in its initial phase, for different reasons. Specifically, CADE was mainly concerned with *ex ante* merger control requirements, as well as that the major private messaging application WhatsApp could cause competition asymmetry between acquirers by occasionally favouring Cielo and foreclosing access to its base of users for Cielo's competitors. The BCB was concerned with the effects of the partnership to competition as well, adding its concern with consumers' data protection and spillover effects on the BCB's instant payment project (more details on section 3.2 below). As big techs start participating in the payments industry as intermediaries, their extensive database and network reach through their digital platforms may enhance efficiency, reduce costs for end-users, and stimulate competition, but, also, raise concerns of market foreclosure and data protection.

In summary, since the blocking injunctions were used to understand the transaction in-depth and quickly reversed by the authorities themselves, this case demonstrates that the fear of "false positives" or overenforcement should not always prevent the use of interim measures by the sector-specific regulator or the competition agency. More importantly, this case is a demonstration of institutional dialogue between antitrust authority and sector-regulator in a matter of innovation in financial services.

This case is only an example of how merger review and conduct investigations in Brazil started to experience greater symmetry between the competition agency and the sector regulator. In 2018, CADE and the BCB issued a joint rule to guide the analysis of conduct and merger cases that involve parties subject to the BCB's sector regulation[36]. According to this rule, notwithstanding the jurisdictional autonomy of each agency, CADE and BCB should exchange information about ongoing cases and regulatory rules that may impact competition. As for merger review specifically, the rule also determines that, in exceptional circumstances where the systemic risk and

35 The injunction was reversed by CADE's General-Superintendency through Order SG n.º 684/2020, on 30 June 2020, only seven days after it had issued it. The final decision on the case, dismissing the investigation of alleged gun jumping infringement, was issued on 19 January 2023, through Order SG n.º 94/2023.

36 CADE and BCB, Joint Normative Act n.º 1/2018 (https://www.bcb.gov.br/conteudo/home-ptbr/TextosApresentacoes/Ato%20normativo%20conjunto%205_12_2018%20limpa.pdf., accessed 20 June 2022).

liquidity of the financial market are at stake, CADE should clear the transaction under the terms set by the BCB.

Such a joint rule tends to induce intense institutional dialogue and symmetry between the competition and sector-regulatory policies, contrary to the scenario seen in the previous section, where the number of interactions between the AdC and the Bank of Portugal appears particularly small.

More recently, the acquisition of cloud-based software management provider Linx by electronic payments' acquirer and gateway provider Stone was unconditionally cleared by CADE[37], in June of 2021. The case was marked by litigation with intervening third parties and intense discussion on portfolio power arising from the merging parties' databases. Beside the alleged efficiencies arising from the intended transaction, CADE also mentioned its *ex-post* conduct control jurisdiction, the BCB's open banking regulation and the recently created Brazilian data protection authority ("ANPD", for its Portuguese acronym) as mitigating elements to the concerns presented along the proceeding. Once again, CADE made a competition assessment based on other agencies' performance (BCB and ANPD), indicating awareness of the institutional ecosystems in which it operates.

Other antitrust investigations are currently underway, demonstrating the authority's focus on competition in the financial sector. More importantly, regardless of their future outcomes, these current cases demonstrate how the authority works to accompany the market's fast-paced innovation and, thus, the complex new ways through which market players may challenge competition. To name a few ongoing cases, four of them seem particularly interesting, encompassing:

- Investigation on alleged refusal to deal with fintech;
- Investigation regarding the segment of electronic payment through automatic vehicle identification technology;
- Vertical discrimination probe on acquiring services; and
- Settlement on banking data portability.

The first case is the fintech payment institution *Nubank*'s complaint on refusal to deal (case n.º 08700.003187/2017-74). *Nubank* filed a complaint before CADE, in early 2017, against dominant banks *Banco do Brasil*, *Bradesco*, *Caixa Econômica*, *Itaú* and *Santander*. According to the complaint, these

37 CADE, 2021.

banks were elevating *Nubank*'s costs at the issuer market, by requiring heavy fees and refusing to provide banking services to *Nubank*. The complainant alleged that, without its clients' ability to use banking services of automatic payment orders ("*débito automático*") and reports of transaction recognition ("*extrato intraday*") provided by the incumbent banks, *Nubank* would have higher costs and become less competitive, reason why these banking services were allegedly essential facilities for the issuing activity.

The investigation is currently ongoing. After being investigated under a preliminary proceeding and an administrative inquiry, the case has been converted into an administrative proceeding and is currently at the discovery phase. When the discovery phase ends, the defendants will have the opportunity to present their final arguments and the General-Superintendency – CADE's investigative unit – will issue its decision, either dismissing the case or suggesting the defendants' conviction, occasion in which the case will be sent to CADE's Administrative Tribunal's final ruling.

The second case concerns automobile payment systems (case n.º 08700.001091/2020-77). Though not a typical case of the electronic payments industry, since it involves payment through automatic vehicle identification (commonly known as "AVI"), this case raises legal issues under the context of new technologies. In this market, vehicle owners hire financial services from companies, like *CGMP* and *Veloe*, to install electronic license tags in their vehicles to pay for services where such vehicles travel (parking lots, gas stations, car wash, toll booths and so on).

In early 2020, *CGMP* filed a complaint before CADE, by which it argued that banking institutions were favouring vertically integrated companies on the market of electronic payments through AVI. According to complainant *CGMP*, for its customers to pay their monthly AVI services without reiterated payment orders, *CGMP* had to hire banks to provide services of automatic payment orders ("*débito automático*") to those costumers' bank accounts. However, the banks allegedly favoured their vertically owned company *Veloe*, either by granting extreme discounts to customers who chose to hire *Veloe* (according to the complaint, such discounts tantamounted to cross-subsidy) or by elevating fees charged from customers who chose to hire *CGMP*.

The General-Superintendency issued requests for information, having the investigated banks alleged that the complaint regards regulatory matters that fall outside CADE's jurisdiction and that no anticompetitive conduct took place. According to these arguments, despite being vertically

integrated, the banks had no influence over *Veloe*'s discount policy and, also, the conditions under which *CGMP*'s customers hired services of automatic payment orders were even more favourable compared to the conditions usually practiced with other companies.

The third case is the vertical discrimination probe (case n.º 08700.000022/2019-11). In late 2018, after CADE had initiated an investigation upon recommendation of the Brazilian Senate's Commission on Economic Issues[38], acquirer *Stone* presented an antitrust complaint against one of the bank *Santander*. According to the complaint, *Santander* favoured its vertically integrated acquirer *Getnet* by tying its banking and credit services with *Getnet*'s acquiring services, as well as by alleged abusive incentive agreements with merchants.

Specifically, *Stone* alleged that *Santander* forced merchants to adhere to *Getnet*'s acquiring services by tying them to merchants' bank account services provided by *Santander*. Supposedly, *Santander* also increased or threatened to increase bank fees for merchants who did not adhere to *Getnet*'s acquiring services, therefore, taking advantage of merchants' switching costs in migrating to other banks.

The second way through which vertical discrimination allegedly took place, according to the complainant, was by the so-called "*incentive agreements*", which consisted of imposing revenue goals to merchants and heavy fines for those who did not achieve those goals. According to the complaint, *Getnet* used these agreements to submit merchants into a *de facto* exclusivity. Additionally, *Santander* supposedly monitored the volume of transactions carried by merchants who, while had bank accounts in *Santander*, used acquiring services of *Getnet*'s competitors. The General-Superintendency is investigating the matter, having submitted requests for information for major issuers, acquirers, and payments scheme owners.

Finally, the fourth relevant case is the settlement celebrated between major private bank *Bradesco* and CADE, in 2020, regarding the investigation about an alleged attempt to impede clients from connecting with a third-party provider's personal finance application to their checking accounts, on the basis of privacy and security concerns[39]. Through this settlement agreement, the bank committed to develop secured application interface for connection by this third-party application to its banking environment, in order to enable

38 Brazilian Senate, 2018.

39 CADE, 2017.

the collection of clients' information through their consent. This settlement partially anticipated the implementation of the current Brazilian open banking regulation, being, therefore, a landmark settlement that combined cutting edge antitrust discussions and their interplay with data protection, technology and regulatory issues.

As the sample cases above demonstrate, in the last five years, CADE initiated various investigations about practices adopted in the financial sector, with vast discovery in order to understand the conducts at hand. The cases demonstrate a cautious approach to antitrust arguments in innovating business models, as indicated by their long and wide-reaching discovery measures, as well as cases of dismissal[40] and a common use of settlements[41], revealing a position that leans towards a greater concern to avoid overenforcement rather than to avoid underenforcement.

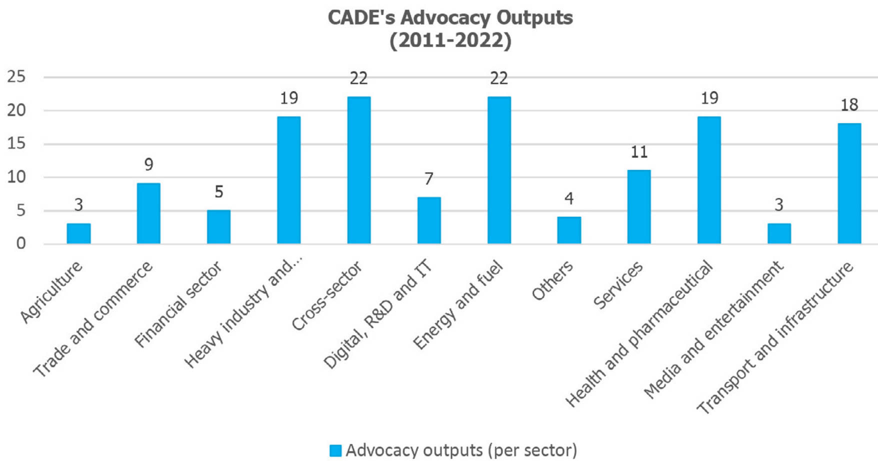
To conclude, as for CADE's advocacy role, the financial sector has not been among the agency's main priorities during the last decade. Considering its policy outputs between 2011 (year when the current competition act was enacted) and 2022[42], CADE, through its Department of Economic Studies, issued five documents related to the financial sector, in comparison to nearly 20 documents for each of its most focused sectors (energy and fuel, health and pharmaceuticals, and heavy industry and transports), as illustrated below:

40 *E.g.*, case n.º 08700.003599/2018-95, in which CADE investigated whether incumbent banks had refused to provide bank account services to cryptocurrency brokers, thus, allegedly discriminating these investment intermediaries. The case was dismissed on late July 2022, on the basis of lack of evidence of anticompetitive infringement. There was also case nº 08700.006268/2018-15, concerning a complaint filed by *Veloe* against *CGMP* in 2018, based on alleged market foreclosure and refusal to deal in the market of electronic payments through AVI services. Specifically, the investigation encompassed *CGMP*'s exclusivity agreement with a major parking management company, *Estapar*, supposedly leading to customer foreclosure to entrants *Veloe* and *Greenpass,* and *CGMP*'s alleged refusal to deal with these entrants, by charging arguably high fees for antenna sharing at the locations where customers pay through AVI. The case was dismissed in December 2020, also based on lack of evidence.

41 Based on a study conducted by CADE's Department of Economic Studies (DEE), up until mid-2019, most of the cases involving the electronic payments segment ended up in settlements, summing a total of 13 settlements in seven investigations. See Technical Note n.º 20/2019/DEE/CADE in the merger review case CADE, 2019*a.*

42 Numbers gathered on 25 January 2023, in CADE's website, based on the documents available in the folders "Cadernos do Cade", "Notas Técnicas", "Documentos de Trabalho" and "Advocacy" of the webpage https://www.gov.br/cade/pt-br/centrais-de-conteudo/publicacoes-institucionais/estudos-economicos and the webpage https://www.gov.br/cade/pt-br/centrais-de-conteudo/publicacoes-institucionais/contribuicoes-do-cade.

Graph 3



Source: Author's creation

This scenario is similar to the AdC's advocacy, in which financial services are not among the agency's priorities, as indicated in Graph 2 above[43]. However, there is a major advocacy study underway, through which CADE will issue recommendations to the sector's competition enhancement for the BCB and the Brazilian Securities Commission (CVM, for its Portuguese acronym)[44]. This market study may be similar to the Portuguese 2018 paper, under a different context, however: digital financial services in Brazil have experienced a boom in the last decade, so the agency is adopting advocacy initiatives even in a situation of intense innovation, differently from the Portuguese context.

In summary, the mix of various regulatory strategies, such as the use of settlements, third-party interventions, quick blocking injunctions, and

43 Note, however, that both graphs refer to similar, but different issues and timeframes. While Graph 2 regards advocacy proceedings, Graph 3 regards advocacy outputs. In addition, while Graph 2 refers to a timeframe from 2003 to 2023, Graph 3 refers to a timeframe of 2011 to 2022, due to the limited information available in CADE's database. To enhance the comparison standards between both graphs, the author manually classified each document from CADE according to categories similar to those available in AdC's database.

44 Based on the author's inquiry to CADE, in 2020 and in 2023, this sector study is being conducted by the competition authority due to Presidential Order n.º 44/2020, to evaluate the sector after the execution of the settlement between CADE, major private bank *Itaú Unibanco*, and major investment platform *XP Investimentos* (merger review case n.º 08700.004431/2017-16), which expired on 31 December 2022.

wide-reaching discovery measures, seems to be a current trend. Although it is hard to make any causal link between CADE's competition policy and concrete market aspects, this policy seems reasonably successful, as indicated above. In general, these competition outcomes suggest that CADE's approach may diversify the AdC's competition policy in the financial sector, thus, moving from a borderline status between path dependence and unseen development to an escalating achievement of policy objectives.

3.2. Brazilian Central Bank's role in fostering competition

The BCB's effort to foster competition in Brazil's financial sector in the last years can be considered distinguished. In 2016, the BCB launched a package programme called *Agenda BC +* (in an adaptation to English, the "Central Bank plus" agenda). This agenda has evolved since then, currently ongoing under the name of *Agenda BC #*,but, generally, it has the same founding principles, which are (i) inclusion (or financial democratization, as occasionally referred by the BCB), (ii) competition, (iii) transparency (such as information symmetry and free price formation), (iv) financial education (finance awareness for citizens in general), and (v) sustainability (goal of stimulating financial activities that protect natural resources and promote sustainable growth).

Naturally, as principles, these elements are broad and may be understood and implemented in a wide variety of ways. Specifically in regard to the competition pillar of the BC# Agenda, the BCB adopted the following measures,[45] among others, most of them still ongoing:

a) Creation of the Department of Competition and Structure of the Financial Market ("Decem", for its Portuguese acronym) at the BCB;
b) Proposition of a federal decree to simplify the authorization process for the installation of branches of foreign financial institutions in Brazilian territory, as well as the increase of accepted foreign investment cap in Brazil's financial institutions' equity (through decree n.º 10,029/2019);
c) Effort to adhere to the Organization for Economic Cooperation and Development (OECD);

45 The measures adopted by the BCB for competition purposes, in the BC# Agenda, are listed at https://www.bcb.gov.br/acessoinformacao/bcmais_competitividade.

d) Proposition of a citizens' registration database of positively classified payers as an additional criterion of transparency for credit supply (through Law n.º 166/2018);
e) Provision of standards and requirements for financial institutions to hire external cloud computing services and structure internal cybersecurity policies (through BCB's Resolution n.º 4,893/2001);
f) Publication of preliminary general directives on the plan of issuing a central bank's electronic currency, resulting from an interdepartmental study group organized by the BCB[46].

Four other measures stand out among those being implemented under the scope of competition in the financial sector, namely, the regulatory sandboxes, the creation of a think-thank with universities and market players, the open banking and open finance regulations, and the recent Brazilian instant payment system, as detailed below.

The regulatory sandbox is an ongoing regulatory environment, where regulated players may attempt innovative financial products and services under a transparent, controlled and specific context, mitigating occasional spillover effects of unsuccessful innovations over the market's systemic risk and allowing entrants to develop their products and services until further consolidation[47]. The BCB's regulatory sandbox encompasses a wide variety of segments of Brazil's financial sector, including electronic payment solutions, currency exchange, rural credit, and banking services in general.

Through the regulatory sandbox, financial services providers submit their projects to a committee formed by civil servants of various departments of the BCB, according to Resolution n.º 77/2021. Once the projects are admitted, the service providers can supply their products and services to real clients, under a predetermined timeframe, as long as prudential and anti-money laundering rules are observed.

The Brazilian regulatory sandbox is similar to the Portugal Finlab, where Portuguese banking, securities and insurance authorities cooperate to provide guidelines for innovative appliers[48]. Both programmes allow for a close accompany of innovative projects by sector regulators, after which a

46 See at https://www.bcb.gov.br/detalhenoticia/17398/nota.

47 More details at https://www.bcb.gov.br/estabilidadefinanceira/sandbox.

48 More details at https://www.portugalfinlab.org/.

non-bidding report will be issued to each participant, with guidance of regulatory limits and allowances to each project.

However, there is a major difference between them: while Portugal Finlab is a programme where the regulators' feedback to innovative players results from an analysis of the participants' submitted documents[49], the Brazilian sandbox involves an analysis of innovative projects in action, after an exceptional authorization to operate under a controlled environment[50]. The Brazilian sandbox, thus, provides an empirical glance of innovative projects, which serves as better input for the regulator's decision in authorizing disruptive projects and editing current regulation.

The second regulatory initiative is the creation of a think-thank to discuss innovation in the financial sector. To enhance transparency and dialogue between stakeholders, regulated players and regulator, the BCB created, in 2018, the Laboratory for financial and technological innovation ("LIFT", for its Portuguese term), where scholars, market players and other stakeholders discuss these cutting-edge issues through annual meetings ("LIFT Day"), live transmissions of interviews and debates ("LIFT Talks"), and production of works ("LIFT Papers")[51].

A third measure is the fact that the BCB is gradually implementing an open banking and open finance regulation in Brazil. As for the open banking, it seeks to enhance competition between credit institutions through banking consumers' data portability among credit suppliers. Specifically, the BCB has structured a complex regulation to tackle incentives to data-driven innovation among credit service providers vis-a-vis consumers' data protection and cybersecurity, in accordance with Brazil's data protection law (Law n.º 13,709/2018). With the open banking regulation, consumer's switching costs and lock-in effects tend to lower, while entrants, such as fintechs, can benefit from greater transparency to offer better-quality and lower-price services.

The open finance regulation, which has recently received the Central Banking Award at the category "Data Management Initiative"[52], adopts the

49 The procedural rules of the Portugal Finlab are set at the Terms and Conditions, available at https://www.portugalfinlab.org/terms-conditions (accessed on 18 June 2022)

50 The rules that govern the BCB's regulatory sandbox is set at BCB Resolution n.º 50/2020, available at https://www.bcb.gov.br/estabilidadefinanceira/exibenormativo?tipo=Resolu%C3%A7%C3%A3o%20BCB&numero=50(accessed on 18 June 2022).

51 More details at https://www.bcb.gov.br/estabilidadefinanceira/lift.

52 Results available at https://www.centralbanking.com/awards/7949321/the-fintech-and-regtech-global-awards-2022-virtual-ceremony (accessed on 18 June 2022).

same approach towards other types of financial services, such as investment and currency exchange, applying to them the same principles and strategies adopted in the open banking project[53].

Finally, the fourth relevant initiative is the recent instant payment system, called "Pix". This system was released on October 2020 and is managed by the BCB itself. Through this system, individuals and businesses can receive and pay instantly, at any time of the day and year, with greater simplicity and data security, for any type of service (civil services included) and through any mobile device (for social inclusion, the BCB structured the system as to accept not only smartphones, but simpler and older devices as well).

For payment institutions that wish to participate in this system, some objective requirements need to be previously observed, including minimum capital, minimum operational capacity, and regulatory duties for risk management[54]. As for consumers who wish to use this system, they must register not necessarily through a bank account, reducing traditional banks' role in electronic payments.

The main aspect of this new system, for this paper's purposes, is that the BCB has imposed rules that tend to promote more competition than the payment schemes seen in section 3.1 above. By allowing instant payment without an individual bank account attached to the digital identity of the payer, the BCB attempted a big bang approach to lower barriers to entry in the electronic payments industry and increase consumer adhesion to electronic payments, as the first year of the system's operation has already demonstrated[55].

4. CONCLUDING REMARKS

As seen in the previous sections, Portugal appears to be experiencing a situation of unseen development rather than a proper path dependence. However, many pro-competitive recommendations given by the AdC are still pending to be implemented and significant entry barriers still exist in Portugal,

53 The Brazilian open finance project is governed by the Joint Resolution n.º 4/2022, issued by the BCB and the National Monetary Council.

54 Brazilian Central Bank (2020).

55 Based on official statistics by the BCB, there were over 550 million user codes ("*chaves Pix*") on 31 December 2022, demonstrating wide consumer adhesion to this new digital service. Up to 31 December 2022, nearly BRL 3 billion were transacted through the Pix system, which had begun operating on November 2020. Data available at https://www.bcb.gov.br/estabilidadefinanceira/estatisticaspix (accessed on 25 January 2023).

challenging the supply of new financial products and services to Portuguese consumers.

The Brazilian experience in this topic provides a useful comparative perspective on strategies to promote competition and, thus, innovation in this sector. Among others, the use of a mix of regulatory strategies, such as settlements, third-party interventions, quick blocking injunctions, institutional dialogue with data protection and financial sector regulators, and wide-reaching discovery measures, may be an interesting policy approach, notwithstanding the peculiarities of each case. Multi-layered problems demand multi-layered remedies, thus, demanding interdisciplinary approaches. However, this mix of strategies does not implicate great risks of overenforcement, as CADE's cautious approach through market studies demonstrate.

In addition, the use of regulatory sandboxes as real innovation hubs, the creation of think-thanks to interact with various stakeholders and experts, as well as a regulatory reform to update existing rules on data portability, can be considered.

Although, on one hand, a competition authority should not focus on only one or few sectors of the national economy and, on the other, the choice of policy priorities may vary from each country, a possible strategy for the AdC is to allocate more of its enforcement effort to the financial sector, so that it reduces the gap between the efforts applied to this sector compared to that applied in the two most prioritized sectors, as seen in Graph 2 above. Considering the importance of financial services for Portugal's development, the suggested advocacy focus can be an optimal choice of policy.

Inevitably, fostering competition through innovation in sectors with longstanding market failures, such as those related to financial services, generates challenges of, on one hand, avoiding excessive intervention that could undermine innovation and, on the other hand, avoiding consumer and stakeholder harms due to abusive conducts and entrenched market structures. Questioning whether competition is an end to itself or a mean for other policy objectives is also an important self-critical guidance for a reasonably successful policy in dealing with innovation.

BIBLIOGRAPHY

AdC – Autoridade da Concorrência

2018 *Inovação tecnológica e concorrência no setor financeiro em Portugal*, of 16.04.2018, available at https://extranet.concorrencia.pt/PesquisAdC/EPR_Page.aspx?Ref=EPR_2018_33 (accessed March 19, 2023)

2021*a* *Concorrência na Implementação da Estratégia de Recuperação Económica*, of June 2021, available at https://www.concorrencia.pt/sites/default/files/2021-Contributo-AdC-recuperacao-economica.pdf (accessed March 19, 2023)

2021*b* *Concorrência no setor financeiro em Portugal: acompanhamento das recomendações da AdC no âmbito do Issues Paper FinTech*, of 15.03.2021, available at https://extranet.concorrencia.pt/PesquisAdC/EPR_Page.aspx?Ref=EPR_2019_2 (accessed March 19, 2023)

Berkowitz, Daniel; Pistor, Katharina; Richard, Jean-Francois

2003 "Economic development, legality, and the transplant effect", in *European Economic Review*, vol. 47, n.º 1, pp. 165-195., available at https://doi.org/10.1016/S0014-2921(01)00196-9 (accessed March 19, 2023)

Brazilian Central Bank

2010 *Report on the Brazilian payment card industry*, of May 2010. Secretariat for Economic Monitoring and Secretariat of Economic Law, available at https://www.bcb.gov.br/Pom/Spb/Ing/Payment_Cards_Report.pdf (accessed March 19, 2023)

2020 *Apresentação da 10ª Reunião Plenária do Fórum Pix*, of 20.08.2020, available at https://www.bcb.gov.br/content/estabilidadefinanceira/pix/Forum_Pix_Plenaria/20200820-ForumPix.pdf (accessed March 19, 2023)

Brazilian Senate

2018 *Inovação e competição: novos caminhos para redução dos spreads bancários* (Report of the Commission on Economic Issues' working group), of December 2018, available at https://legis.senado.leg.br/sdleg-getter/documento?dm=7891618 (accessed March 19, 2023)

CADE – Conselho Administrativo de Defesa Econômica

2017 Case n.º 08700.003187/2017-74, Defendants: Banco do Brasil S.A., Banco Bradesco S.A., Caixa Econômica Federal, and Banco Santander Brasil S.A., General-Superintendency, initiated on 25 May 2017 (ongoing)

2019*a* Merger review case n.º 08700.006345/2018-29, Parties: Itaú Unibanco S.A. and Ticket Serviços S.A., Reporting Commissioner João Paulo de Resende, ruled on 26 June 2019

2019*b* Case n.º 08700.000022/2019-11, Defendants: unspecified, General-Superintendency, initiated on 07 January 2019 (ongoing)

2019*c* *Mercado de Instrumentos de Pagamento*, of October 2019, available at https://cdn.cade.gov.br/Portal/centrais-de-conteudo/publicacoes/estudos-economicos/cadernos-do-cade/mercado-de-instrumentos-de-pagamento-2019.pdf (accessed March 19, 2023)

2020 Case n.º 08700.004201/2018-38, Defendant: Banco Bradesco S.A., General-Superintendency, suspended due to settlement on 07 October 2020 (ongoing)

2021 Merger review case n.º 08700.003969/2020-17, Parties: STNE Participações S.A and Linx S.A., Reporting Commissioner Sérgio Ravagnani, ruled on 16 June 2021

2023 Case n.º 08700.002871/2020-34, Parties: Cielo S.A. and Facebook Inc., General-Superintendency, ruled on 19 January 2023

Claessens, Stinj

2009 *Competition in the financial sector: overview of competition policies*, IMF Working Paper, of March 2009, available at https://www.imf.org/external/pubs/ft/wp/2009/wp0945.pdf (accessed March 19, 2023)

CVM – Comissão de Valores Mobiliários

2022 *Direito do mercado de valores mobiliários*. 2nd ed., available at https://www.gov.br/investidor/pt-br/educacional/publicacoes-educacionais/livros-cvm/direito-do-mercado-de-valores-mobiliarios/view (accessed March 19, 2023)

Davis, Kevin E. & Trebilcock, Michael J.

2008 "The relationship between law and development: optimists versus skeptics", in *The American Journal of Comparative Law*, vol. 56, n.º 4, pp. 895-946

Dimoulis, Dimitri; Vieira, Oscar V.; Lunardi, Soraya; Ramos, Luciana de O.; Nassar, Paulo A.; Glezer, Rubens E.

2013 *Resiliência constitucional: compromisso maximizador, consensualismo político e desenvolvimento gradual*, in Série Pesquisa Direito GV, available at https://bibliotecadigital.fgv.br/dspace/handle/10438/10959 (accessed March 19, 2023)

Estrela, Márcio Antonio

2011 *Moeda, Sistema Financeiro e Banco Central*: *Uma abordagem prática e teórica sobre o funcionamento de uma autoridade monetária no mundo e no Brasil*, Rio de Janeiro: Fundação Cesgranrio

European Commission

2020 *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a Digital Finance Strategy for the EU*, COM(2020) 591, of 24.09.2020, available at https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52020DC0591&from=EN (accessed March 19, 2023)

Evans, Peter

2005 "The challenges of the institutional turn: new interdisciplinary opportunities in development theory", in Nee, Victor & Swedberg, Richard (ed.), in *The economic sociology of capitalism*, Princeton: Princeton University Press, pp. 90-116

Jones, Alison & Pereira Neto, Caio Mario da S.

2021 "Combatting corruption and collusion in public procurement: Lessons from Operation Car Wash", in *University of Toronto Law Journal*, vol. 71, n.º1, pp. 103-150

Kahn, Lina

2017 "Amazon's antitrust paradox", in *The Yale Law Journal*, vol. 126, n.º 3, pp. 710-805

OECD – Organisation for Economic Cooperation and Development

2009 *Competition and the Financial Crisis*, available at https://www.oecd.org/competition/sectors/42538399.pdf (accessed March 19, 2023)

2019 *Due Diligence for Responsible Corporate Lending and Securities Underwriting: Key considerations for banks implementing the OECD Guidelines for Multinational Enterprises*, available at https://mneguidelines.oecd.org/final-master-due-diligence-for-responsible-corporate-lending-and-securities-underwriting.pdf (accessed March 19, 2023)

Lancieri, Filippo Maria

2018 "Digital protectionism? Antitrust, data protection and the EU/US transatlantic rift", in *Journal of Antitrust Enforcement*, vol. 7, n.º 1 pp. 27-53, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3075204 (accessed March 19, 2023)

Lourenço, Mário; Martins, Fernando; Magalhães, Cloé; Pereira, Manuel Coutinho; Reis, Hugo

2022 *Uma análise da competitividade das empresas em Portugal e em alguns países europeus*, in Bank of Portugal, of April 2022, available at https://www.bportugal.pt/sites/default/files/anexos/papers/re202207_pt.pdf (accessed March 19, 2023)

Marrara, Thiago

2015 "Defesa da concorrência x regulação setorial: o que mudou com a lei de 2011?", in *Revista de Direito Público da Economia*, vol. 13, n.º 50, pp. 245-261

Mckinsey & Company

2019 *Brazil Digital Report*, April 2019, available at https://www.mckinsey.com/br/~/media/McKinsey/Locations/South%20America/Brazil/Our%20Insights/Brazil%20Digital%20Report/Brazil-Digital-Report-1st-Edition_Portuguese-vAjustado.pdf (accessed March 19, 2023)

2020 *The 2020 Mckinsey Global Payments Report*, of October 2020, available at https://www.mckinsey.com/~/media/mckinsey/industries/financial%20services/our%20insights/accelerating%20winds%20of%20change%20in%20global%20payments/2020-mckinsey-global-payments-report-vf.pdf (accessed March 19, 2023)

North, Douglass C.

1991 "Institutions", in *Journal of economic perspectives*, vol. 5, n.º 1, pp. 97-112

Perez, Adriana H. & Bruschi, Cláudia

2018 *A indústria de meios de pagamento no Brasil: movimentos recentes*, Insper, 08.03.2018, available at https://www.insper.edu.br/wp-content/uploads/2018/09/industria-meios-pagamento-brasil-movimentos-recentes.pdf (accessed March 19, 2023)

Prado, Mariana Mota & Trebilcock, Michael

2009 "Path Dependence, Development, and the Dynamics of Institutional Reform", in *University of Toronto Law Journal*, vol. 59, n.º 3, pp. 341-380

2010 "Presidential Dominance from a Comparative Perspective: The Relationship between the Executive Branch and Regulatory Agencies in Brazil", in Rose-Ackerman, Susan & Lindseth, Peter (ed.), *Comparative administrative law*, Edward Elgar, pp. 1-24, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1690815 (accessed March 19, 2023)

Rajkovic, Nikolas M.
2008 "The Visual Conquest of International Law: Brute Boundaries, the Map, and the Legacy of Cartogenesis", in *Leiden Journal of International Law*, vol. 31, n.º 2, pp. 267-288

Rothstein, Bo
2011 "Anti-corruption: the indirect 'big bang' approach", in *Review of International Political Economy*, vol. 18, n.º 2, pp. 228-250

Whish, Richard & Bailey, David
2011 *Competition law*, 7th ed., Oxford: Oxford University Press

THE INSUFFICIENCY OF THE TURNOVER THRESHOLD IN MERGER CONTROL IN THE DIGITAL MARKET: THE CASE OF KILLER ACQUISITIONS*

*Joana Tomaz Hilzbrich***

Abstract *Digital markets, marked by rapid technological progress, network effects, and data-driven competition, pose unique challenges in the context of mergers, particularly killer acquisitions. The conventional turnover threshold in European competition law falls short in capturing the nuances of these markets, neglecting non-price elements like data, innovation, and user engagement. Killer acquisitions strategically target innovative startups, aiming to exploit and eliminate potential disruptors. As these emerging companies lack substantial turnover, they escape scrutiny under the existing European merger regulation. To address this, a more comprehensive approach is needed, revaluating criteria, and incorporating alternative indicators when assessing mergers in digital markets.*

Table of Contents 1. Introduction. 2. Digital markets, startups, and killer acquisitions. 3. The (potential) effects of killer acquisitions. 4. The insufficiency of the turnover threshold. 5. Potential solutions to address the current threshold gap. 5.1. Mandatory notifications: the case of the Digital Markets Act. 5.2. Broadening the application of the referral mechanism under Article 22 of the EUMR. 5.3. Post-merger analysis: the case of Article 21 of the EUMR and Article 102 of the TFEU in the Towercast case law (C-449/21). 5.4. Potential implications of the Towercast case law on the future of merger control. 6. The flexible approach solution. 7. Final remarks.

Key-Words Digital Markets – Killer Acquisitions – Turnover – Quantitative Threshold – Merger Control – European Regulation – Competition Law –Theories of Harm – Startups – Innovation – Digital Platforms

JEL D400, D430, D490, K210, L400, L490

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1. INTRODUCTION

In the dynamic evolution of digital sectors and markets, the role of National Competition Authorities (NCAs) and regulators, particularly the European Commission (Commission), becomes increasingly vital in ensuring effective investigation and control of potentially anticompetitive practices. Consequently, the scrutiny of mergers emerges as a fundamental pillar of competition policy, aimed at fostering a landscape of healthy and fair competition.

However, the Commission encounters heightened challenges when confronted with mergers in digital markets, where the current legal framework, reliant on quantitative criteria such as turnover thresholds under the European Merger Control Regulation (EUMR), struggles to effectively address the intricacies of these transactions.

Digital markets, characterized by innovation, disruption, and rapid growth, often see startups, epitomizing these characteristics, becoming vulnerable merger targets. Their susceptibility arises from frequently falling outside turnover thresholds, thereby evading thorough assessment. It's noteworthy that these startups, often prioritizing long-term innovation over immediate monetization, may exhibit low or negligible turnovers.

In this context, digital markets become fertile ground for killer acquisitions, where incumbents strategically acquire startups to thwart their growth, preventing them from becoming effective competitors with innovative products or services. This phenomenon allows incumbents to bolster their market positions and power without undergoing prior scrutiny, posing challenges to maintaining healthy competition levels, open markets, and safeguarding consumer welfare.

Recognizing the limitations of the existing turnover threshold in overseeing mergers, especially those embodying characteristics of killer acquisitions, a range of proposed and enacted measures accentuates the imperative for a restructured or fortified legal framework. In response to the dynamic evolution of the digital landscape, this imperative arises from the necessity to adapt and fortify the regulatory environment and enhance legal frameworks, to effectively confront the complexities associated with the assessment of mergers, particularly those resembling killer acquisitions, ensuring its resilience and effectiveness in countering anticompetitive effects. Amidst this backdrop, startups, symbolic of innovation and disruption, find themselves increasingly vulnerable, necessitating regulatory flexibility and responsiveness. The trajectory of proposed and implemented measures signals a fundamental shift towards a more resilient legal framework, an indispensable

element in nurturing fair and dynamic competition within the ever-changing contours of the digital economy.

2. DIGITAL MARKETS, STARTUPS AND KILLER ACQUISITIONS

The intersection of the digital sector and competition law has recently gained heightened attention due to the unique challenges posed by the digital landscape. The evolution of technology significantly influences the nature of competition, while the surge in startup acquisitions by incumbents has raised concerns, as they have escaped merger control oversight in recent decades.

Digital markets, characterized by platforms facilitating interactions and transactions, pose significant competition-related issues (Falce & Granieiri, 2017:16). The dominance of a few incumbents in platforms, exemplified by high-profile cases involving Facebook and Alphabet[1], suggests potential high entry barriers, market concentration tendencies, and innovation constraints. Current regulatory frameworks prove inadequate in addressing the distinct features of these markets, prompting the emergence of the Digital Services Act (DSA) and the Digital Markets Act (DMA) to ensure fair competition in digital markets.

The existing EUMR and national merger control legislations justify their existence based on the acknowledgment that certain operations within a market can yield anticompetitive effects. Mergers, in particular, stand out for their ability to induce lasting changes in market structures[2]. In digital markets, the impact on innovation becomes a primary concern, especially when mergers, potentially identified as killer acquisitions, escape EUMR control[3], given that innovation emerges as an essential characteristic for promoting economic growth[4].

Although it being true that competition law cannot be concerned–neither consistently nor for the same reasons–with all mergers[5],given that many may

1 It should be noted that acquisitions involving digital incumbents, such as Facebook or Alphabet, which were subject to assessment, were eventually cleared by the Commission.

2 Silva, 2018:1157; European Commission, 2008:4-5.

3 In this sense, the revised Market Definition Notice (revised notice), by the European Commission (OJ C/2024/1645, of 22nd February 2024) acknowledges the significance of innovation and innovative markets, as well as the importance of multisided platforms and digital ecosystems.

4 Holmström *et al.,* 2019:1.

5 Gorjão-Henriques, 2011:625.

display positive effects[6], nevertheless, "*frequent acquisitions by digital conglomerates […] raise two different concerns for merger control. Firstly, how to identify problematic acquisitions and ensure their notification to competition authorities. Secondly, how to assess whether the merger is indeed a 'killer acquisition' rather than a pro-competitive one*" (Holmström *et al.*, 2019:12).

Killer acquisitions are strategically crafted to eliminate or neutralize potential competitors and their products or services that might directly challenge those developed or marketed by incumbents. The primary objectives include sustaining or amplifying existing market concentration and erecting barriers to entry[7]. Beyond these effects, killer acquisitions empower incumbents to enter new market segments, attract consumers, and access innovative technologies. This conglomerate effect is achieved through the integration of specialized knowledge about specific market niches, databases of loyal customers, and unique value propositions[8].

Exploring the concept of killer acquisitions in the context of potential competition reveals varying interpretations across different sectors and markets, leading to the emergence of terms such as 'zombie, suicide, or reverse acquisitions'[9]. Particularly within the digital sector, killer acquisitions can be defined as strategic manoeuvres aimed at neutralizing emerging competitors, irrespective of whether the target company's innovative project concludes post-acquisition[10]. This definition is grounded in the distinctive features of digital markets, characterized by rapid innovation, robust network effects, data-centric business models, the presence of multi-sided markets, and a notable tendency toward market concentration. In such environments, a few dominant operators control significant market shares, justifying the need to identify and scrutinize killer acquisitions as they pose unique challenges to maintaining competition and innovation.

A common denominator among these acquisitions is the substantial financial investment they entail, irrespective of the acquired firm's negligible turnover[11]. While these acquisitions may yield efficiency gains, they universally exhibit, to varying extents, anticompetitive effects. This underscores

6 Merely as an example, positive effects displayed by mergers can be efficiency gains.

7 OECD, 2020:8.

8 OECD, 2020:2.

9 Lamo, 2019:2.

10 *Ibidem*:§2.

11 Gautier & Lamesch, 2020:2.

the significance of scrutinizing such transactions, considering their potential impact on competition, even when efficiency gains are apparent. As Vestager (2016) emphasizes, these mergers are integral to innovation and have the potential to generate efficiency gains, fostering competition and disrupting existing paradigms in the digital world. However, conventional merger control primarily focuses on static price effects, a less relevant aspect in digital markets where many goods and services, from the consumer's perspective, seemingly incur no cost.

The relatively limited attention afforded to startup acquisitions can be traced to the perception that these companies may not emerge as direct competitors to incumbent firms. Traditional considerations often define potential competitors based on product overlap, a criterion less applicable in digital markets where the emphasis shifts from tangible products to intangible assets and innovative solutions. Consequently, the role of startup acquisitions has been confined to evaluating barriers to entry, market power concentration, or potential abuse of dominant positions.

Yet, with an evolving understanding of digital markets, Crémer et al. (European Commission, 2019) suggest a broader perspective on potential competitors. Companies lacking product overlap but possessing a substantial user base and innovative technologies become viable contenders. These companies, focused on addressing gaps in existing products or services through research and development (R&D), often yield negligible turnovers. Their products or services complement existing ones, making it challenging to discern their true competitive potential using traditional criteria. In this context, startups, rich in intangible assets, become attractive to incumbents, offering a higher probability of acquisitions escaping scrutiny, particularly by regulatory bodies like the Commission.

In addition to the difficulties encountered, the reality of a killer acquisition may vary depending on the sector or market where it occurs. While in the pharmaceutical sector, as defined by Cunningham *et al.* (2021:1), the purpose of these acquisitions is to eliminate competitors, discontinue or eliminate innovation projects, or the products/services of target companies; in the digital sector, the motivation may lie in the desire to obtain the database developed by the target company and the development of its products or services. This is not with the aim of closure but rather integration for the assimilation of vast amounts of data, which may even generate efficiency gains[12]. However,

12 Alexiadis *et al.*, 2020:69.

even though they may differ in their motivations and how they unfold, there is a common aspect of killer acquisitions that cuts across sectors or markets where they take place: the elimination of a potential competitor and prevention of the emergence of future competition (or competitive pressure).

It is crucial to highlight the potential for misinterpreting killer acquisitions, as they may be conflated with exit strategies devised by startups themselves. The intricacies of exit strategies also intertwine with competition-related concerns. When evaluating exit strategies, the emphasis should shift to startups intentions to be acquired by incumbent companies, prompting scrutiny under competition law, distinct from the realm of killer acquisitions. These strategies, crafted to secure financial returns and profits by harnessing synergies between innovation and scalability, pose pertinent questions. Consequently, behaviours associated with potential killer acquisitions may not solely be attributable to incumbent companies but also, or predominantly, to startups and their investors. This complexity introduces the possibility of negative effects within the domain of competition law.

The ongoing debate surrounding killer acquisitions also delves into a pivotal aspect–their inherent nature. Specifically, there is a question of whether killer acquisitions should be categorized as a strategic approach or a distinct type of acquisition or rather a theory of harm. In the realm of mergers, the theories of harm serve as a framework employed by the Commission to evaluate potential anticompetitive effects, facilitating the determination of whether the notified merger could detrimentally impact competition in the internal market, thereby negatively affecting consumers[13]. The selective use of theories of harm allows for pinpointing company behaviours that have adverse effects on competition. In this context, we contend that killer acquisitions should be construed as a distinct category of acquisition, subject to analysis within the framework of existing theories of harm, such as the loss of potential competition. The challenge arises when considering killer acquisitions as a theory of harm, as delineating a clear distinction between this theory and the loss of potential competition may prove to be challenging, if not outright impossible, owing to practical application issues.

Nonetheless, it is important to note that, despite the existence of a considerable volume of acquisitions in these markets and the concern surrounding those involving startups, a killer acquisition has not yet been identified at the European Union (EU) level. We believe that the absence of this identification

13 Zenger & Walker, 2012:209.

is more likely since the relevant reality diverges from traditional criteria and notions. This allows many mergers to evade effective scrutiny, or if not, to receive approval due to the inadequacy of applicable criteria, rather than their actual non-occurrence.

The increasing intersection of the digital sector and competition law has brought forth pressing concerns, notably the surge in startup acquisitions evading merger control as the traditional focus on static price effects in merger control is deemed less relevant in the dynamic realm of digital markets. Scrutinizing startup acquisitions becomes vital as potential competitors may lack product overlap but contribute to innovation and possess substantial user bases. The ongoing debate surrounding killer acquisitions raises questions about their categorization and the need for nuanced scrutiny criteria in the evolving landscape of digital markets.

3. THE (POTENTIAL) EFFECTS OF KILLER ACQUISITIONS

Killer acquisitions, resulting from the intricate features of digital markets such as network effects, innovation, concentration, scalability, and ecosystem integration, have the potential to adversely impact or harm competition and innovation through various channels. The intricacy of both the digital market dynamics and the killer acquisitions themselves contributes to the challenges faced by competent authorities in effectively addressing this reality.

In terms of their (potential) effects, killer acquisitions manifest both horizontal and non-horizontal effects, posing threats by eliminating or diminishing potential competition, stifling innovation (thus limiting consumer choice), fortifying market power, and establishing entry barriers that limit efficiency and the overall dynamics of the relevant markets.

While theoretically, identifying the characteristics and anticompetitive effects of killer acquisitions may seem relatively straightforward, the practical detection and control present formidable challenges[14]. This complexity becomes pronounced when confronted with uncertainties surrounding immediate effects and the need to consider variables in a constant state of flux, such as innovation, prices, and entry barriers. These dynamic factors

14 Although the Commission has been making efforts towards a more comprehensive approach to these issues, with a particular emphasis on assessing the impact of these acquisitions concerning innovation, the challengers have been numerous. This is especially true due to the rapid and constant evolution of digital markets.

compound the complexity of practical analysis in addressing killer acquisitions in digital markets[15].

One of the distinctive features of digital markets, arising from their organization as platforms or multi-sided markets, which significantly impacts the effects of killer acquisitions, is the notable presence of network effects[16] – both direct and indirect in nature. In these markets, different user groups are brought together. Direct network effects occur when the value of a particular product increases for users as more users join the same network. On the other hand, indirect network effects occur when the value increases as more complementary products or services become available. Network effects, whether direct or indirect, tend to create dependence and interdependence among users, complicating potential transitions to adjacent platforms due to costs and obstacles to change. Examples include the transfer of contacts, re-establishment of connections, and learning new interfaces.

The dependence generated by network effects often leads to winner-takes-all or winner-takes-most scenarios, as stronger network effects result in quicker market dominance. This translates into various advantages such as economies of scale, data accumulation, and more network effects. Killer acquisitions, by influencing network effects, can become inflection points with the capacity to harm long-term competition, consequently limiting consumer choice. Therefore, understanding network effects is crucial for authorities since these effects shape the dynamics of competition and market structures in digital markets, especially when directly related to killer acquisitions[17].

Another effect associated with killer acquisitions is the elimination of potential competition. This could result in reduced innovation, limited consumer choice, strengthened market power, leading to the reduction or elimination of potential competition that might have arisen had the acquisition not taken place. As Dasgupta and Stiglitz refer, "*first, potential competition affected the behaviour of incumbent firms. They were induced to engage in faster research, to pre-empt the entry of rivals*" (1988:574-575). On the other hand, these types of acquisitions can create or reinforce barriers to entry for new or potential competitors, which, even with efficiency gains, may lead to a limitation of consumer choice. The lower the competition in a given market,

15 Lamo, 2019:5-6.

16 Martín-Laborda, 2017:1-15.

17 *Ibidem*: §§1-15.

the lesser the incentives for the incumbents to enhance their offerings and implement the benefits that may arise from increased innovation, with negative repercussions for consumers.

In terms of innovation, the effects of killer acquisitions are associated with a potential decrease or elimination thereof, including the elimination of potential competitors. A reduction in the number of innovative competitors may diminish the incentives for incumbents to invest in research and development (R&D) efforts. However, evaluating the impact of killer acquisitions on innovation proves to be a genuine challenge, as these effects do not occur immediately. There may be a varying time lapse until their manifestation, coupled with the fact that they take place in markedly dynamic and constantly evolving markets[18].

Killer acquisitions grant incumbents access to valuable assets like user databases, innovative technologies, products, and intellectual property. This enables them to expand into adjacent market segments (conglomerate effects) or fortify their dominant position within the relevant market. Consequently, such acquisitions may result in data concentration under a single operator, raise privacy concerns, and potentially lead to the abuse of dominant market positions. Recognizing these anticompetitive effects underscores the critical importance of analysing and controlling killer acquisitions. This scrutiny is essential to prevent adverse impacts on competition, innovation, and consumer welfare. Consequently, it serves as an incentive for implementing mechanisms that ensure the protection of these objectives.

In terms of positive effects, benefits can be discerned in the strategic approach taken in a killer acquisition, even as the operation retains its inherent nature. Efficiency gains, synergies, and economies of scale emerge, potentially favouring the incumbent and, by extension, its consumers. This is because the acquisition in question provides access to intellectual property and specific knowledge, expediting innovation and modernization processes. It also facilitates expansion into new markets, fostering competition and innovation. These positive outcomes align with broader digital transformation initiatives, encompassing process modernization, the adoption of digital technologies, and the reformulation of business models.

In specific contexts, the acquisition of startups can contribute to digital transformation, yielding benefits for consumers such as the introduction of innovative products, enhancements in the quality of existing ones, and

18 Bundeskartellamt, 2016:71-80.

potentially more affordable prices. The acquisition grants the incumbent access to specialized skills and knowledge, particularly in data-related aspects. Coupled with their data and know-how, this allows for a more effective utilization of resources compared to the startup itself. This, in turn, can lead to improved decision-making, the implementation of targeted marketing strategies, and the continuous enhancement of the user experience.

In this context, it is imperative for the NCAs and, especially, the Commission to consider the positive effects generated by killer acquisitions. This is because, as stated by Holmström et al. (2018:18), "*if an acquisition is blocked, which otherwise would have created a platform for new products or services when combined with the incumbent's assets, we lose economic efficiency*".

Measuring the impact of a killer acquisition, especially in the future market, can prove to be a challenging task, as various variables are at play, subject to changes over time. These variables may include, among other factors, the analysis of market shares, prices, entry barriers, long-term market effects, impact on innovation, research and development efforts, economic analysis, and the level of sector specialization[19].

Therefore, the evaluation of killer acquisitions requires a case-by-case approach, considering the various effects mentioned (along with others that may arise) to ensure the preservation of competition, innovation, and consumer well-being. Based on the uniqueness of each acquisition, it is imperative to conduct thorough and expedited analyses capable of determining the predominant effects of killer acquisitions in a given case: whether positive or adverse. Even in cases where a certain merger is concluded to be a killer acquisition, the decision to authorize it (or not) should always consider the specific circumstances and the unique dynamics of the market in question.

4. THE INSUFFICIENCY OF THE TURNOVER THRESHOLD

The turnover threshold is the determining factor that dictates application of the EUMR to the assessment of mergers and that determines the allocation of jurisdictional powers over that assessment to the Commission, embodying a distinctly *ex ante* mechanism. Only the mergers that satisfy this threshold will be assessed by the Commission, except in cases of voluntary notification or via the referral mechanism foreseen in the EUMR.

19 European Commission, 1997.

While the turnover threshold offers a degree of legal certainty, its limitations lie in its narrow focus on accounting aspects, overlooking pivotal factors inherent in digital market mergers, including database control, network effects, and innovation, among others. This constraint raises concerns about the potential exclusion of mergers in digital markets, particularly those involving startups. Such exclusions might inadvertently overlook killer acquisitions, particularly as startups may not generate sufficient turnover to ensure the application of the EUMR[20].

Over the past decades, an intense debate has unfolded, engaging both the academic community and EU institutions, complemented by the initiation of pertinent public consultations aimed at potential reforms within merger control. The focal point of these reform calls has been the notification thresholds for mergers, with a particular emphasis on the perceived insufficiency of the turnover threshold as stipulated in the EUMR. As discussions unfold regarding the efficiency of the current regime, particularly in the context of digital markets, attention has been drawn to the limitation of the current turnover threshold. Notably, there is a recognized challenge in its ability to comprehensively capture and assess mergers that are mainly characterized by added value and innovation orientation. In response to these complexities, proposed solutions underscore the shortfall of current regulatory frameworks and mechanisms in adequately and effectively addressing the distinctive challenges posed by mergers in digital markets, especially those involving startups[21].

In the dynamic landscape of digital markets, mergers, particularly acquisitions, operate on non-fungible or qualitative criteria, diverging from the quantitative nature of turnover. This is evident in scenarios where control extends beyond traditional turnover metrics, encompassing entities with substantial databases despite modest financial turnovers. These companies, while lacking in traditional revenue, wield considerable value when assessed through qualitative criteria such as ownership of extensive data reserves and innovative, disruptive technologies.

This underscores the notion that mergers within these markets can exert profound influences on both market structures and the competitive prowess of startups. The unique characteristics of digital markets and startups introduce a nuanced dimension, where their acquisition by established companies

20 United Nations, 2019:9.

21 Tyagi, 2019:279.

can yield significant impacts on competition[22]. As highlighted by Vestager (2016), "*a merger that involves this sort of company could clearly affect competition, even though the company's turnover might not be high enough to meet our thresholds. So, by looking only at turnover, we might be missing some important deals that we ought to review*"[23].

Digital markets, heavily reliant on robust data collection practices, give rise to heightened concerns regarding privacy, data protection, and the potential for market power abuse. These apprehensions surpass traditional assessments based solely on turnover, demanding a more comprehensive analysis of their repercussions on consumer privacy and the concentration of data. Numerous digital companies adopt business models that prioritize intangible assets over tangible ones, emphasizing elements like user data, algorithms, and intellectual property, and although their turnover is generally low or insignificant, these companies possess high value[24]. For example, the presence of network effects increases the likelihood of profitability emerging long after a product or service captures a substantial portion of the relevant market. This potentially significant time gap renders the turnover-based threshold inadequate for addressing mergers that, despite not meeting this criterion, are potentially anticompetitive.

The transformative impact of digital market dynamics, primarily driven by intangible assets like user data, algorithms, and intellectual property, extends beyond conventional turnover-based evaluations. This shift has profound implications for competition, particularly in fostering innovation, areas that quantitative thresholds, such as turnover, often inadequately capture. Adding complexity, the global reach of digital markets, crossing national borders, necessitates a collaborative approach among relevant entities. Addressing intricate cases involving globally reaching companies and users across multiple jurisdictions becomes imperative.

Within this context, an exclusive focus on turnover by the EURM proves to be insufficient. Such an approach overlooks operations possessing characteristics capable of manifesting adverse effects on market structure and overall competitive landscape. Recognizing the shortcomings of the existing legal framework for merger control at the EU level, especially in adapting to the challenges of the digital economy, is crucial. Despite institutional efforts

22 OECD – 2020:3.

23 Also in this sense, OECD, 2020:9.

24 Tyagi, 2019:277.

to adjust rules, persistent gaps exist, particularly in notification and jurisdiction rules associated with digital markets. Acknowledging the shortfall of relying solely on turnover constitutes a pivotal step. This recognition is vital for ensuring that merger control effectively safeguards competition and consumers while fostering legal certainty. Such an approach aims to lessen unnecessary burdens for both the involved companies and the overseeing entities, namely the Commission at the EU level[25].

In light of the dynamic and ever-evolving nature of digital markets, it becomes imperative to adapt and enhance the current merger control system to effectively safeguard competition within the internal market. This adaptation may encompass streamlining the analysis of small-scale mergers, with a heightened focus on addressing potential risks associated with killer acquisitions. Additionally, reinforcing international cooperation between competition authorities and relevant entities is crucial for conducting logical and transparent analyses, thereby ensuring legal certainty.

Consequently, there is an undeniable need to deepen the evolution of thresholds, introducing new criteria that consider the nature of assets involved in operations, data accessibility, market dynamics, network effects, and the multilateral nature of platforms in digital markets. This evolution is not only current but also essential for addressing the unique challenges posed by the digital landscape. While optimal solutions may not always be readily available, there is a continuous pursuit of more effective approaches to navigate this new reality. This endeavour aims to maintain an acceptable level of legal certainty for all stakeholders, including companies, Member States, and European institutions.

The insufficiency of the turnover threshold lies in its limitations in adequately capturing market power, contemplating non-monetary parameters, and assessing competition effects specific to digital markets, such as network effects and their multilateral nature. Consequently, emphasizing the necessity of developing new approaches, solutions, and alternative mechanisms for evaluating specific mergers in digital markets, particularly those involving startups, befalls imperative.

25 Vestager, 2016.

5. POTENTIAL SOLUTIONS TO ADDRESS THE CURRENT THRESHOLD GAP

Since the emergence of the debate around the need to reform the current regulatory framework for merger control at the EU level, various authors have proposed different solutions to address the gap left by the current threshold, especially when confronted with mergers in the digital sector and markets.

Given the myriad of proposed solutions, we have strategically narrowed our analysis to focus on three options. We assert that these selected alternatives possess the potential to stimulate a more robust and engaging debate, ultimately playing a pivotal role in crafting a viable solution to address the insufficiency of the existing threshold.

Upon identifying the insufficiency of the current criteria, it becomes crucial to approach potential solutions or mechanisms with caution. The goal is to avoid inadvertently impeding mergers that could genuinely foster pro-competitive outcomes. Striking a delicate balance is paramount to prevent unintended hindrances, as excessive regulation, or control, akin to the anti-competitive conduct of companies, poses a tangible risk of diminishing competition. This underscores the nuanced and careful considerations required in regulatory approaches.

Another aspect to consider in any adopted solution or mechanism is the ability to assess the extent to which efficiency gains resulting from the merger (such as complementarities, cost reductions, or network effects) offset any adverse horizontal, vertical, or other effects. However, conducting such an evaluation may prove challenging due to the inherently *ex ante* nature of the assessment. The impediment of these pro-competitive mergers can also yield adverse effects, potentially discouraging future pro-competitive mergers if the precedent establishes an impression of overly stringent merger control.

Any discourse on whether, in merger control, excessive enforcement is more acceptable than insufficient enforcement should carefully weigh this second-order effect.

5.1. Mandatory notifications: the case of the Digital Markets Act

An alternative strategy suggested to address the turnover threshold gap entails imposing obligations, specifically notification requirements, on companies deemed to wield significant market power, offering a prospective solution to this challenge[26]. In addressing this issue, the Commission has incorpo-

26 Alexiadis *et al.*, 2020:76-80.

rated a similar approach within the framework of the Digital Markets Act (DMA), specifically targeting platforms acting as gatekeepers. Mandated by the DMA, these platforms are obligated to inform the Commission about their planned or completed acquisitions, encompassing both core platform services and other digital sector offerings[27].

In this context, a company will have gatekeeper status if it exercises significant control over access to platforms or digital services essential for other businesses to reach their customers or conduct their operations, and if it has the capacity to establish rules and standards for the use of its platforms, control data flows, and influence the prices and availability of good s and services. Therefore, gatekeeper status is often associated with concerns about competition and access to digital markets. Some gatekeepers may use their market power to harm or eliminate smaller competitors through the adoption of anticompetitive practices, such as favouring their own products or services, using data collection for unfair advantages, among others.

It is noteworthy that a similar solution was advanced by the Furman Report (2019:12), where it was suggested that digital entities attaining a strategic market status – signifying their dominance in a pivotal bottleneck market – should notify the competent authorities of their intentions to acquire potential competitors, enabling the competent authorities to determine whether these acquisition intentions require a more detailed review and assessment.

In alignment with the underlying principles of this mechanism, entities falling under the purview of gatekeeper or strategic market status are required to notify authorities of their plans for acquisitions or mergers. The shared information, as envisaged, is anticipated to adhere to a straightforward and transparent reporting format.

Nevertheless, this approach prompts the inquiry into the nuanced process of determining or articulating the most fitting mechanism for ascertaining whether a specific company possesses substantial market power, occupies the role of a gatekeeper, or attains the status of a strategic market holder. Striking a delicate balance becomes imperative, ensuring that while navigating these

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27 The definition of gatekeeper is outlined in the Digital Markets Act (Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2020/1828. It stipulates that the gatekeeper status is granted to an essential platform service provider when (i) it has a significant impact on the internal market; (ii) the services provided constitute a crucial entry point for professional users to reach end-users; and (iii) it holds and entrenched and lasting market position or is expected to acquire such a position in the near future.

considerations, the crucial element of legal certainty is preserved – an indispensable aspect of any mandatory notification regime.

Furthermore, even if the inherent challenges could be navigated with relative ease, it remains crucial to acknowledge that the information necessary for such determinations would invariably originate from the involved company. This introduces a potential risk, as the company may opt to withhold or manipulate information strategically, impeding the pertinent authorities from conducting a substantive preliminary analysis. This analysis is indispensable for ensuring a comprehensive evaluation of the reported potential merger, particularly under the DMA.

Alexiadis et al. emphasize an additional layer of complexity: mandatory notification regimes should (i) be exceptional by nature; and (ii) entail a list of companies that meet the specific criteria (as is w the case under the DMA). However, and according to analysis, these aspects pose a significant challenge when confronted with EU legislation precedents, given that according to these "*no individual finding of a dominant position shall be binding for future investigations*", imposing a periodical challenge to the list of designated companies, perhaps on a three to five-year cycle (2020:76-80), or even less, could potentially result in an excessive workload for the Commission every time a new potential gatekeeper emerges or an existing gatekeeper loses its status.

This heightened workload and constant concern for companies, their stakeholders, and European institutions themselves may impose more constraints than benefits. As the DMA will come into full effect in March 2024, an evaluation is necessary to determine whether this mechanism presents greater benefits regarding mergers in the digital sector or if it further complicates a process intended to be as straightforward as possible, as simplicity is crucial to ensure that anticompetitive operation, such as mergers, do not escape the necessary assessment.

Even if it can be argued that all the above issues can be addressed based on the logic that dominant companies are always subject to special or exceptional obligations, the use of the mere existence of a dominant position in the digital sector as the jurisdictional threshold still raises relevant concerns, and the focus should still pend on the substantive review of the existence of a dominant position, as has been the practice until now[28].

In the context of this issue, and as highlighted by Lamo (2019:13), we posit that this communication mechanism holds significant potential for

28 Alexiadis *et al.*, 2020:76-80.

positive impact, particularly when synergistically integrated with the existing Article 22 of the EUMR and the evolution of ex post mechanisms, regardless of the concerns that may be raised. The integration of mandatory notification and the referral mechanism has the potential to facilitate a more nuanced and comprehensive knowledge of trends within the specified sectors and markets, thereby functioning as a valuable tool in the realm of market investigations.

5.2. Broadening the applications of the referral mechanism under Article 22 of the EUMR

In 2022 the Commission expanded the application of the referral mechanism of Article 22 of the EUMR. In its communication on the application of the referral mechanism outlined in Article 22 of the EUMR to certain categories of cases (2021/C 113/01)[29] the Commission disclosed categories of mergers involving parties with certain characteristics that are subject to referral to the Commission by the NCAs even if they do not meet the thresholds defined the national legislations of the NCAs – including the acquisition of startups where the turnover is not sufficient or sufficiently relevant and not revealing of the true importance and potential of such companies – aiming at ensuring that mergers that may present a significant impact on competition in the internal market are assessed by the Commission.

This expanded application of the EUMR referral mechanism appears to be an attempt to mitigate the turnover threshold gap and to strengthen and expand a mechanism that has proven to be the most effective in enabling the Commission to assess mergers that fall outside the scope of application of the EUMR. The guidelines offer detailed explanations and examples for each category, assisting Member States and market participants in understanding when a case should be referred to the Commission. It emphasizes the need for swift cooperation and information sharing between NCAs and the Commission, in order to ensure the effective application of Article 22 of the EUMR.

The Commission's intentions behind this expanded interpretation of the scope of Article 22 of the EUMR, seem to be one of promoting a consistent application of the referral mechanism across Member States, enhancing legal certainty, and ensuring an efficient and effective application of the community rules on merger control, by allowing this body to assess a significant number or mergers, including those in the technology sector, which

29 European Commission, 2021:1.

would otherwise go unassessed by it. And the Commission justifies this new approach by concluding that the effectiveness of the quantitative thresholds of the EUMR, combined with the referral mechanisms, is generally successful in capturing mergers with a significant impact on competition in the internal market of the EU.

Alongside the Commission, in the Illumina case (C611/22 P)[30] the General Court endorsed this approach of encouragement NCAs to refer mergers to the Commission for potential assessment even if they do not meet the quantitative thresholds under Article 22 of the EUMR. In the context of the Illumina case, an appeal was presented to the Court of Justice of the European Union (CJEU) precisely challenging this decision of the General Court, which is still pending.

While the broadening of the scope of Article 22 of the EUMR may allow for the analysis of relevant transactions that fall outside the framework of the EUMR and of domestic legislations of Member States, it is important to note that it may also give rise to some legal uncertainty given the rather broad and subjective criteria on which it is based, despite the Commission's claims on legal certainty, lacking further development in terms of its criteria as to avoid over burdening the Commission with the assessment of too many mergers, which may give rise to indirect anticompetitive effects.

Nevertheless, the expansion of the referral mechanism combined with the turnover threshold may present an interesting solution to the gap of the turnover threshold, pending a finetuning of the criteria surrounding the new expanded scope of application of the Article 22 of the EUMR.

5.3. Post-merger analysis: the case of Article 21 of the EUMR and Article 102 of the TFEU in the Towercast case law (C-449/21)

In 2023, the CJEU issued a highly significant judgement in the context of the *ex post* assessment of mergers. The focus of the judgment revolved around the potential resort to Article 102 of the TFEU as a mechanism for controlling mergers after their completion, under specific conditions. These conditions include the mergers not having been subjected to any other prior control mechanism, including national legislations and the EUMR.

The case in question (C-449/21) pertained to an acquisition in the digital terrestrial television (DTT) broadcasting sector in France, with Towercast

30 C-611/22 P, *Grail* LLC, ECLI:EU:C:2023:205 (appeal of T-227/21, *Illumina Inc. v European Commission*, ECLI:EU:T:2022:447).

alleging an abuse of dominant position by TDF. Despite the initial rejection of the claims by the French Competition Authority (FCA), Towercast appealed to the CJEU, leading to a preliminary ruling on the application of Article 102 of the TFEU to mergers not previously controlled. In its judgment, the CJEU concluded that the EUMR, while favouring prior or *ex ante* control, does not preclude the subsequent assessment of a merger under Article 102 of the TFUE, provided it has not undergone *ex ante* scrutiny. Thus, the CJEU concluded that mergers not subjected to prior control may be assessed retrospectively considering Article 102 of the TFEU, aiming to ensure a comprehensive control system for mergers that are particularly relevant to competition law. The CJEU's interpretation differs from the stance taken by the FCA and other parties involved, that argued against the direct application of Article 102 of the TFEU, given the existence of a specific merger control instrument, the EUMR.

It is crucial for the discussion to bear in mind that, in accordance with the provisions of Article 102 of the TFEU, the abuse of a dominant position by one or more companies in the internal market (or a substantial part thereof) constitutes an infringement, and as such is prohibited if has the potential to affect trade between Member States. Moreover, if one looks closely at the EUMR, one will find that Paragraph 24 outlines a crucial principle that states that in order to maintain a fair and competitive landscape within the common market, any community-scale mergers that lead to the formation or strengthening of a dominant position, potentially causing substantial hindrance or restriction to competition in the common market, or a significant portion of it, should be considered incompatible with the common market[31].

Consequently, Article 102 of the TFUE enjoys direct effect, and its enforcement is not subject to the prior adoption of procedural regulations, as it confers rights, being the responsibility of national courts to uphold them. Therefore, it is also crucial to emphasize that the abuse of a dominant position is not subject to exemption under any circumstances, with the CJEU determining that the list of practices and conducts outlined in Article 102 of the TFEU is not exhaustive[32], which implies that the forms and practices leading to an abuse of a dominant position are not confined to the enumeration

31 See §24 of the EUMR.

32 For example, the judgments C-333/94 P, *Tetra Pak International SA v Commission*, ECLI:EU:C:1996:436; C-95/04 P, *British Airways plc v Commission*, ECLI:EU:C:2007:166; C-280/08 P, *Deutsche Telekom AG v European Commission*, ECLI:EU:C:2010:603.

within the said article. As such, this behaviour is directly prohibited by the Treaty, and the task of implementing the consequences of such prohibition falls, as appropriate upon the competent national authorities or the Commission, depending on the body competent in a specific case-scenario.

While the guiding principle of the EUMR is its exclusive application to mergers, as stipulated in Article 21(1), the procedural law of Member States is applicable to mergers that do not meet the EU thresholds. Consequently, the EUMR does not preclude a merger from undergoing assessment by NCAs and their respective judicial bodies, which implies the application of Article 102 of the TFEU. In strict terms, the prohibition outlined in Article 102 of the TFEU is sufficiently clear, precise, and unconditional, obviating the need for a provision of derived law expressly authorizing or mandating its application by national authorities or judicial bodies. As such, Article 102 of the TFEU can be invoked concerning a merger that does not surpass the pre-established control thresholds in the EUMR and applicable national laws, provided that the criteria defined in this article for establishing an abuse of dominant position are met.

Particularly, it is incumbent upon the competent authority to assess whether the acquirer, holding a dominant position in a specific market and having gained control of another company in that market through a merger, has significantly restricted competition in the relevant market through its conduct. It is crucial to note that the mere observation of a strengthening of a company's position is insufficient to establish the presence of an abuse, as it is necessary to demonstrate that this increased dominance would lead to a significant restriction of competition.

It is also noteworthy that the position adopted by the CJEU regarding the potential application of Article 102 of the TFEU to mergers that have not undergone prior assessments, serving as a mechanism of *ex post* control, is grounded not only in its interpretation of the EUMR, Treaties, and Union Law but also fins support in established case law[33].

The established jurisprudential trajectory over the years validates the CJEU's interpretation regarding the application and scope of Article 102 of the TFEU to mergers not subjected to prior assessments. Therefore, the position adopted by the CJEU rests on a solid foundation, both in its analysis

33 As is the case with the judgments C-6/72, *Europemballage Corporation and Continental Can Inc v Commission*, ECLI:EU:C:1973:22,§26; C-395/96 P and C-396/96 P, *Compagnie Maritime Belge Transports e o. v Commission*, ECLI:EU:C:2000:132, §113; C-52/09, *Konkurrensverket v TeliaSonera Sverige AB*, ECLI:EU:C:2011:83,§26; C-724/17, EU:C:2019:204, *Vantaan kaupunki v Skanska Industrial Solutions Oy e o*, ECLI:EU:C:2019:204, §24.

and in decisions rendered in previous cases, demonstrating the coherence and continuity of the approach taken.

Therefore, the CJEU concluded that the aforementioned Article 21(1) of the EUMR does not prevent an NCA from assessing a merger (i) that lacks an EU dimension; (ii) falls below relevant control thresholds; and (iii) has not been subject to prior control, as constituting an abuse of a dominant position under Article 102 of the TFEU, especially in the context of a national market.

Within the scope of Case C-449/21, and aligning with the CJEU, Advocate-General Kokott (2022), in a non-binding opinion submitted to this Court, expressed that mergers that have not been notified and therefore assessed (either under the EUMR or national merger control rules) may still fall under the scope of Article 102 of the TFEU. AG Kokott (2022) further argues that a parallel can be drawn between the application of Article 102 of the TFEU and Article 22 of the EUMR, suggesting that both share an equivalent level of relevance, especially when dealing with mergers posing competition challenges that, nevertheless, do not reach the required predefined thresholds and, as such, are not subject, in principle, to prior assessment.

The effects of applying Article 102 of the TFEU as a directly applicable *ex post* assessment mechanism, which is not incompatible with the EUMR, become even more crucial when considering acquisitions targeting promising small enterprises, particularly in the technological sector. Although potential arguments surrounding legal uncertainty may be raised against the use of Article 102 of the TFEU, AG Kokott (2022) emphasizes that the application of Article 102 of the TFEU retrospectively is only possible if the merger has not been approved within a merger control regime, precisely due to the principle of legal certainty.

Therefore, mergers whose market structure effects have been declared compatible with the internal market cannot be classified as abusive under Article 102 of the TFEU as a mechanism for controlling mergers. However, this would no longer be the case if the abusive conduct of the company in question extends beyond the scope of merger control.

5.4. Potential implications of the Towercast case law on the future of merger control

Revisiting an older practice and considering the recent developments in merger control, particularly the increased analytical authority granted to NCAs regarding mergers below established thresholds, it can be stated that

the decision of the CJEU aligns precisely with this recent context in addressing increasing concerns raised by killer acquisitions[34].

Therefore, although there may be disagreement regarding the application of Article 102 of the TFEU as an *ex post* mechanism for merger control, the stance taken by the CJEU in the Towercast case is, in our view, another step in the evolution of increasingly stringent merger control, notwithstanding that the practical implications are not yet fully known. The use of this mechanism will dictate its practical ramifications.

As an example, in March 2023, following the judgement rendered by the CJEU in the Towercast case, the Belgian National Competition Authority announced the initiation of an investigative process into a potential abuse of dominant position related to a recent acquisition in the broadband communication services market. This acquisition had not been subject to prior notification or approval under Belgian competition law. The Belgian NCA deemed that, following the Towercast case law, the CJEU unequivocally affirmed the competence of national competition authorities to examine non-notifiable mergers under merger control, based on the *ex post* application logic of Article 102 of the TFEU[35].

The use of Article 102 of the TFEU is not, in itself, a novelty, and the potential application of this article has been discussed in academic literature. Despite some doctrinal discussions, most opinions have not been favourable to its application.

In a favourable stance towards the application of Article 102 of the TFEU as a mechanism capable of addressing the challenges of competition in the digital sector Crémer *et. al*[36] asserted that "*we are convinced that the basic framework of competition law, as embedded in Articles 101 and 102 of the TFEU, continues to provide a sound and sufficiently flexible basis for protecting competition in the digital era*".

In terms of positive implications arising from the prospect of the direct application of Article 102 of the TFUE, particularly concerning the oversight of killer acquisitions that hitherto have eluded the mesh of national regulations and legislations governing merger control, Lamo (2019:4-5) argues that the Tetra Pak I case shares various resemblances with killer acquisitions.

34 Dentons, 2023.

35 Thorell & Ek, 2023.

36 European Commission, 2019:3. Regarding the use of Article 102 of the TFEU, the Crémer Report focuses primarily on the issue of access to date.

Lamo further suggests that the rationale of the Tetra Pak I case could be extrapolated to the latter scenarios, upholding that there is no impediment to the application of Article 102 of the TFEU. In line with the proposition outlined in the Furman Report (endorsed by the UK Competition and Markets Authority), Lamo advocates for a combination of an *ex ante* control mechanism, requiring companies with a strategic market status to notify their transactions, alongside an *ex post* application of Article 102 of the TFEU by a dedicated unit for digital markets.

In contrast, one of the unfavourable arguments, highlighted as a potential implication of this case law is that, from the perspective of companies, investigations into transactions that do not reach notification thresholds diminish the predictability of operations, in terms of timelines and considering the risk of operations being scrutinized by competition authorities even after their completion[37].

While AG Kokott has underscored the inapplicability of Article 102 of the TFEU to mergers that have undergone assessment, the question of when or at what point Article 102 of the TFEU ceases to be applicable as a mechanism for *ex post* assessment of mergers becomes intriguing, pertaining particularly to those operations did not undergo and *ex ante* assessment.

It is crucial to underscore, within the scope of the current discussion, that the burden of proof, both concerning the existence of an abuse of dominant position and its opposite, may prove to be excessively burdensome for the involved parties.

For the purpose of Article 102 of the TFEU, and in the context of practices that take time to consolidate and exhibit their characteristics, it may become necessary to establish criteria or guidelines that enable the parties not only to fulfil their respective burdens of proof but also identify the moment at which it becomes apparent whether the mechanism in question is applicable to the merger or not.

Therefore, despite concluding that the mechanism of Article 102 of the TFEU is a judicious step towards addressing competition concerns arising in the context of killer acquisitions, particularly in the realms of digital markets and sectors, when applied *ex post* to mergers that were not subject to an *ex ante* assessment, there still appears to be some uncertainty regarding its actual effectiveness in controlling such mergers and in its practical application. Thus, the concerns raised by some authors regarding the application of

37 Mills & Reeve, 2023.

Article 102 of the TFEU as a mechanism to address mergers that elude the framework of merger control legislation seem reasonable and justified, being necessary to explore additional solutions that address potential shortcomings that may emerge in the application of such mechanism.

6. THE FLEXIBLE APPROACH SOLUTION

Digital markets are highly flexible, which requires an adaptation in the assessment of mergers. Such assessment needs to extend beyond the traditional framework, taking into consideration the complexities of these markets, despite the existing flexibility in the merger control framework.

Assuming that the proposed solution must be better that the existing one, we advocate for an approach that embraces flexibility[38]. This entails a solution that combines existing measures and novel mechanisms to minimize the turnover threshold gap, ensuring that killer acquisitions undergo the scrutiny they should face due to their inherent complexity and potential effects.

As such, when we refer to a flexible approach, we allude to the Commission's ability to adapt its analytical framework and tools to effectively confront the unique challenges posed by killer acquisitions. This entails considering both the specific characteristics of the merger and the involved markets, as well as the dynamic nature of competition in the digital markets. Such an approach ensures the safeguarding and protection of both effective and potential competition, as well as innovation and consumer welfare. It allows for the recognition of the importance of non-price-related competition, such as technological competition, which relates to other factors such as data, innovation, quality, or privacy. This involves assessing how killer acquisitions are likely to impact these dimensions of competition.

The first step, and perhaps the most complex, involves clearly defining what constitutes a killer acquisition. The difficulty also lies in determining whether a single notion of killer acquisition should be identified, adaptable to all sectors where it may occur, each presenting distinct characteristics, or if separate notions should be established for each sector or market where such acquisitions may take place. Given the dynamic nature of this reality, even with one (or several) definitions of killer acquisitions, it will need to be revised regularly to guarantee its effective application.

38 In this sense, Lamo, 2019:17.

In this regard, the control mechanisms to be implemented should be as rigorous as possible, enabling the early identification of mergers exhibiting the characteristics or nature of a killer acquisition. An ongoing assessment and scrutiny of transaction trends at the level of, in this specific case, the digital sector and markets, will undoubtedly be necessary. Specific observatories may be established for this purpose, fostering close collaboration between academics and industry experts.

The introduction of qualitative thresholds, such as the incorporation of criteria like innovation and database ownership, to address the gap of quantitative criteria, is, in our view, imperative. This should be coupled with the strengthening of existing mechanisms, such as Article 22 of the EUMR, essential for achieving the intended objectives. Despite the recent expansion of Article 22 of the EUMR and the acknowledgment of efforts to broaden a mechanism that has proven to be among the most useful in ensuring certain mergers are reviewed by the Commission, it lacks greater determination in its criteria. It is crucial to note that its application will always be confined to the territories of those Member states resorting to this mechanism.

The enhancement of international cooperation is another crucial aspect for the success of any solution, particularly that of the flexible approach. Digital markets are not constrained by physical or geographical barriers, although they may encounter regulatory obstacles. Therefore, reinforcing information sharing, coordinating investigations, and aligning efforts in applying competition law and merger control with global effects would be an asset in addressing potential jurisdictional challenges that may arise.

Ultimately, the presence of *ex post* mechanisms to rectify anticompetitive consequences is emphasized. Expanding upon the legal approach established in the Towercast case, the clarification is sought on the Commission's allowable extent and duration of intervention under Article 102 of the TFEU in mergers that have occurred but exhibit their effects at a later time.

Regardless of the adopted solution, it should always uphold the principle of legal certainty. This entails ensuring transparency and clarity in criteria and processes, preventing unnecessary bureaucracy, and providing certainty to all involved parties regarding the definitive solution or response to be given in a specific case.

7. FINAL REMARKS

The reality of digital markets, with their unique and constantly evolving characteristics, poses a significant challenge to competition law in general, and to the European Commission in particular, regarding merger control.

The insufficiency of the turnover threshold underscores the need for profound changes in the regulatory framework for merger control, as current norms face heightened challenges in comprehending and capturing the dynamics of digital markets. This insufficiency ultimately amplifies the risk of potentially anticompetitive practices, such as killer acquisitions.

In seeking to develop new solutions and mechanisms that enable the effective and efficient control of mergers involving startups, which may potentially give rise to anticompetitive effects, steps are being taken towards safeguarding innovation, fostering fair competition, and enhancing consumer well-being.

In this context, the significance of precedents such as the Towercast case constitutes a crucial milestone that reinforces the notion of the importance of a broader and more flexible approach within the scope of merger control, particularly within the digital sector.

With the evolution of the digital landscape, it is essential for authorities to remain vigilant and flexible, developing strategies that allow them the necessary adaptability to apply the legal framework to innovative situations. This must be achieved without compromising the crucial legal certainty, thereby ensuring the sustainable and competitive development of the digital economy.

Regulatory bodies and policymakers should contemplate the integration of additional criteria in the assessments of mergers in digital markets. These criteria may encompass the evaluation of potential impacts on innovation, market entry barriers, data concentration, intellectual property, and ecosystem effects.

To ensure healthy competition and foster innovation in digital markets, it is crucial to strike a balance between facilitating acquisitions that generates genuine synergies and prohibiting acquisitions with the sole purpose of eliminating potential rivals.

Digital markets operate on a global scale, with companies often surpassing national borders. Assessing the impact of a killer acquisition may require consideration of global competition dynamics and potential effects on international competition. Coordinated efforts among competition authorities worldwide may be necessary to address the challenges posed by cross-border killer acquisitions.

The weighing of quantitative and qualitative factors, the delineation of relevant markets, the understanding of long-term innovation implications, the outset of effective solutions, and the promotion of international cooperation dictate a thorough analysis as addressing these issues will contribute to the development of more robust and adaptable frameworks for merger assessments, better equipped to safeguard competition and consumer welfare in an evolving business landscape.

As such, we are led to conclude on the necessity for reassessment, improvement, and the development of new mechanisms that enable and ensure effective application of competition law and merger control to the digital sector and markets.

BIBLIOGRAPHY

Alexiadis, Peter & Bobowiec, Zuzanna

2020 "EU Merger Review of 'Killer Acquisitions' in Digital Markets: Threshold Issues Governing Jurisdictional and Substantive Standards of Review", in *Indian Journal of Law and Technology*, vol. XVI, pp. 64-102

Bundeskartellamt

2016 *Market Power of Platforms and Networks*, Working Paper no B6-113/15, available at https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Berichte/Think-Tank-Bericht-Langfassung.pdf;jsessionid=6F59D-5F0681D9628B7EE3D06C87FF73B.1_cid362?__blob=publicationFile&v=2 [accessed on 20.11.2020]

Cunningham, C. *et al.*

2021 "Killer Acquisitions", in *Journal of Political Economy*, vol. 129, no. 3, issue March 2021

Dasgupta, P. & Stiglitz, J.E.,

1988 "Potential competition, actual competition, and economic welfare", in *European Economic Review*, vol. 32, issues 2-3, pp. 569-577

Dentons

2023 *CJEU Decision in the Towercast case: Ex-post review of deals by the back door?*, available at https://www.dentons.com/en/insights/articles/2023/march/24/cjeu-decision-in-the-towercast-case-ex-post-review-of-deals-by-the-back-door [accessed on 20.08.2023]

European Commission

1997 *Commission Staff Working Document Evaluation of the Commission Notice on the definition of relevant market for the purpose of Community competition law*, SWD/2021/0199 final, of December 9, 1997

2008 *Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings,* (2008/C 95/01), OJ C 95, of April 16, 2008

2019 *Competition policy for the digital era, Crémer, Jacques, et al. (coord.), available at* https://data.europa.eu/doi/10.2763/407537

2024 *Commission Notice on the Definition of the Relevant Market for the Purposes of Union Competition Law,* COM (2023) 6789 final, of February 22, 2024

Falce, Valeira & granieiri, Massimiliano,

2017 "Search Design Policy, Digital Disruption and Competition Law", in *Market and Competition Law Review,* vol. I, no. 2, pp. 15-46

Funta, Ratislav

2019 "Economic and legal features of digital market", in *Danube: Law, Economics and Social Issues Review,* vol. 10, issue 2, pp. 173-183

Gautier, Alex & Lamesch, Joe,

2020 *Mergers in the Digital Economy*, in *CESifo Working Paper No. 8056,* available at http://dx.doi.org/10.2139/ssrn.3529012 [accessed on 10.09.2022]

Gorjão-Henriques, Miguel,

2011 "O conceito de concentração de empresas no direito da concorrência: nótulas teórico-práticas", in *Jorge Miranda (coord.), Estudos em Homenagem ao Prof. Doutor Sérvulo Correia: Volume III*, Coimbra: Coimbra Editora, pp. 621-660

Holmstrom, Mats *et al.*,

2019 *Killer acquisitions? The debate on merger control for digital markets*, in *2018 Yearbook of the Finnish Competition Law Association*, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3465454 [accessed on 12.04.2023]

Kokott, Juliane

2023 "Conclusões da Advogada-Geral Juliane Kokott apresentadas em 13 de outubro de 2022 no Processo C-449/21 Towercast contra Autorité de la concurrence, Ministère de l'Économie" in *Coletânea da Jurisprudência, ECLI:EU:C:2022:777*, available at https://eur-lex.europa.eu/legal-content/PT/TXT/PDF/?uri=CELEX:62021CC0449 [accessed on 20.07.2023]

Lamo, David Péres

2019 “Killer acquisitions in the digital sector: a framework to preserve innovation competition”, in *Competition Policy International*, pp. 1-20

Martín-Laborda, Antonio Robles

2017 “Merger Control and Online Platforms: The Relevance of Network Effects”, in *Market and Competition Law Review*, vol. 2

Mills & Reeve

2023 *Dominant Companies and deal planning: implications of the Towercast ruling*, available at https://www.mills-reeve.com/insights/publications/dominant-companies-and-deal-planning-—-implication [accessed on 21.08.2023]

OECD, Directorate for Financial and Enterprise Affairs (Competition Committee)

2020 *Start-ups, killer acquisitions, and merger control: background note*, DAF/COMP(2020)5, of May 12, 2020

Silva, Miguel Moura e

2018 *Direito da Concorrência*, 1.ª Ed., Lisboa: AAFDL

Thorell, Philip & EK, Sarah,

2023 *Abuse of Dominance in Acquisitions that Do not Trigger Notification Obligations*, available at https://www.hannessnellman.com/news-views/blog/the-towercast-case-abuse-of-dominance-in-acquisitions-that-do-not-trigger-notification-obligations/ [accessed on 20.08.2023]

Tyagi, Kalpana

2019 *Promoting Competition in Innovation Through Merger Control in the ICT Sector: a comparative and interdisciplinary study*, vol. 10, Munich: Springer

UNITED NATIONS

2019 *Issues in the digital economy: note by the UNCTAD secretariat*, in *United Nations Conference on trade and development* (TD/B/C.I (CLP/54), available at https://unctad.org/meetings/en/SessionalDocuments/ciclpd54_en.pdf [accessed on 12.01.2023]

Vestager, Margrethe

2016 *Refining the EU Merger Control System,* available at https://ec.europa.eu/commission/presscorner/detail/en/speech_16_4736 [accessed on 04.06.2022]

Zenger, Hans & Walker, Mike,

2012 “Theories of harm in European competition law: a progress report”, in Jacques Bourgeois & Denis Waelbroeck (eds.), *Ten years of effects-based approach in EU competition Law*, Bruylan, pp. 185-209

CASE LAW OF THE COURT OF JUSTICE OF THE EUROPEAN UNION

Judgment of the Court of Justice of February 21, 1973 – *Europemballage Corporation and Continental Can Inc v Commission*, Case 6/72, ECLI:EU:C:1973:22
Judgment of the Court of Justice of November 14, 1996 -*Tetra Pak International SA v Commission*, C-333/94 P, ECLI:EU:C:1996:436
Judgment of the Court of Justice of March 16, 2000 – *Compagnie Maritime Belge Transports e o. v Commission*, C-395/96 P and C-396/96 P, ECLI:EU:C:2000:132
Judgment of the Court of Justice of March 15, 2007 – *British Airways plc v Commission*, C-95/04 P, ECLI:EU:C:2007:166
Judgment of the Court of Justice of October 14, 2010-*Deutsche Telekom AG v European Commission*, C-280/08 P, ECLI:EU:C:2010:603
Judgment of the Court of Justice of February 17, 2011-*Konkurrensverket v TeliaSonera Sverige AB,* C-52/09, ECLI:EU:C:2011:83
Judgment of the Court of Justice of March 14, 2019 – *Vantaan kaupunki v Skanska Industrial Solutions Oy e o*, C-724/17, ECLI:EU:C:2019:204
Appeal of March 10, 2023 – *Grail LLC*, C-611/22 P, ECLI:EU:C:2023:205, of the Judgment of the Court of Justice of July 13, 2022 – *Illumina Inc. v European Commission*, T-227/21, ECLI:EU:T:2022:447

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JURISPRUDÊNCIA DE CONCORRÊNCIA DA UNIÃO EUROPEIA – DE JULHO A DEZEMBRO DE 2023

Elaborado por Filipa C. Lopes Castanheira

Abuso de posição dominante

Acórdão do Tribunal Geral de 25 de outubro de 2023, proferido no âmbito do processo T-136/19; ECLI:EU:T:2023:669

Partes: Bulgarian Energy Holding e o./Comissão

Descritores: Concorrência – Abuso de posição dominante – Mercado interno do gás natural – Decisão que declara uma infração ao artigo 102 TFUE – Mercado regulamentado – Definição do mercado relevante – Gasoduto de trânsito romeno 1 – Titular de um direito de uso exclusivo do gasoduto romeno 1 – Recusa de acesso – Obrigação de fornecimento público – Exceção da ação estatal – Operador da rede de transporte – Operador da instalação de armazenamento – Estratégia anticoncorrencial – Efeitos de exclusão – Infração única e continuada – Direitos de defesa.

Acórdão do Tribunal de Justiça de 21 de setembro de 2023, proferido no âmbito do processo C-510/22; ECLI:EU:C:2023:694

Partes: Romaqua Group SA/Societatea Națională Apele Minerale SA e Agenția Națională pentru Resurse Minerale

Descritores: Reenvio prejudicial – Artigos 102 e 106 TFUE – Empresas públicas – Liberdade de empresa – Liberdade de estabelecimento – Empresa detida inteiramente por um Estado-Membro e que beneficia de concessões exclusivas de exploração de água mineral natural na sequência de uma adjudicação sem concurso – Legislação nacional que permite a prorrogação ilimitada da concessão.

Acordos, decisões de associações de empresas e práticas concertadas

Acórdão do Tribunal de Justiça (Grande Secção), de 21 de dezembro de 2023 proferido no âmbito do processo C-124/21 P; ECLI:EU:C:2023:1012

Partes: International Skating Union/Comissão

Descritores: Recurso de decisão do Tribunal Geral – Concorrência – Regulamentação instituída por uma associação desportiva

internacional – Patinagem no gelo – Entidade de direito privado investida de poderes de regulamentação, controlo, decisão e sanção – Regras relativas à autorização prévia de competições, à participação de atletas nessas competições e à resolução arbitral de litígios – Exercício paralelo de atividades económicas – Organização e comercialização de competições – Artigo 101, n.º 1, TFUE – Decisão de associação de empresas que prejudica a concorrência – Conceitos de "objeto" e de "efeito" anticoncorrenciais – Justificação –Requisitos.

Acórdão do Tribunal Geral de 20 de dezembro de 2023, proferido no âmbito do processo T-106/17; ECLI:EU:T:2023:832

Partes: JPMorgan Chase & Co. e o./Comissão

Descritores: Concorrência – Acordos, decisões e práticas concertadas – Setor dos produtos derivados de taxas de juro expressas em euros – Decisão que declara uma infração ao artigo 101 TFUE e ao artigo 53 do Acordo EEE – Manipulação das taxas de referência interbancárias da Euribor – Troca de informações confidenciais – Restrição da concorrência por objeto – Infração única e continuada – Procedimento "híbrido" escalonado no tempo – Presunção de inocência – Imparcialidade – Coimas – Montante de base – Valor das vendas – Artigo 23, n.ºs 2 e 3, do Regulamento (CE) n.º 1/2003 – Dever de fundamentação – Decisão de alteração que completa a fundamentação – Igualdade de tratamento – Proporcionalidade – Competência de plena jurisdição.

Acórdão do Tribunal Geral de 20 de dezembro de 2023, proferido no âmbito do processo T-113/17; ECLI:EU:T:2023:847

Partes: Crédit agricole SA e Crédit agricole Corporate and Investment Bank/Comissão

Descritores: Concorrência – Acordos, decisões e práticas concertadas – Setor dos produtos derivados de taxas de juro em euros – Decisão que declara uma infração ao artigo 101 TFUE e ao artigo 53 do Acordo EEE – Manipulação das taxas de referência interbancárias da Euribor – Troca de informações confidenciais – Restrição da concorrência por objeto – Infração única e continuada – Procedimento "híbrido" escalonado no tempo – Presunção de inocência – Imparcialidade – Coimas – Montante de base – Valor das vendas – Artigo 23, n.ºs 2 e 3, do Regulamento (CE) n.º 1/2003 – Dever de fundamentação – Decisão de alteração que completa a fundamentação – Igualdade de tratamento – Competência de plena jurisdição.

Acórdão do Tribunal de Justiça de 9 de novembro de 2023, proferido no âmbito do processo C-331/21; ECLI:EU:C:2023:812

Partes: EDP – Energias de Portugal, S. A., e o./Autoridade da Concorrência

Descritores: Pedido de decisão prejudicial apresentado pelo Tribunal da Relação de Lisboa. Reenvio prejudicial – Artigo 101 TFUE – Acordos, decisões e práticas concertadas – Proibição de acordos, decisões e práticas concertadas – Acordos entre empresas – Distinção entre um acordo vertical e um acordo horizontal – Concorrência potencial – Restrição da concorrência por objeto ou por efeito – Acordo entre um comercializador de energia elétrica e um retalhista de bens de grande consumo que explora hipermercados e supermercados – Cláusula de não concorrência – Regulamento (UE) n.º 330/2010 – Contrato de agência – Liberalização do mercado de comercialização de energia elétrica.

Acórdão do Tribunal Geral de 18 de outubro de 2023, proferido no âmbito do processo T-74/21; ECLI:EU:T:2023:651

Partes: Teva Pharmaceutical Industries Ltd e Cephalon Inc./Comissão

Descritores: Concorrência – Acordos, decisões e práticas concertadas – Mercado do modafinilo – Decisão que declara uma infração ao artigo 101 TFUE – Transação em litígios em matéria de patentes – Restrição da concorrência pelo objetivo – Qualificação – Restrição da concorrência pelo efeito – Condições de isenção do artigo 101, n.º 3, TFUE – Coimas.

Acórdão do Tribunal Geral de 18 de outubro de 2023, proferido no âmbito do processo T-590/20; ECLI:EU:T:2023:650

Partes: Clariant AG e Clariant International AG/Comissão

Descritores: Concorrência – Acordos, decisões e práticas concertadas – Mercado do etileno – Decisão que declara uma infração ao artigo 101 TFUE – Coordenação sobre uma componente do preço de compra – Procedimento de transação – Coima – Ajustamento do montante de base da coima – Ponto 37 das Orientações para o cálculo das coimas – Reincidência – Ponto 28 das Orientações para o cálculo das coimas – Competência de plena jurisdição – Pedido reconvencional de aumento do montante da coima.

Auxílios de Estado

Acórdão do Tribunal de Justiça de 21 de dezembro de 2023, proferido no âmbito do processo C-421/22; ECLI:EU:C:2023:1028

Partes: Dobeles Autobusu Parks SIA e o./Iepirkumu uzraudzības birojs e Autotransporta direkcija VSIA

Descritores: Reenvio prejudicial – Transportes – Serviços públicos de transporte ferroviário e rodoviário de passageiros – Regulamento (CE) n.º 1370/2007 – Artigo 1, n.º 1 – Artigo 2-A, n.º 2 – Artigo 3, n.º 1 – Artigo 4, n.º 1 – Artigo 6, n.º 1 – Contrato de serviço público de transporte de passageiros por autocarro – Processo de adjudicação de um contrato público de serviços – Concurso público, transparente e não discriminatório – Caderno de encargos – Montante da compensação concedida pelas autoridades nacionais competentes – Indexação limitada no tempo e a categorias de custo específicas – Repartição dos riscos.

Acórdão do Tribunal Geral de 20 de dezembro de 2023, proferido no âmbito do processo T-166/21; ECLI:EU:T:2023:862

Partes: Autorità di Sistema Portuale del Mar Ligure Occidentale e o./Comissão

Descritores: Auxílios de Estado – Tributação das autoridades portuárias em Itália – Isenção do imposto sobre as sociedades – Decisão que declara o auxílio incompatível com o mercado interno – Auxílio existente – Conceito de "empresa" – Conceito de "atividade económica" – Vantagem – Seletividade – Distorção da concorrência – Afetação das trocas comerciais entre os Estados-Membros – Igualdade de tratamento.

Acórdão do Tribunal Geral de 20 de dezembro de 2023, proferido no âmbito do processo T-415/21; ECLI:EU:T:2023:833

Partes: Banca Popolare di Bari SpA/Comissão

Descritores: Responsabilidade extracontratual – Auxílios de Estado – Auxílio concedido pelas autoridades italianas à Banca Tercas – Decisão que declara o auxílio incompatível com o mercado interno – Prescrição – Dano continuado – Inadmissibilidade parcial – Violação suficientemente caracterizada de uma norma jurídica que tem por objeto conferir direitos aos particulares – Nexo de causalidade.

Acórdão do Tribunal Geral de 20 de dezembro de 2023, proferido no âmbito do processo T-216/21; ECLI:EU:T:2023:822

Partes: Ryanair DAC e Malta Air Ltd./Comissão

Descritores: Auxílios de Estado – Auxílio concedido pela França à Air France no contexto da pandemia de COVID-19 – Garantia de Estado para um empréstimo bancário e um empréstimo subordinado do Estado – Decisão que declara o auxílio compatível com o mercado interno – Recurso de anulação – Legitimidade processual – Prejuízo substancial para a posição de mercado do recorrente – Admissibilidade – Determinação do beneficiário do auxílio no contexto de um grupo de sociedades.

Acórdão do Tribunal Geral de 20 de dezembro de 2023, proferido no âmbito do processo T-494/21; ECLI:EU:T:2023:831

Partes: Ryanair DAC e Malta Air ltd./Comissão

Descritores: Auxílios de Estado – Auxílio concedido pela França à Air France e à Air France-KLM no contexto da pandemia de COVID-19 – Recapitalização – Decisão que declara o auxílio compatível com o mercado interno – Recurso de anulação – Legitimidade processual – Prejuízo substancial para a posição de mercado do recorrente – Admissibilidade – Determinação do beneficiário do auxílio no contexto de um grupo de sociedades.

Acórdão do Tribunal de Justiça de 14 de dezembro de 2023, proferido no âmbito do processo C-457/21 P; ECLI:EU:C:2023:985

Partes: Comissão Europeia/Grão-Ducado do Luxemburgo e o.

Descritores: Recurso de decisão do Tribunal Geral – Auxílios de Estado – Artigo 107, n.º 1, TFUE – Decisão fiscal antecipada adotada por um Estado-Membro – Auxílio declarado incompatível com o mercado interno – Conceito de "vantagem" – Determinação do quadro de referência – Tributação "normal" segundo o direito nacional – Princípio da plena concorrência – Fiscalização pelo Tribunal de Justiça da interpretação e da aplicação do direito nacional pelo Tribunal Geral.

Acórdão do Tribunal de Justiça de 14 de dezembro de 2023, proferido no âmbito do processo C-693/21 P; ECLI:EU:C:2023:989

Partes: EDP España, SA e Naturgy Energy Group, SA (anteriormente Gas Natural SDG, SA)/Comissão Europeia

Descritores: Recurso de decisão do Tribunal Geral – Auxílios de Estado – Medida de incentivo ambiental adotada por Espanha a favor das centrais a carvão – Decisão de dar início ao procedimento formal de investigação – Recurso de anulação.

Acórdão do Tribunal de Justiça de 7 de dezembro de 2023, proferido no âmbito do processo C-700/22; ECLI:EU:C:2023:960

Partes: RegioJet a. s. e Student Agency k.s./České dráhy a.s. e o.

Descritores: Pedido de decisão prejudicial apresentado pelo Nejvyšší soud. Reenvio prejudicial – Regulamento (UE) 2015/1589 – Auxílio existente e auxílio novo – Auxílio concedido em violação das regras processuais previstas no artigo 108, n.º 3, TFUE – Fim do prazo de prescrição previsto no artigo 17 do Regulamento (UE) 2015/1589 – Obrigação do juiz nacional de ordenar a recuperação do auxílio.

Acórdão do Tribunal de Justiça (Grande Secção) de 5 de dezembro de 2023, proferido no âmbito do processo Processo C-451/21 P; ECLI:EU:C:2023:948

Partes: Grão-Ducado do Luxemburgo e o./Comissão

Descritores: Recurso de decisão do Tribunal Geral – Auxílios de Estado – Artigo 107, n.º 1, TFUE – Decisões fiscais antecipadas adotadas por um Estado-Membro – Auxílio declarado incompatível com o mercado interno – Obrigação de recuperar o auxílio – Conceito de "vantagem" – Determinação do quadro de referência – Tributação "normal" segundo o direito nacional – Fiscalização pelo Tribunal de Justiça da interpretação e da aplicação do direito nacional pelo Tribunal Geral da União Europeia – Fiscalidade direta – Interpretação estrita – Poderes da Comissão Europeia – Dever de fundamentação – Qualificação jurídica dos factos – Conceito de "abuso de direito" – Apreciação ex ante pela Administração Fiscal do Estado-Membro em causa – Princípio da segurança jurídica.

Acórdão do Tribunal de Justiça de 23 de novembro de 2023, proferido no âmbito do processo C-758/21 P; ECLI:EU:C:2023:917

Partes: Ryanair DAC e Airport Marketing Services Ltd/Comissão

Descritores: Recurso de decisão do Tribunal Geral – Auxílios de Estado – Medidas aplicadas pela República da Áustria a favor do aeroporto de Klagenfurt, da Ryanair e de outras companhias aéreas que utilizam este aeroporto – Decisão que declara as medidas de auxílio parcialmente incompatíveis com o mercado interno – Artigo 85, n.º 3, do Regulamento de Processo do Tribunal Geral da União Europeia – Elementos de prova apresentados ao Tribunal Geral após o encerramento da fase escrita do processo – Admissibilidade – Regulamento (UE) 2015/1589 – Artigo 17, n.ºs 1 e 2 – Poderes da Comissão Europeia para recuperação do auxílio – Prazo de prescrição – Grau de precisão das medidas de interrupção deste prazo – Dever de fundamentação – Desvirtuação dos elementos de prova – Dados pertinentes para determinar o montante do auxílio a recuperar.

Acórdão do Tribunal de Justiça de 23 de novembro de 2023, proferido no âmbito do processo C-210/21 P; ECLI:EU:C:2023:908

Partes: Ryanair DAC/Comissão

Descritores: Recurso de decisão do Tribunal Geral – Auxílios de Estado – Artigo 107, n.º 2, al. *b)*, TFUE – Mercado francês dos transportes aéreos – Regime de auxílios notificado pela República Francesa – Moratória sobre o pagamento de taxas e de taxas aeronáuticas para apoio às companhias aéreas durante a pandemia de COVID-19 – Quadro temporário relativo às medidas de auxílio de Estado – Decisão da Comissão Europeia de não suscitar objeções – Auxílio destinado a reparar os danos sofridos na sequência de um acontecimento extraordinário – Princípios da proporcionalidade e da não discriminação – Livre prestação de serviços.

Acórdão do Tribunal de Justiça de 23 de novembro de 2023, proferido no âmbito do processo C-209/21 P; ECLI:EU:C:2023:905

Partes: Ryanair DAC/Comissão

Descritores: Recurso de decisão do Tribunal Geral – Auxílios de Estado – Artigo 107, n.º 3, al. *b)*, TFUE – Mercado sueco dos transportes aéreos – Regime de auxílios notificado pelo Reino da Suécia – Garantias de empréstimo para apoio às companhias aéreas durante a pandemia de COVID-19 – Quadro temporário relativo às medidas de auxílio de Estado – Decisão da Comissão Europeia de não suscitar objeções – Auxílio

destinado a sanar uma perturbação grave da economia – Princípios da proporcionalidade e da não discriminação – Livre prestação de serviços.

Acórdão do Tribunal Geral de 15 de novembro de 2023, proferido no âmbito do processo T-167/21; ECLI:EU:T:2023:723

Partes: European Gaming and Betting Association/Comissão

Descritores: Auxílios de Estado – Medida estatal que prorroga as licenças de jogos de fortuna ou azar concedidas pelos Países Baixos – Decisão que declara a inexistência de um auxílio de Estado – Não abertura de procedimento formal de investigação – Dificuldades sérias – Direitos processuais das partes interessadas.

Acórdão do Tribunal de Justiça de 19 de outubro de 2023, proferido no âmbito do processo C-325/22; ECLI:EU:C:2023:793

Partes: TS e HI/Ministar na zemedelieto, hranite i gorite

Descritores: Pedido de decisão prejudicial apresentado pelo Administrativen sad - Varna. Reenvio prejudicial – Auxílios concedidos pelos Estados-Membros – Artigo 107, n.º 1, TFUE – Conceito de "empresa" – Regulamento (UE) 2015/1589 – Recuperação de um auxílio ilegal – Decisão (UE) 2015/456 – Permutas de terrenos florestais – Determinação do "valor de mercado".

Acórdão do Tribunal de Justiça de 12 de outubro de 2023, proferido no âmbito do processo C-11/22; ECLI:EU:C:2023:765

Partes: Est Wind Power OÜ/Elering AS

Descritores: Pedido de decisão prejudicial apresentado pelo Tallinna Halduskohus. Reenvio prejudicial – Auxílios concedidos pelos Estados-Membros – Apoio às energias renováveis – Construção de um parque eólico – Comunicação da Comissão intitulada "Orientações relativas a auxílios estatais à proteção ambiental e à energia 2014-2020" – Ponto 19, alínea 44), e nota de pé de página 66 – Conceitos de "início dos trabalhos", de "trabalhos de construção", de "qualquer outro compromisso que torne o investimento irreversível" e de "licença nacional necessária à realização do projeto" – Tipo e intensidade do exame a efetuar pela autoridade nacional competente.

Acórdão do Tribunal de Justiça de 28 de setembro de 2023, proferido no âmbito do processo C-321/21 P; ECLI:EU:C:2023:713

Partes: Ryanair DAC/Comissão

Descritores: Recurso de decisão do Tribunal Geral – Auxílio de Estado – Artigo 107.º, n.º 2, al. *b)* TFUE – Mercado dinamarquês do transporte aéreo – Auxílio concedido pelo Reino da Dinamarca em benefício de uma companhia aérea no âmbito da pandemia de COVID-19 – Quadro temporário relativo a medidas de auxílio estatal – Garantia pública que tem por objeto uma linha de crédito renovável – Decisão da Comissão Europeia de não levantar objeções – Auxílio destinado a remediar os danos sofridos por uma única vítima – Princípios da proporcionalidade e da não discriminação – Liberdades de estabelecimento e de livre prestação de serviços.

Acórdão do Tribunal de Justiça de 28 de setembro de 2023, proferido no âmbito do processo C-320/21 P; ECLI:EU:C:2023:712

Partes: Ryanair DAC/Comissão

Descritores: Recurso de decisão do Tribunal Geral – Auxílios de Estado – Artigo 107, n.º 2, al *b)* TFUE – Mercado sueco do transporte aéreo – Auxílio concedido pelo Reino da Suécia em benefício de uma companhia aérea no âmbito da pandemia de COVID-19 – Quadro temporário relativo a medidas de auxílio estatal – Garantia pública que tem por objeto uma linha de crédito renovável – Decisão da Comissão Europeia de não levantar objeções – Auxílio destinado a remediar os danos sofridos por uma única vítima – Princípios da proporcionalidade e da não discriminação – Liberdades de estabelecimento e de livre prestação de serviços.

Acórdão do Tribunal Geral de 27 de setembro de 2023, proferido no âmbito do processo T-12/15, T-158/15 e T-258/15; ECLI:EU:T:2023:583

Partes: Banco Santander, SA e o./Comissão

Descritores: Auxílios de Estado – Regime de auxílios executado pela Espanha – Deduções do imposto sobre o rendimento das sociedades que permitem às empresas com domicílio fiscal em Espanha amortizar o goodwill resultante de aquisições indiretas de participações em empresas estrangeiras através da aquisição direta de participações em holdings não residentes – Decisão que declara o regime de auxílios ilegal e incompatível com o mercado interno e que ordena a recuperação dos auxílios pagos – Decisão 2011/5/CE – Decisão 2011/282/UE – Âmbito de aplicação – Revogação de um ato – Segurança jurídica – Confiança legítima.

Acórdão do Tribunal de Justiça de 21 de setembro de 2023, proferido no âmbito do processo C-831/21 P; ECLI:EU:C:2023:686

Partes: Fachverband Spielhallen eV e LM/Comissão

Descritores: Recurso de decisão do Tribunal Geral – Auxílios de Estado – Artigo 107, n.º 1, TFUE – Conceito de "auxílio" – Requisito relativo à vantagem seletiva – Tratamento fiscal reservado aos operadores de casinos públicos na Alemanha – Taxa sobre os lucros – Dedutibilidade parcial dos montantes pagos a título desta taxa da base tributável do imposto sobre o rendimento ou sobre as sociedades e do imposto sobre as atividades económicas – Decisão da Comissão Europeia – Rejeição de uma denúncia no termo da fase de apreciação preliminar com fundamento na inexistência de um auxílio de Estado constituído por essa dedutibilidade – Declaração distinta da inexistência de uma vantagem económica e da inexistência de seletividade – Recurso para o Tribunal Geral da União Europeia limitado à declaração de inexistência de seletividade – Caráter inoperante do recurso – Identificação pela Comissão do sistema de referência ou regime fiscal "normal" – Interpretação para este efeito do direito fiscal nacional aplicável – Qualificação da taxa sobre os lucros de "imposto especial" dedutível a título das "despesas decorrentes de operações comerciais" – Princípio ne ultra petita.

Acórdão do Tribunal Geral de 20 de setembro de 2023, proferido no âmbito do processo T-263/16 RENV; ECLI:EU:T:2023:565

Partes: Magnetrol International e o./Comissão

Descritores: Auxílios de Estado – Regime de auxílios concedido pela Bélgica – Decisão que declara o regime de auxílios incompatível com o mercado interno e ordena a recuperação dos auxílios concedidos – Decisão fiscal antecipada (tax ruling) – Lucros tributáveis – Isenção em matéria de lucros excedentários – Vantagem – Caráter seletivo – Recuperação.

Acórdão do Tribunal Geral de 20 de setembro de 2023, proferido no âmbito do processo T-131/16 RENV; ECLI:EU:T:2023:561

Partes: Reino da Bélgica/Comissão

Descritores: Auxílios de Estado – Regime de auxílios executado pela Bélgica – Decisão que declara o regime de auxílios incompatível com o mercado interno e ilegal e que ordena a recuperação do auxílio pago – Decisão fiscal antecipada (tax ruling) – Lucros tributáveis – Isenção em matéria de lucros excedentários – Vantagem – Caráter seletivo – Violação da concorrência – Recuperação.

Acórdão do Tribunal de Justiça de 14 de setembro de 2023, proferido no âmbito do processo C-508/21 P e C-509/21 P; ECLI:EU:C:2023:669

Partes: Comissão Europeia e Interessengemeinschaft der Grenzhändler (IGG)/Dansk Erhverv

Descritores: Recurso de decisão do Tribunal Geral – Auxílios de Estado – Artigo 107, n.º 1, TFUE – Venda de bebidas em lata aos residentes do Reino da Dinamarca – Venda sem depósito na condição de as bebidas adquiridas serem exportadas – Não aplicação de coima – Conceito de "auxílio de Estado" – Conceito de "recursos estatais" – Decisão que declara a inexistência de auxílio – Recurso de anulação.

Acórdão do Tribunal de Justiça de 14 de setembro de 2023, proferido no âmbito do processo C-466/21 P; ECLI:EU:C:2023:666

Partes: Land Rheinland-Pfalz/Deutsche Lufthansa AG.

Descritores: Recurso de decisão do Tribunal Geral – Auxílios de Estado – Setor da aviação – Auxílio ao funcionamento concedido pela República Federal da Alemanha ao aeroporto de Frankfurt-Hahn – Artigo 108 TFUE – Decisão de não dar início ao procedimento formal de investigação – Recurso de anulação – Qualidade de parte interessada – Salvaguarda dos direitos processuais.

Acórdão do Tribunal Geral de 13 de setembro de 2023, proferido no âmbito do processo T-525/20; ECLI:EU:T:2023:542

Partes: ITD, Brancheorganisation for den danske vejgodstransport e Danske Fragtmænd A/S/ Comissão

Descritores: Auxílios de Estado – Setor postal e transporte rodoviário de mercadorias – Denúncia de um concorrente – Entrada de capital concedida por uma empresa pública à sua filial – Decisão que declara a inexistência de auxílio de Estado no termo da fase de análise preliminar – Sociedade-mãe do grupo controlada conjuntamente por dois Estados-Membros – Aprovação da entrada de capital pela sociedade-mãe do grupo – Imputabilidade ao Estado.

Acórdão do Tribunal de Justiça de 13 de julho de 2023, proferido no âmbito do processo C-313/22; ECLI:EU:C:2023:574

Partes: Achilleion Anomymi Xenodocheiaki Etaireia/Elliniko Dimosio.

Descritores: Pedido de decisão prejudicial apresentado pelo Elegktiko Synedrio. Reenvio prejudicial – Fundos estruturais – Fundo Europeu de

Desenvolvimento Regional (FEDER) – Cofinanciamento – Regulamento (CE) n.º 1260/1999 – Artigo 30, n.º 4, e artigo 39, n.º 1 – Perenidade das operações relativas a investimentos – "Alteração importante" de uma operação de investimento cofinanciada – Recuperação de um auxílio em caso de cessão do estabelecimento objeto dessa operação – Incidência das circunstâncias específicas que rodeiam essa cessão.

Acórdão do Tribunal de Justiça de 13 de julho de 2023, no âmbito do processo C-73/22 P e C-77/22 P; ECLI:EU:C:2023:570

Partes: Grupa Azoty S.A. e o./Comissão

Descritores: Recurso de decisão do Tribunal Geral – Auxílios de Estado – Orientações relativas a determinadas medidas de auxílio estatal no âmbito do sistema de comércio de licenças de emissão de gases com efeito de estufa – Setores económicos elegíveis – Exclusão do setor do fabrico de produtos azotados e de adubos – Recurso de anulação – Admissibilidade – Direito de recurso das pessoas singulares ou coletivas – Artigo 263, quarto parágrafo, TFUE – Requisito segundo o qual o recorrente deve ser diretamente afetado.

Controlo de Concentrações

Acórdão do Tribunal de Justiça de 21 de dezembro de 2023, proferido no âmbito do processo C-297/22 P; ECLI:EU:C:2023:1027

Partes: United Parcel Service, Inc./Comissão

Descritores: Recurso de decisão do Tribunal Geral – Ação de indemnização – Operações de concentração de empresas – Decisão da Comissão Europeia que declara a operação de concentração incompatível com o mercado interno e com o funcionamento do Acordo EEE – Anulação da decisão por vícios processuais – Responsabilidade extracontratual da União Europeia – Nexo de causalidade.

Acórdão do Tribunal Geral de 20 de dezembro de 2023, proferido no âmbito do processo T-53/21; ECLI:EU:T:2023:834

Partes: EVH GmbH/Comissão

Descritores: Concorrência – Concentrações – Mercados alemães da eletricidade e do gás – Decisão que declara a concentração compatível com o mercado interno – Dever de fundamentação – Conceito de "concentração única" – Direito a uma proteção jurisdicional efetiva – Direito de audiência – Delimitação do mercado – Período de análise – Apreciação

dos efeitos da operação sobre a concorrência – Erros manifestos de apreciação – Compromissos – Dever de diligência.

Acórdão do Tribunal de Justiça de 9 de novembro de 2023, proferido no âmbito do processo C-746/21 P; ECLI:EU:C:2023:836

Partes: Altice Group Lux Sàrl/Comissão

Descritores: Recurso de decisão do Tribunal Geral – Concorrência – Controlo das operações de concentração de empresas – Regulamento (CE) n.º 139/2004 – Exceção de ilegalidade – Artigo 4, n.º 1 – Obrigação de notificação prévia das concentrações – Artigo 7, n.º 1 – Obrigação de suspensão das concentrações – Âmbito de aplicação – Conceito de "realização" de uma concentração – Artigo 14, n.º 2 – Decisão que aplica coimas pela realização de uma operação de concentração antes da sua notificação e da sua autorização – Dever de fundamentação – Princípio da proporcionalidade – Competência de plena jurisdição.

NOTAS CURRICULARES

DANIEL FAVORETTO ROCHA
Advogado, Consultor do CADE no Programa das Nações Unidas para o Desenvolvimento (PNUD) e Consultor Não-Governamental perante a International Competition Network (ICN). Mestre (cum laude) em Direito & Desenvolvimento e Bacharel em Direito pela FGV Direito SP (Fundação Getúlio Vargas). Bruxelas, Bélgica. E-mail: favoretto.it@gmail.com

Competition lawyer, Consultant for the Brazilian Competition Agency (CADE) under the United Nations Development Programme (UNDP) and Non-Governmental Advisor at the International Competition Network (ICN). Master (cum laude) in Law & Development and Bachelor in Law, FGV Law School (Fundação Getúlio Vargas). Brussels, Belgium. E-mail: favoretto.it@gmail.com

EVA OLIVEIRA
Advogada-Estagiária na Miranda & Associados desde 2023. Consultora Jurídica em Direito Europeu e da Concorrência na Miranda & Associados de 2022 a 2023. Colaboradora Júnior no Observatório da Aplicação do Direito da Concorrência de 2021 a 2022. Em 2022 estagiou no Departamento de Controlo de Concentrações da Autoridade da Concorrência Portuguesa e no Tribunal da Concorrência, Regulação e Supervisão. Mestre em Direito da Empresa e dos Negócios pela Universidade Católica Portuguesa Regional do Porto. Licenciada em Direito pela Universidade de Coimbra.

Trainee Lawyer at Miranda & Associados since 2023. Legal consultant in European and Competition Law at Miranda & Associates from 2022 to 2023. Junior Associate at the Observatory for the Application of Competition Law from 2021 to 2022. Intern at the Merger Control Department of the Portuguese Competition Authority in 2022. Intern at the Competition, Regulation and Supervision Court in 2022. Eva holds a Master's Degree in Corporate and Business Law from the Catholic University of Porto and an Undergraduate Degree in Law from the University of Coimbra.

JOANA TOMAZ HILZBRICH
Advogada desde março de 2017. Até à data e desde 2020, dirige o seu próprio escritório de advocacia JTH Advogados | Lawyers. Entre 2022 e 2024, atuou como Legal Manager da Phi Wallet, uma startup portuguesa. Entre 2019 e 2020 foi Advogada Associada da Pais de Vasconcelos & Associados e Advogada Estagiária entre 2015 e 2017. Entre 2017 e 2019 atuou como Specialist Compliance Officer do BNP Paribas em Portugal e em setembro de 2017 do BNP Paribas em Amesterdão. Atuou como Tutora de Direito da Economia entre 2014 e 2015 na Faculdade de Direito da Universidade de Lisboa. Foi Advogada Estagiária entre 2013 e 2015 na Ana Cristina Pimentel & Associados. Licenciada em Direito pela Faculdade de Direito da Universidade de Lisboa, e Mestre em Direito e Prática Jurídica em Concorrência e Regulação pela mesma instituição, faz atualmente parte de um grupo de investigação em direitos humanos e conduta empresarial da *NOVA Knowledge Centre for Business Himan Rights and the Environment* em conjunto com a Elsa *Legal Research Group Network*.

Lawyer since March 2017. As of the current date and since 2020, has been managing her own law firm, JTH Advogados | Lawyers. Between 2022 and 2024, served as the Legal Manager at Phi Wallet, a Portuguese startup. From 2019 to 2020, was an Associate Lawyer at Pais de Vasconcelos & Associados and worked as a Trainee Lawyer from 2015 to 2017. Between 2017 and 2019, worked as a Specialist Compliance Officer at BNP Paribas in Portugal, and in September 2017, at BNP Paribas in Amsterdam. Also served as a Law and Economics Tutor from 2014 to 2015 at the Faculty of Law, University of Lisbon and as a Trainee Lawyer from 2013 to 2015 at Ana Cristina Pimentel & Associados. Holds a Law degree from the Faculty of Law, University of Lisbon, and a Master's in Law and Legal Practice in Competition and Regulation from the same institution. Is currently part of a research group on human rights and corporate conduct at the NOVA Knowledge Centre for Business Human Rights and the Environment, in collaboration with the Elsa Legal Research Group Network.

TÂNIA LUÍSA FARIA
Advogada, responsável pela Área de Prática de Direito da Concorrência e Direito da União Europeia da Uría Menéndez-Proença de Carvalho, em Lisboa, desde 2020, tendo também passado pelo escritório de Bruxelas.
Concluiu o doutoramento em Ciências Jurídico-Económicas pela Faculdade de Direito da Universidade de Lisboa, em 2021, Faculdade onde concluiu a

licenciatura em Direito e o mestrado em Ciências Jurídico-Económicas em 2012.
Assistente convidada da Faculdade de Direito de Universidade de Lisboa deste 2010, Professora Auxiliar Convidada da mesma Faculdade desde 2023, lecionando diversas cadeiras de pendor económico na licenciatura, em particular Economia Política e Mercados Financeiros, bem como pós-graduações em matéria de concorrência e regulação.
Desde 2023, Professora Convidada da Universidade Lusófona em matéria de Direito da Concorrência, Finanças Públicas e Direito do Consumo.
Autora de diversos artigos e intervenções públicas em matéria de Direito da Concorrência, da União Europeia e do Consumo.

Lawyer, head of the Competition and EU Law Practice at Uría Menéndez-Proença de Carvalho, in Lisbon, since 2020, having also worked in the Brussels office. She completed her PhD in Law and Economics at the Faculdade de Direito da Universidade de Lisboa in 2021, where she obtained her Law Degree and a Master's degree in Law and Economics in 2012.
She has been an Assistant Lecturer at the Faculdade de Direito da Universidade de Lisboa since 2010, and has been a Visiting Assistant Professor at the same Faculty since 2023, teaching various economics subjects in the degree programme, in particular Political Economy and Financial Markets, as well as postgraduate courses in competition and regulation.
Since 2023, she has been a guest lecturer at Universidade Lusófona, teaching Competition Law, Public Finance and Consumer Law.
Author of several articles and public speeches on competition, European Union and consumer law.

TOMÁS CARVALHO GUERRA
Investigador Júnior no Observatório da Aplicação do Direito da Concorrência desde julho de 2021. Desde junho de 2023 que é Investigador Júnior no Departamento Legal I&D da Cavaleiro & Associados.
Atualmente é, também, estagiário extracurricular na Garrigues, Departamento de Direito Laboral (Porto), e Colaborador na Clínica Jurídica da Faculdade de Direito da Universidade Católica Portuguesa – Escola do Porto. Entre outubro e dezembro de 2023, foi estagiário curricular no Departamento de Direito Criminal da Morais Leitão, Galvão Teles, Soares da Silva & Associados (Porto). No verão de 2023 foi estagiário de verão na

Uría Menéndez-Proença de Carvalho (Lisboa), Departamento de Direito da Concorrência e da União Europeia.
Em fevereiro de 2023 foi vencedor do concurso "A União Europeia na minha Vida", organização dos CDEs e Representação da Comissão Europeia, com o tema "A (re)inversão das teses de Ferdinand Tonnies".
No seguimento da obtenção do 1.º lugar na Essay Competition "Direito e Tecnologia: Desafio dos Direitos Humanos na Era Digital", em 2021, teve a oportunidade de estagiar na AdC Advogados.

Junior Researcher at the Observatory on Competition Law Enforcement, since July 2021. Since June 2023, the author has been a Junior Researcher in the Legal R&D Department of Cavaleiro & Associados.
He is also currently an extracurricular intern at Garrigues, Labour Law Department (Porto), and a Collaborator at the Legal Clinic of the Faculdade de Direito da Universidade Católica Portuguesa – Escola do Porto. Between October and December 2023, he was an intern at the Criminal Law Department of Morais Leitão, Galvão Teles, Soares da Silva & Associados (Porto). In the summer of 2023, he was a summer trainee at Uría Menéndez - Proença de Carvalho (Lisbon), Competition and European Union Law Department.
In February 2023, he won the competition "The European Union in my Life", organised by CDEs and the European Commission's Representation, with the following paper: "The Inversion of Ferdinand Tonnies' theses".
After winning 1st place in the Essay Competition "Law and Technology: Challenges for Human Rights in the Digital Age", in 2021, he had the opportunity to work as an intern at AdC Advogados.

REVISTA DE CONCORRÊNCIA E REGULAÇÃO

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Concorrência – Questões gerais

Questões processuais

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4	Helena Gaspar Martinho	*Acórdão do Tribunal de Justiça de 14 de Setembro de 2010 no Processo C–550/07 P, Akzo Nobel Chemicals Ltd e Akcros Chemicals Ltd c. Comissão Europeia*
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6	Carla Farinhas	*Acórdão do Tribunal de Justiça de 3 de Maio de 2011 no Processo C–375/09 –Tele2Polska*
7-8	Alexander Italianer	*The European Commission's New Procedural Package: Increasing Interaction With Parties and Enhancing the Role of the Hearing Officer*
9	João Espírito Santo Noronha	*Impugnação de decisões da Autoridade da Concorrência em procedimento administrativo*
9	Helena Gaspar Martinho	*Acórdão do Tribunal Europeu dos Direitos do Homem de 27 de setembro de 2011, Petição n.º 43509/08, A. Menarini Diagnostics SLR c. Itália*
10	Márcio Schlee Gomes	*As buscas e apreensões nos escritórios de advogados de empresas*
11-12	Paulo de Sousa Mendes	*O problema da utilização de elementos recolhidos em ações de supervisão como meios de prova em processo sancionatório*
16	Paulo de Sousa Mendes	*Eficácia das sanções e transações*
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22	Jeroen Capiau/Virgílio Mouta Pereira	*The Easyjet Case and the rejection of complaints when they have already been dealt with by another Member of the ECN*
23-24	Eva Lourenço	*O Acórdão Vinci Construction e GTM Génie Civil et Services c. França, do Tribunal Europeu dos Direitos Humanos (TEDH), de 2 de abril de 2015, n.ºs 63629/10 e 60567/10*

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26	Margarida Caldeira	*Acórdão do Tribunal Constitucional de 8 de junho de 2016, Peugeot Portugal Automóveis, S.A. contra Autoridade da Concorrência – Efeito devolutivo da interposição do recurso de impugnação judicial*
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Private enforcement

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Nemo tenetur se ipsum accusare

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1	Helena Gaspar Martinho	*O direito ao silêncio e à não auto–incriminação nos processos sancionatórios do Direito da concorrência – Uma análise da jurisprudência comunitária*
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1	Catarina Anastácio	*O dever de colaboração no âmbito dos processos de contra–ordenação por infracção às regras de defesa da concorrência e o princípio nemo tenetur se ipsum accusare*
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26	Miguel Moura e Silva	*As operações sobre valores mobiliários e o direito da concorrência*
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36	María Ortiz	*Competition enforcement and advocacy in the financial sector in Spain*
36	Ana Patrícia Carvalho	*Competition compliance: a mudança do paradigma*
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Concorrência – Práticas restritivas

Geral

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3	Ana Perestrelo de Oliveira / Miguel Sousa Ferro	*The sins of the son: parent company liability for competition law infringements*
9	Nuno Carroulo dos Santos	*Like running water? The Interplay Between Antitrust and Online Music Licensing*
10	Fernando Xarepe Silveiro	*O regime jurídico da clemência na nova Lei da Concorrência: Novas valências, novos desafios*
13	Stéphane Rodrigues	*Les services sociaux d'intérêt général dans la jurisprudence de la Cour de Justice de l'Union Européenne*
18	Harry First/Spencer Weber Waller	*Antitrust's Democracy Deficit*
26	Francisco Hernández Rodríguez/José Antonio Rodríguez Miguez	*La aplicación descentralizada del derecho de la competencia: la experiencia española*
37	Francisco Marcos	*A desordem judicial e a defesa da concorrência*
38	Eduardo Maia Cadete	*Artigo 101.º, law in books, law in action e o mundo real*
38	João Pateira Ferreira	*Old classics die hard. A few comments on vertical restraints as object infringements*

Abuso de posição dominante

N.º RCR	Autor	Título do Artigo
1	João E. Gata/Jorge Rodrigues	*Uma perspectiva económica sobre abuso de posição dominante – A distribuição de gelados de impulso a nível europeu*
1	Miguel Moura e Silva	*A tipificação do abuso de posição dominante enquanto ilícito contra-ordenacional*
5	Ioannis Kokkoris	*Should the Dominance Test Have Been Changed?*
5	António Pedro Santos	*Acórdão do Tribunal de Justiça de 17 de Fevereiro de 2011 no Processo C–52/09, Telia–Sonera (Abuso de posição dominante sob a forma de esmagamento de margens pela empresa TeliaSonera)*
6	Damien Neven/Hans Zenger	*Some remarks on pricing abuses and exclusionary conduct*
6	João Ilhão Moreira	*Preços predatórios: Encontros e desencontros de jurisprudência e pensamento económico*
7-8	Vicente Bagnoli	*Um balanço crítico do desenvolvimento da política de concorrência no Brasil nos últimos 15 anos e o início da repressão das condutas unilaterais – Abuso de posição dominante*
7-8	Carlos Emmannuel Joppert Ragazzo	*A eficácia jurídica da norma de preço abusivo*
9	Miguel Moura e Silva	*Os abusos de exploração sobre os consumidores: Uma revolução silenciosa no novo regime nacional de proibição do abuso de posição dominante?*
14-15	Konstantina Bania	*Abuse of dominance in online search: Google's special responsibility as the new bottleneck for content access*
14-15	Lucas Saretta Ferrari	*Google e o direito europeu da concorrência: abuso de posição dominante?*
29	Tânia Luísa Faria	*Direito da concorrência e big data: ponto da situação e perspetivas*
37	John Davies & Jorge Padilla	*Another look at the role of barriers to entry in excessive pricing cases*
38	Luís do Nascimento Ferreira	*Breve apontamento sobre os desafios das plataformas digitais em processos de abuso de posição dominante*

Restrições verticais

N.º RCR	Autor	Título do Artigo
4	Miguel Gorjão-Henriques / Miguel Sousa Ferro	*The latest reform of EU Competition Law on Vertical Restraints*
4	Laurence Idot	*La pratique de l'Autorité française de concurrence en matière de restrictions verticales*
4	Ioannis Lianos	*Upfront access payment, category management and the new regulation of vertical restraints in EU Competition Law: importing the retail side of the story*
5	Jean-François Bellis	*The new EU rules on vertical restraints*
7-8	Paula Vaz Freire	*O poder de compra e as restrições verticais determinadas pela procura*
7-8	Nuno Cunha Rodrigues	*Acórdão do Tribunal de Justiça de 4 de outubro de 2011, nos Processos C–403/08 e C429/08, Murphy Football Association Premier League Ltd e o. / QC Leisure e o. e Karen Murphy / Media Protection Services Ltd*
33-34	Francisco Espregueira Mendes, Leyre Prieto & Daniela Cardoso	*Da natureza das restrições à concorrência nos acordos de distribuição seletiva: a influência de Coty Prestige no comércio eletrónico*
37	Tânia Luísa Faria, Maria Francisca Couto e Francisco Chilão Rocha	*Comércio eletrónico e restrições verticais da concorrência: regresso ao futuro?*
45	Sofia Villas-Boas	*Bringing competition law into the digital era – selective distribution and marketplace bans: what should change?*

Restrições horizontais

N.º RCR	Autor	Título do Artigo
1	João Matos Viana	*Acórdão do Tribunal de Primeira Instância de 8 de Julho de 2008 – Processo T–99/04 (Os conceitos de autor e cúmplice de uma infracção ao artigo 81.º TCE)*
2	João Pateira Ferreira	*Acórdão do Tribunal de Justiça de 4 de Junho de 2009 (3.ª secção) no Processo C–8/08, T–Mobile Netherlands BV e o. c. Raad van bestuur van de Nederlandse Mededingingsautoriteit (Práticas concertadas entre empresas, trocas de informações e infrações concorrenciais por objecto e/ou por efeito)*
4	Arianna Andreangeli	*Modernizing the approach to article 101 TFEU in respect to horizontal agreements: has the Commission's interpretation eventually "come of age"?*
4	Silke Obst / Laura Stefanescu	*New block exemption regulation for the insurance sector – main changes*
6	Donald I Baker/Edward A. Jesson	*Adam Smith, modern networks and the growing need for antitrust rationality on competitor cooperation*
6	Luís D. S. Morais	*The New EU Framework of Horizontal Cooperation Agreements*
6	Fernando Pereira Ricardo	*As infracções pelo objecto do artigo 101.º do Tratado sobre o Funcionamento da União Europeia na jurisprudência da União Europeia*
6	Cristina Camacho/Jorge Rodrigues	*Using Economic Evidence in Cartel Cases: A Portuguese Case Study*
6	João Pateira Ferreira	*A aplicação da Lei da Concorrência às decisões de associações de empresas na jurisprudência do Tribunal do Comércio de Lisboa*
13	Imelda Maher	*The New Horizontal Guidelines: Standardisation*
13	Margarida Caldeira	*Acórdão do Tribunal de Justiça de 28 de fevereiro de 2013, no Processo C-1/12, Ordem dos Técnicos Oficiais de Contas v. Autoridade da Concorrência – Aplicação das regras de concorrência a ordens profissionais*
16	Margarida Caldeira	*Acórdão do Tribunal da Relação de Lisboa de 7 de janeiro de 2014 e Decisão Sumária do Tribunal Constitucional de 21 de maio de 2014, Ordem dos Técnicos Oficiais de Contas contra Autoridade da Concorrência*

18	João Cardoso Pereira	*Judgment of the Court (Third Chamber) of 11 September 2014, Groupement des cartes bancaires (CB) v European Commission (Groupement des Cartes Bancaires: Reshaping the Object Box)*
19	Margarida Caldeira	*Acórdão do Tribunal Constitucional de 16 de Dezembro de 2014, Ordem dos Técnicos Oficiais de Contas contra Autoridade da Concorrência – Aplicação das regras de concorrência a ordens profissionais e foro competente*
33-34	Angelo Gamba Prata de Carvalho	*Os contratos associativos no direito da concorrência brasileiro*
33-34	Marcela Lorenzetti	*Contratos associativos no transporte marítimo: análise de VSAs no Brasil*
35	Bernardo Sarmento & Jorge Padilla	*Another look at the competitive assessment of information exchanges amongst competitors in EU Competition Law*
36	Richard Whish	*Hub and spoke concerted practices*
37	João Miranda Poças	*O enquadramento da figura hub–and–spoke na jurisprudência do Tribunal de Justiça da União Europeia e dos tribunais britânicos*
39	João E. Gata	*Controlling Algorithmic Collusion: Short Review of the Literature, Undecidability, and Alternative Approaches*
41	Nuno Alexandre Pires Salpico	*As restrições à concorrência nas plataformas de cartões de pagamento através das interchange fees*

Concorrência – Controlo de concentrações

N.º RCR	Autor	Título do Artigo
1	António Gomes	*Minority Shareholders and Merger Control in Portugal*
2	Carlos Pinto Correia / António Soares	*Tender offers and merger control rules*
4	Fernando Pereira Ricardo	*A aquisição de participações ou de ativos da empresa insolvente e o conceito de concentração de empresas*
5	Miguel Mendes Pereira	*Natureza jurídica e função de compromissos, condições e obrigações no controlo prévio de concentrações*
7-8	Pedro Costa Gonçalves	*Controlo de concentração de empresas no direito português (uma visão jus–administrativista)*

7-8	Ana Paula Martinez	*Histórico e desafios do controle de concentrações econômicas no Brasil*
10	Luis Ortiz Blanco/ Alfonso Lamadrid de Pablo	*Del test de posición dominante al test OSCE (Historia y evolución de los criterios de prohibición y autorización de las concentraciones entre empresas en el Derecho europeo, 1989 – 2004)*
31	Maria Teresa Capela	*Controlo de concentrações e o n.º 14 do artigo 145.º–N do RGICSF: uma exceção à obrigação de notificação prévia?*
33-34	Daniela Cardoso	*Comentário ao Acórdão do Tribunal de Justiça da União Europeia, de 7 de setembro de 2017, processo C–248/16*
35	Carlos Oliveira Cruz & Joaquim Miranda Sarmento	*A fusão da Estradas de Portugal com a REFER: o caso da integração do operador rodoviário com o operador ferroviário*
36	Ricardo Bayão Horta	*Articulação AdC–ERC no âmbito do artigo 55.º do regime jurídico da concorrência: cenas dos próximos capítulos*
37	Alípio Codinha, Mariana Costa, Marta Ribeiro & Pedro Marques	*Input foreclosure em concentrações verticais nos media: o caso Altice/Media Capital*
37	Rita Prates	*Partial implementation and gun–jumping, how original. What will they think of next? – Chapter One*
38	Joaquim Caimoto Duarte	*Inovação e controlo de concentrações – breves notas sobre a sua prática em Portugal*
39	Thomas Hoehn	*Challenges in Designing and Implementing Merger Remedies – A Monitoring Trustee Perspective*
39	Simone Maciel Cuiabano	*Análise Alternativa de Fusões: Indicadores de Preços x Definição de Mercado Relevante*
39	Nuno Rocha de Carvalho	*European Champions vs. Real Champions: What will it cost you?*
41	Rita Prates	*Partial implementation and gun–jumping, how original. what will they think of next? – Chapter Two*
44	Rita Prates & Ricardo Bayão Horta	*Cooperation in multijurisdictional merger fillings – the ECA notice mechanism*
45	Tânia Luísa Faria, Margot Lopes Martins & Mariana Viana Pedreira	*New trends in merger control: the baby, the bathwater, uncertain outlooks and eternal returns*

50	Eva Oliveira	*Preventing Killer acquisitions: the combination between Article 22 of the EU Merger Regulation and the Digital Markets Act's Merger Rules*

Concorrência – Auxílios de Estado

N.º RCR	Autor	Título do Artigo
3	Piet Jan Slot	*The credit crisis and the Community efforts to deal with it*
3	Manuel Porto / João Nogueira de Almeida	*Controlo negativo, controlo positivo ou ambos?*
3	António Carlos dos Santos	*Crise financeira e auxílios de Estado – risco sistémico ou risco moral?*
3	Ana Rita Gomes de Andrade	*As energias renováveis – Uma luz verde aos auxílios de Estado?*
3	Marco Capitão Ferreira	*Decisão da Comissão Europeia relativa à garantia estatal concedida pelo Estado português ao Banco Privado Português*
11-12	Alexandra Amaro	*Auxílios de Estado e contratos públicos: Os limites do concurso*
17	Ricardo Pedro	*Auxílios de minimis 2014–2010: notas à luz do Regulamento (UE) n.º 1407/2013*
20-21	João Zenha Martins	*Consultoria em inovação e o redesenho dos apoios ao emprego e à formação no Regulamento (UE) n.º 651/2014*
27-28	Edmilson Wagner dos Santos Conde	*Poderão as decisões dos órgãos jurisdicionais que atribuam indemnizações constituir auxílios de Estado?*
27-28	Luis Seifert Guincho	*State aid and systemic crises: appropriateness of the European State aid regime in managing and preventing systemic crises*
27-28	Mariana Medeiros Esteves	*Os auxílios de Estado sob a forma fiscal e o combate da concorrência fiscal prejudicial na União Europeia*
27-28	Ricardo Quintas	*A incongruência judicativa de uma deliberação positiva de compatibilidade de um auxílio de Estado não notificado*
42-43	Miguel Mendes Pereira & Carla Marcelino	*Regras sobre auxílios de estado em tempos pandémicos: flexão ou torção?*

49	Manuel Queiroz Ribeiro	*O regime dos auxílios de estado – reflexões a propósito do quadro temporário covid 19 e da necessidade de flexibilização das regras gerais*
51	Beatriz Ribeiro Fernandes	*Fiat, Starbucks, Apple e Amazon e a aferição da seletividade do auxílio: Oportunidade desperdiçada?*

Financeiro e bancário

N.º RCR	Autor	Título do Artigo
2	René Smits	*Europe's Post–Crisis Supervisory Arrangements – a Critique*
2	José Nunes Pereira	*A caminho de uma nova arquitetura da supervisão financeira europeia*
2	Pedro Gustavo Teixeira	*The Evolution of Law and Regulation and of the Single European Financial Market until the Crisis*
2	Paulo de Sousa Mendes	*How to deal with transnational market abuse? – the Citigroup case*
2	Luís Máximo dos Santos	*A reforma do modelo institucional de supervisão dos setores da banca e dos seguros em França*
2	José Renato Gonçalves	*A sustentabilidade da zona euro e a regulação do sistema financeiro*
2	Paulo Câmara	*"Say on Pay": o dever de apreciação da política remuneratória pela assembleia geral*
3	Nuno Cunha Rodrigues	*Acórdão do Tribunal de Justiça de 8 de julho de 2010 (1.ª secção) no Processo C–171/08 – Comissão c. Portugal (Crónica de uma morte anunciada?)*
7-8	Paulo de Sousa Mendes	*A derrogação do segredo bancário no processo penal*
7-8	Felipe Hochscheidt Kreutz	*O segredo bancário no processo penal*
7-8	Madalena Perestrelo de Oliveira	*As alterações ao Regime Geral das Instituições de Crédito: o fim da era do sigilo bancário?*
9	Luís Guilherme Catarino	*A "agencificação" na regulação financeira da União Europeia: Novo meio de regulação?*
9	Luís Máximo dos Santos	*O novo regime jurídico de recuperação de instituições de crédito: Aspetos fundamentais*

9	Ana Pascoal Curado	*As averiguações preliminares da CMVM no âmbito da luta contra a criminalidade financeira: Natureza jurídica e aplicação do princípio nemo tenetur*
9	Miguel Brito Bastos	*Scalping: Abuso de informação privilegiada ou manipulação de mercado?*
11-12	Helena Magalhães Bolina	*O direito ao silêncio e o estatuto dos supervisionados no mercado de valores mobiliários*
11-12	Vinicius de Melo Lima	*Ações neutras e branqueamento de capitais*
13	Bernardo Feijoo Sánchez	*El Derecho Penal Español frente a fraudes bursátiles transnacionales – ¿Protege el derecho penal del mercado de valores los mercados financieros internacionales?*
14-15	Bernardo Feijoo Sánchez	*Imputacion objetiva en el derecho penal economico: el alcance del riesgo permitido. Reflexiones sobre la conducta típica en el derecho penal del mercado de valores e instrumentos financieros y de la corrupción entre particulares*
17	Joseph Dale Mathis	*European Payment Services: How Interchange Legislation Will Shape the Future of Retail Transactions*
18	José Gonzaga Rosa	*Shadow Banking – New Shadow Entities Come to Light*
18	Pedro Lobo Xavier	*Das medidas de resolução de instituições de crédito em Portugal – análise do regime dos bancos de transição*
18	Sofia Brito da Silva	*A notação de risco da dívida soberana: O exercício privado de um serviço de interesse público*
20-21	Pablo Galain Palermo	*Lavado de activos en Uruguay: una visión criminológica*
20-21	Sérgio Varela Alves	*Da participação da Banca em Sociedades não Financeiras: Mais do que allfinance*
20-21	Rute Saraiva	*Um breve olhar português sobre o modelo de supervisão financeira em Macau*
20-21	Luís Pedro Fernandes	*Dos sistemas de Microcrédito na Lusofonia: Problemas e soluções*
20-21	Daniela Pessoa Tavares	*O segredo bancário na legislação bancária de Angola, Cabo Verde e Moçambique*
20-21	Raluca Ghiurco	*As instituições de supervisão financeira em Moçambique*
20-21	Francisco Mário	*Supervisão bancária no sistema financeiro Angolano*
20-21	Catarina Balona/João Pedro Russo	*O Banco de Cabo Verde – Principais aspetos orgânicos e funcionais*

20-21	José Gonzaga Rosa	*União Económica e Monetária da África Ocidental: uma boa ideia, com uma execução pobre*
20-21	Tiago Larsen	*Regulação bancária na Guiné–Bissau*
23-24	Luís Guilherme Catarino	*"Fit and Proper": o controlo administrativo da idoneidade no sector financeiro*
23-24	Margarida Reis	*A idoneidade dos membros dos órgãos de administração e fiscalização das instituições de crédito*
23-24	Inês Serrano de Matos	*"Debt finance": as obrigações como engodo do investidor e a informação externa como um meio de tutela daquele*
23-24	João Andrade Nunes	*Os deveres de informação no mercado de valores mobiliários: o prospeto*
23-24	João Vieira dos Santos	*A união dos mercados de capitais e o Sistema Europeu de Supervisão Financeira*
27-28	Bruno Miguel Fernandes	*A garantia de depósitos bancários*
29	Álvaro Silveira de Meneses	*Leading the way through: the role of the European Central Bank as pendulum, shield and supervisor of the euro area*
31	Miguel da Câmara Machado	*Problemas, paradoxos e principais deveres na prevenção do branqueamento de capitais*
33-34	Katerina Lagaria	*Towards a single capital markets supervisor in the EU: the proposed extension of ESMA's supervisory powers*
33-34	Ivana Souto de Medeiros	*A resolução bancária e a salvaguarda do erário público na União Europeia: do bail–out ao bail–in*
33-34	Lucas Catharino de Assis	*A liberdade de circulação de capitais e a necessidade de se garantir a eficácia dos controles fiscais nas situações envolvendo Estados terceiros*
33-34	Frederico Machado Simões	*Sobre o novo regime do concurso de infrações no Código dos Valores Mobiliários e o Princípio do Ne Bis in Idem*
39	Lara Tobías Peña, José Luís Rodríguez López & Pedro Hinojo González	*Fintech and its Implications for Competition and Regulation*
40	Luís Guilherme Catarino	*Ofertas Públicas de Criptomoedas: FinTech, Tokens, Smart Contracts, Blockchain, and all that jazz…*
40	Armando Sumba	*A Regulação e Supervisão de Instituições de Microfinanças na África Ocidental*
41	Joana Vaz Baptista	*A adoção de sanções pecuniárias compulsórias pelo Banco Central Europeu no âmbito do Mecanismo Único de Supervisão*

45	Luís Catarino	*A cooperação na supervisão financeira da união do mercado de capitais – entre o experimentalismo e a governance*
50	Diogo Pina Chiquelho	*O whistleblowing interno nas instituições de crédito e as políticas de participação de irregularidades*

Seguros

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25	Catarina Baptista Gomes	*Os danos indemnizáveis no seguro financeiro*
25	Celina Isabel Dias Videira	*O seguro de responsabilidade civil profissional dos advogados*
25	Miguel Duarte Santos	*O beneficiário nos seguros de pessoas*
36	Maria Elisabete Ramos	*Distribuição de seguros, proteção do cliente e arbitragem regulatória*

Comunicações eletrónicas

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7-8	Ana Amante/João Vareda	*Switching Costs in the Portuguese Telecommunications Sector: Results from a Customer Survey*
11-12	Ana Proença Coelho	*Entre o dever de colaborar e o direito de não se autoinculpar: O caso da supervisão do ICP-ANACOM*
14-15	Manuel da Costa Cabral	*A governação da Internet e o posicionamento de Portugal*
14-15	Marta Moreira Dias	*Perspetiva sobre os 25 anos da Internet em .pt*
14-15	Victor Castro Rosa	*Digital Piracy and Intellectual Property Infringement: role, liability and obligations of Internet Service Providers. The evolution of European Case-Law*
14-15	David Silva Ramalho	*A investigação criminal na dark web*
19	João Confraria	*Perspetivas de mudança na regulação das comunicações*

Energia

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11-12	Miguel Sousa Ferro	*Nuclear Law at the European Court in the 21st Century*
13	Orlindo Francisco Borges	*Responsabilidade civil das sociedades de classificação por derrames petrolíferos causados por navios inspecionados: em busca de um claro regime entre o port state control e os contratos de classificação*
18	Filipe Matias Santos	*O comercializador de último recurso no contexto da liberalização dos mercados de eletricidade e gás natural*
44	Edson da Graça Francisco Macuácua & Octávio de Jesus Gonçalves	*Regime jurídico da regulação do setor de petróleo e gás em Moçambique*
46-47	João Lopes	*Choque de preços no gás e tempestade elétrica: reflexos nos consumidores e na segurança de abastecimento*
46-47	Lisa Pinto Ferreira	*Energy efficiency first: overcoming the hurdles?*
51	Edson da Graça Francisco Macuácua & Noé José Penete	*A Regulação do Sector do Petróleo em Moçambique: o Dilema entre o Instituto Nacional de Petróleo e a Alta Autoridade da Indústria Extrativa*

Saúde

N.º RCR	Autor	Título do Artigo
10	Olívio Mota Amador	*Desafios da regulação da saúde em Portugal nos tempos de crise*
30	Sofia Nogueira da Silva, Nuno Castro Marques & Álvaro Moreira da Silva	*O Tribunal da Concorrência, Regulação e Supervisão: visão da regulação em saúde*
42-43	Joaquim Miranda Sarmento & Diogo Nunes da Silva	*A eficiência dos hospitais em regime PPP em Portugal*

Autoridades Reguladoras e Tribunal da Concorrência, Regulação e Supervisão

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3	João Confraria	*Falhas do Estado e regulação independente*
6	Jorge André Carita Simão	*A responsabilidade civil das autoridades reguladoras*
7-8	Victor Calvete	*Entidades administrativas independentes: Smoke & Mirrors*
17	Luís Silva Morais	*Lei-Quadro das Autoridades Reguladoras – Algumas questões essenciais e justificação do perímetro do regime face às especificidades da supervisão financeira*
17	João Confraria	*Uma análise económica da Lei-Quadro das Autoridades Reguladoras Independentes*
17	Luis Guilherme Catarino	*O Novo Regime da Administração Independente: Quis custodiet ipsos custodes?*
17	Tânia Cardoso Simões	*Entidades reguladoras: Um ano de Lei-Quadro*
29	Nuno Cunha Rodrigues & Rui Guerra da Fonseca	*O quadro da responsabilidade civil extracontratual das entidades reguladoras do setor financeiro*
30	Francisca Van Dunem	*Prefácio ao dossier especial comemorativo do 5.º aniversário do TCRS*
30	Carla Câmara	*Tribunal da Concorrência, Regulação e Supervisão: quo vadis?*
30	Fernando Oliveira Silva & Fernando Batista	*A regulação dos setores da construção, do imobiliário e dos contratos públicos*
30	Luís Miguel Caldas, Marta Borges Campos, Alexandre Leite Baptista & Anabela Morão de Campo	*Âmbito e desafios do controlo jurisdicional do Tribunal da Concorrência Regulação e Supervisão: a vida íntima dos processos*
30	Miguel Sousa Ferro	*Tribunal da Concorrência, Regulação e Supervisão: uma análise jurídico–económica no seu 5.º aniversário*
30	Pedro Marques Bom & Ana Cruz Nogueira	*Cinco anos, cinco desafios*
30	Pedro Portugal Gaspar & Helena Sanches	*Deverão os recursos de todas as decisões contraordenacionais adotadas pela ASAE caírem na jurisdição do TCRS?*
30	Ricardo Gonçalves & Ana Lourenço	*Uma proposta de avaliação de impacto da criação do Tribunal da Concorrência, Regulação e Supervisão*

30	Sofia Nogueira da Silva, Nuno Castro Marques & Álvaro Moreira da Silva	*O Tribunal da Concorrência, Regulação e Supervisão: visão da regulação em saúde*
33-34	Raúl Vieira da Silva	*A independência orçamental das entidades reguladoras à luz da nova lei–quadro*
33-34	Miguel Pena Machete & Catarina Pinto Xavier	*Autoridade da Concorrência – dividir para reinar?*
33-34	Vicente Bagnoli	*Business strategies to improve antitrust compliance in Brazil and the approach of CADE to advocacy: the Car Wash investigation*
35	Fernando Pereira Ricardo	*As cativações e a autonomia administrativa e financeira das entidades reguladoras independentes (e da AdC em particular)*
42-43	José Luís da Cruz Vilaça & Mariana Martins Pereira	*Parental liability under the ECN+ Directive and its extension to accessory sanctions*
42-43	André Veloso Pedrosa, Francisco Espregueira Mendes & Rui Mesquita Guimarães	*O controlo das práticas restritivas da concorrência – nothing else matters?*
42-43	Luís Henrique	*A transposição da Diretiva ECN+ e o seu impacto no ordenamento jurídico nacional*
42-43	Joaquim Vieira Peres & Luís Nascimento Ferreira	*Água mole em pedra dura… mais um retoque na noção de empresa*
42-43	Nuno Ruiz	*A ECN+ não basta*
42-43	Luís Silva Morais & Lúcio Tomé Feteira	*Algumas notas sobre a Diretiva ECN+ e o seu processo de transposição para o ordenamento nacional*
42-43	Miguel Pena Machete, Catarina Pinto Xavier & Beatriz Belo	*Direito da concorrência: a necessária reforma por força da Diretiva ECN+*
42-43	João Pateira Ferreira	*The ECN@2.0. System failure ahead?*
44	Gonçalo Anastácio	*Projeto de transposição da Diretiva ECN+*
44	Inês Neves	*On the concept of "court or tribunal" for the purposes of article 267 of the TFEU: the status of National Competition Authorities, after the judgement of the Court of Justice in Case C–462/19*
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Regulação do comércio e concorrência desleal

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