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Enforcement of EU Competition Law during COVID crisis: cooperation among competitors, exploitative practices and consumer protection

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INTRODUCTION

The COVID-19 pandemic has triggered and led to a major economic downturn across many sectors, even exceeding the negative impact of the 2008 global financial crisis. The brutal disruption caused by the pandemic has provoked difficulties in the production and distribution of a number of essential products, which, together with increased demand, have had as consequence shortages. These supply and demand shocks may significantly influence how firms behave in markets for the supply of essential goods and services. Firms adjusting their strategies to these new market circumstances might require close scrutiny on the part of competition authorities. Competition rules play a significant role in the EU economy; furthermore, the role of competition authorities is even more fundamental role in assisting governments and contributing to a faster and more sustained economic recovery.

The research question of this dissertation focuses on the enforcement of EU antitrust rules during the COVID crisis. This dissertation analyses the state of antitrust enforcement during the COVID crisis and how it developed during this period, aiming to show that the monitoring activity of the competition authorities does not stop during a crisis, but instead the attention is even higher than usual. This dissertation specifically refers to the EU antitrust policy enshrined in Articles 101 and 102 of the Treaty of Functioning of the European Union ("TFEU"): according to Article 101 TFEU the agreements between undertakings, decisions by associations of undertakings and concerted practices which have as their object or effect the prevention, restriction or distortion of competition are incompatible with the internal market; Article 102 TFEU prohibits abusive behaviour by companies holding a dominant position on any given market.[1] The dissertation considers both legislative and jurisprudential instruments. In particular, it will be taken into account also soft-law measures like Guidelines, Notices and Communications of the Commission. With regards to the jurisprudential side, the case law of the Court of Justice of the EU (CJEU) and the Commission's practice have a key role for the analysis of the concerned issues. Great consideration will be given to the concrete recent actions and solutions of the National Competition Authorities ("NCAs") in order to know their enforcement approach towards COVID related antitrust issues. During the pandemic it emerged the necessity of an emergency approach for the enforcement of Articles 101 and 102 TFEU, and many NCAs clarified their will to adapt the competition rules to the exceptional

[1] On this point see, *ex multis*, A. PAPPALARDO, "*Il diritto della concorrenza dell'Unione europea*", Utet Giuridica, seconda edizione, 2018; R. WHISH, D. BAILEY, "*Competition Law*", tenth edition, 2021 Oxford University Press; B. CORTESE, F. FERRARO, P. MANZINI, "*Il diritto antitrust dell'Unione europea*", 2014; F. GHEZZI, G. OLIVIERI, "*Diritto antitrust*", 2019

circumstances caused by the pandemic, in particular for the healthcare sector. There are two main types of potentially problematic activities and antitrust issues in the context of the sanitary crisis: arrangements with competitors and exploitative practices, particularly exploitative pricing. On one side, the emergency may favour anticompetitive practices as the price increase for medicines, which creates the necessity of a more careful enforcement of the antitrust prohibitions. In order to not threaten the deterrence, it is necessary to make the undertakings aware that the enforcement is active even during the emergency phase. However, on the other side, the emergency highlighted the necessity of cooperative actions between undertakings aimed at coordinating the production and the distribution of essential products during the pandemic, which consequently requires a relaxation of the prohibition of Article 101 towards agreements among competitors. The market conditions provoked by the crisis may consequently make necessary that the undertakings cooperate between them, especially in the healthcare sector. Thus, during the COVID crisis, it will be seen a dual emergency approach of the competition law enforcers in Europe in the application of Articles 101 and 102: relaxation, flexibility and tolerance towards cooperative agreements aimed at filling up shortages of essential products, combined with absolute reluctance and rigidity towards excessive pricing practices. While clarifying that the cooperative agreements aimed at increasing the production and the distribution of COVID essential products would be permitted, it has been reminded, at both national and EU level, the stronger attention towards exploitative pricing practices.

As it was necessary to avoid that a rigid enforcement of antitrust rules hinders the cooperation among competitors which may help to face the effect of the crisis, most NCAs decided to adapt their enforcement priorities to the exceptional circumstances of the crisis, prioritizing the healthcare sector. In these exceptional circumstances, cooperation between undertakings may be in the public interest as Co-operation between private firms may be a way to address the sudden and severe disconnect between demand and supply during the COVID crisis.

While wishing to promote a wider range of efficiencies that this type of agreements may generate, competition authorities remain watchful that such co-operation does not spill over into hard-core restrictions of competition, such as price-fixing cartels. It will be taken into account the condition of the crisis-cartels, a special type of cartels which had been foreseen during previous crisis. The opposers to COVID crisis cartels assert that they apparently try to solve the crisis and the problems related to the supply of essential products, but they are actually a stratagem that the undertakings implement in order to make unfair profits. The

cartels are an example of agreements that do not benefit from the lenient approach adopted during the crisis, because they are considered anti-competitive and very harmful for consumers. In fact, the cartels do not help to enlarge the production, nor to restructure the supply chain and nor to favour the consumers, but they represent only a way to exploit the crisis and make unlawful profits.

As anticipated at EU level, the answers by antitrust enforcers have occurred showing openness to dialogue with the business community. In the present analysis many competition policy statements published during the crisis have to be considered as crucial element to explain the competition enforcement approach and priorities during the crisis. The most important are the ECN (European Competition Network) statement and the Temporary Framework, two soft-law and non-legislative documents. The ECN, with its statement, after having realised the necessity for the undertakings to cooperate in order to guarantee an equal and continuous distribution of scarce products, made clear that the products which are essential to protect consumers' health need to be sold at competitive and non-exorbitant prices; for this reason, the practices which exploit the crisis situation in order to make unlawful profits should be strongly sanctioned by the NCAs.

In this framework, a particular attention has been paid to the Temporary Framework for assessing antitrust issues related to COVID-19 outbreak published by the EU Commission to provide guidance to the market players during the crisis for the antitrust issues of both Articles 101 and 102. In the work it will be analysed how the Commission, using its capacity to identify investigative priorities, decided to distinguish the antitrust issues which emerged during the crisis identifying exploitative pricing practices as enforcement priorities, while the cooperative agreements benefited from a lenient and soft approach. The Commission, on one side confirmed that Articles 101 and 102 prohibit anticompetitive collusions and the abuses of dominance respectively, on the other opened to the possibilities of cooperation between undertakings. However, the cooperation has to be aimed only at solving the issues provoked by the emergency, to the advantage of the consumers. The framework provides the criteria for the assessment of the compatibility between the cooperation formed by undertakings and the EU competition rules, exempting the agreements aimed at efficiently increase the production and the distribution of products without hindering competition.

One of the many consequences of the COVID-19 crisis is the disruption of supply chains and the connected significant increase of the prices of essential products. Competition authorities are expected to intervene for sudden price increases during the crisis, and this may well be

justified when firms engage in exploitative behaviour without objective justification. Some competition authorities are empowered to act directly against exploitative pricing abuses under competition law. Exploitative pricing practices are considered very harmful and detrimental during the emergency. Immediately after the outbreak, at both EU and national level, it was assured that there would have been no tolerance for any abusive practice which tried to exploit crisis in order to charge excessive prices, and the enforcers adopted an intransigent approach. However, bringing excessive pricing cases is challenging even in normal times. Before bringing such cases, competition authorities should consider whether antitrust enforcement against high prices is needed, proportionate and effective. However, as it will be seen within this dissertation, Article 102 may concretely be unsuitable and ineffective for facing exploitative pricing practices related to the COVID emergency. The investigations during the crisis demonstrate that the characteristics of Article 102 do not allow a quick and effective repression of this type of practices.

This dissertation addresses also alternatives such as temporary dominance, consumer protection or even price regulation that competition authorities and governments may have at their disposal use to deal with the virus-profiteers. In particular, for the issues of Article 101, the consumer protection became a difference criterion for the tolerance of agreements which benefit consumers and the intransigence towards those which are strongly anticompetitive and detrimental for consumers (such as cartels). In fact, cartels are banned even during the crisis, due to their detrimental effect for consumers. The role of consumer protection concerning exploitative pricing is even more important because this type of practices may be very harmful for consumers. Within this dissertation it will be seen that consumer protection may be used as legal basis for the investigations of exploitative pricing, due to the difficulties of enforcing Article 102 towards these practices and contemporarily thanks to the characteristics of consumer protection rules which favour prompt and effective solutions towards these practices. It will be explored whether, unlike Article 102 TFEU, consumer protection instruments may allow to guarantee a more complete protection, going beyond the complexity and length of enforcing competition law for excessive pricing cases, and the difficulty of detecting dominant positions.

In the thorough analysis, as anticipated, the enforcement activity by the Member States (MSs) and by their national competition authorities during the crisis, considering the practical actions and solutions they adopted (especially with regard to undertakings which operate in sectors where there was a spike in demand of the products), will suggest comprehensive

considerations to the actual role of antitrust rule in the European scenario and its effective enforcement.

This dissertation is structured as follows.

After a brief introduction about the legislative and jurisprudential outline for agreements among competitors under EU competition law, Chapter I will consider the approaches towards agreements between competitors adopted at both EU and domestic level. With regards to EU level, it will be analysed the solutions adopted by the ECN and by the European Commission, while the actions of Member states which are taken into account are those of Italy and UK. Then, Chapter I will focus on anti-competitive agreements like cartels, and in particular on the crisis cartels and their admissibility during COVID crisis. The last part of Chapter I will describe the relationship between agreements and consumer protection, and the consumer protection issues raised by agreements during the crisis and in case law will be taken into consideration.

Chapter II, after a brief connotation of excessive pricing, considering both the treaties and the EU case law, will analyse what happened with high prices during COVID crisis. It will take into account different solutions for high prices during the crisis, considering the toolbox that the NCAs have at their disposal for their intervention, weighing the pros and cons of enforcing antitrust law in this exceptional situation. In fact, Chapter II will consider another legal basis that could be useful against excessive pricing: consumer protection, which may be the complementary legal basis to obstruct exploitative pricing practices, thanks to the fact that most of the NCAs have the competence for both competition law and consumer protection. Chapter II will lastly examine the Aspen case, a recent case for excessive pricing in pharmaceuticals, which becomes more relevant in the light of the COVID pricing issues of essential products.

Chapter III will take under scrutiny the antitrust actions adopted at both EU and domestic level for exploitative pricing. The soft-law measures and the investigations of EU bodies and of the NCAs will be taken into account. The chapter will focus on the enforcement activity to face the problem of exploitative pricing implemented at both the EU and domestic level during the COVID crisis. Particular attention will be given to the soft law measures of the ECN and of the EC, and to the activity of four MSs and on their NCAs, focusing on the different responses and solutions that they adopted to face excessive pricing and how they step up their enforcement against this practice. The concerned countries will be Italy, France, United Kingdom and Greece, but there will even be a brief look at a country outside the EU, South

Africa, whose action against exploitative pricing for the COVID related products could be very useful for the EU: during the COVID crisis, the national competition authority of South Africa was provided of ad hoc powers thanks to the adaptation of the pre-existing rules to the emergency period, in order to face COVID-related exploitative high pricing in a more efficient way.

CHAPTER I: COOPERATION AMONG COMPETITORS AND COVID

Between February and March 2020, an unprecedented sanitary emergency arose in Europe: COVID. Nobody could have imagined the outbreak of a pandemic and its consequent economic crisis. European countries were not well prepared to face this emergency, they did not have the essential products in stock, such as face masks, hand sanitizers, medicines, to protect people from the infection and reduce the spread of the virus.[2] Therefore, in the first weeks of the emergency, there was enormous demand but insufficient supply of these medical devices, which caused a temporary shortage[3]. Many firms were risking going into bankruptcy, it emerged the need to restructure sectors and to contemporarily provide sufficient quantities of essential goods for consumers. The exceptional circumstances of this crisis may trigger the need of undertakings, and especially competitors to cooperate between them. This chapter focuses on the agreements' situation during the COVID crisis. In particular, this chapter will analyse the role and the legitimacy of various form of cooperation between competitors during the crisis, considering them under the magnifying lens of competition acquis and in the view also of their ability to fulfil economics and consumerist aims. The legitimacy of agreements between competitors during the COVID crisis will be evaluated not only in light of the legal and formal competition rules, but also in light of the particular circumstances of COVID crisis and of the concrete benefits that the agreements generate for the economic recovery and for the consumers.

Being this dissertation focused on the antitrust enforcement during the COVID crisis, the purpose of this chapter is to shed light on one of the most important aspects of this enforcement within EU: the agreements between undertakings. In particular, the role of this chapter within this dissertation is to consider the situation of agreements among competitors during COVID crisis, which may be triggered by the will reach proper solutions concerning productivity after the disruption of supply chains and the demand shocks. However, agreements among competitors may be directed to restructure the supply chains after a sudden and deep sanitary and economic crisis, but also may be a way to exploit the exceptional situation of shock in order to make profits. The competition law enforcers at both national and EU level must avoid the risk of anticompetitive agreements which do not give any benefits during the crisis. The risk of anticompetitive agreements such as cartels during this particular period is high.

[2] See inter alia B. HALL, G. CHAZAN, D. DOMBEY, S. FLEMING, D. GHIGLIONE, M. JOHNSON, S. JONES, V. MALLET, "*How coronavirus exposed Europe's weaknesses*", Financial Times, 20 October 2020

[3] See on this topic Organisation for Economic Co-operation and Development ("OECD"), "*The face mask global value chain in the COVID-19 outbreak: Evidence and policy lessons*", 2020

Although the softened and lenient approach towards specific agreements, cartels (even special crisis cartels) are not included and are considered in the same manner as any other exploitative conducts. The enforcers give the green light for agreements, but their attention and intransigence for cartels and anti-competitive is still high. It is important to preserve consumer protection, especially during an emergency period. Thanks to the deep connection and mutual relevance that there is between competition law and consumer protection, the agreements between competitors, in order to be legitimate, must be in line with consumer interests, generating benefits for consumers or at least not going to their detriment.

The first paragraph of this chapter will consider the general approach of the EU legislation and EU case law towards agreements between undertakings. The most relevant rule to be considered is Article 101, which contains the general prohibition for anti-competitive agreements, but also contains an exemption for agreements which comply with specific criteria. Article 101 is the main basis of the agreements in EU, but this paragraph takes into consideration also important developments of case law which have contributed to shape the EU law for agreements between firms.

The main focus of the chapter will be on the agreements' situation during the COVID crisis. In particular the chapter considers the exceptional approach of competition law enforcement towards the agreements between competitors. This approach consists of keeping a strong enforcement of competition law even during the crisis, but with some exceptions. The policy that emerged was a sort of "relaxation" of competition law enforcement for some particular issues related to the COVID crisis. This relaxation consists in the non-enforcement or in a softened enforcement of competition rules towards some specific practices during the crisis and which are motivated by the crisis.[4] This relaxation did not consist in a general exemption for these practices or in the suspension of the application of competition rules, but consisted in the application of competition law whose intensity varied on the basis of the particular case and the particular practice. Therefore, the relaxation consists in setting enforcement priorities during this crisis, electing the investigative priorities and deciding to dedicate more attention to some competition law issues rather than to others. In particular, during the COVID crisis, as it will emerge from this dissertation, the European enforcers decide to deserve a different

[4] See for instance V. MELI, "*Il public interest nel diritto della concorrenza della UE*", Mercato Concorrenza Regole, Fascicolo 3, dicembre 2020, according to which systemic global events like the Covid pandemic have as consequence the need to waive the enforcement of the rules in force, or at least to adopt a more lenient approach towards the protection of competition, without focusing exclusively on the mere economic efficiency and productivity, but even prioritizing superior and new interests which are required to be considered through antitrust tools.

treatment towards agreements between competitors motivated by the crisis on one hand, and price increases of essential products on the others, giving them two different grades of priority showing a more lenient approach (i.e. a relaxation) towards the former and a very strict one towards practices involving excessive pricing. The setting of enforcement priorities is in line with the wide discretion that the Commission enjoys in assessing whether to open an investigation, as it can determine its own priorities in the exercise of its powers in the light of the criterion of community interest.[5] Thus, having the EU public interest as inspiring principle, the actions taken at the EU level and also by the National Competition Authorities (NCAs) of Member States (MSs) thought about a line of relaxation of the competition rules for agreements, allowing particular collaborations between competitors aimed at fighting the emergency and at solving the shortage of essential goods.

The second paragraph focuses on the provisions of relaxation of competition law adopted at the EU level for the agreements between competitors. The first reaction to be analysed will be the actions taken by the European Competition Network, which published a statement about the application of competition law during the crisis. The other two solutions adopted at the EU level were both adopted by the Commission. The first one is the Temporary Framework, the real guidance for undertakings and NCAs during the crisis, whose approach was for relaxing competition rules and allowing cooperation between competitors in specific cases, in order to find solutions against the crisis, in particular increasing production and distribution of essential products. The second document of the Commission are the Guidelines: they do not regard directly competition law, but, as they consider the relationship between demand and supply for essential goods, suggesting solutions to reducing shortage, they are important for this dissertation.

The third paragraph will look at the actions of the member states with regard to the agreements between competitors. The states to be analysed will be Italy and United Kingdom (UK). Despite Brexit and the fact that UK is today no more a Member State, this dissertation will consider the policy adopted by UK because the Withdrawal Agreement established that during the first period of the COVID crisis (and in particular until the 31st December 2020, the UK was still subject to EU competition rules in parallel with its national competition rules.[6] Moreover, this dissertation will look at the policy adopted by UK during the crisis also because

[5] See G. CODACCI PISANELLI "*Questioni di priorità: la Direttiva Ecn+ e la discrezionalità dell'Autorità di concorrenza nella selezione dei casi*" in Mercato Concorrenza Regole, Fascicolo 1, April 2021

[6] Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (2019/C 384 I/01)

the antitrust law has an Anglo-Saxon origin and UK has often represented an inspirational model in this branch of law. It is interesting to look at Italy and UK for the reactions adopted by them towards the crisis, they were the between the most active, publishing guidance documents and specific exemptions, but also enforcing competition rules in COVID related cases. Moreover, the nature of EU competition law consists in the mixture between the communitarian and the national dimension, therefore the actions taken by the national competition authorities have great relevance in this sector of law.

The fourth paragraph of this chapter will concretely focus on anti-competitive agreements during COVID crisis. It will compare the approach towards them both during normal times and during the current crisis. Then, the focus will be on the most famous form of anti-competitive agreement: the cartel.[7] In particular the paragraph will have regard for the figure of the cartels formed during the crisis. Thus, the paragraph compares how cartels have been treated during previous crises and how they are treated during the COVID crisis. It will emerge that historically crisis cartels, even being adopted in few cases, have been considered by the enforcers as unlawful and not as a proper solution during a time of crisis.

Lastly, there will be regard for the relationship between agreements and consumer protection. Consumer welfare and the protection of consumers are the fundamental basis and aim of competition law. The competition law enforcement should always be oriented towards the safeguard of those values. Especially during a crisis, it is essential to defend consumers' interests. The circumstances of the crisis and the exceptional measures taken by the undertakings in order to overcome the crisis, could alter the general equilibrium directly or indirectly provoking consumer harm. The measures undertaken could be aimed at recovering or gaining profits, but forgetting to take into consideration the interests and the protection of the consumers. This cannot be accepted. The lawfulness of agreements between competitors will be considered in relation with the satisfaction of consumers' interests and welfare. In fact, consumer protection issues raised by agreements during the crisis and in case law will be taken into consideration.

[7] On cartels see R. WHISH, D. BAILEY "*Competition Law*", tenth edition, 2021, Oxford University Press, Chapter 13, pp. 536-587; I. VAN BAEL, J. BELLIS, "*Competition Law of the European Union*", sixth edition, 2021, Kluwer Law International, Chapter 4, pp. 369 - 436; A. JONES, B. SUFRIN, N. DUNNE, "*EU Competition Law: Text, Cases, and Materials*", 7th Edition, 2019, Oxford University Press, Chapter 9, 642-701

1. AGREEMENTS BETWEEN COMPETITORS UNDER EU COMPETITION LAW: ARTICLE 101 TFEU AND CASE LAW

The Treaty of the Functioning of the European Union (TFEU), the developments of the Case law of the Court of Justice and Commission action contain the "acquis communautaire" for EU Competition Law. therefore, it is from these different sources, which combine the legislation and the executive and judicial results, that should derive the Eu antitrust corpus.

The legislative reference when talking about collusions between undertakings, is contained in the treaties and is the Article 101 of the TFEU. According to this Article, there may exist three types of practices which may have the capacity of restricting competition and they are: agreements between undertakings, decisions by associations of undertakings and concerted practices. These practices may restrict competition by for instance fixing prices, limiting production, sharing market. However, Article 101 can be divided in two parts, the first part entailing the prohibited collusions and practices between undertakings; instead, the second part provides an exemption for some specific agreements which comply with specific conditions. In particular, the third paragraph of Article 101(3) states that collusions between undertakings are not prohibited whether they cause some efficiencies, like the improvement of goods' production or distribution or the promotion of progress, from which benefit consumers. Moreover, the collusions receive exemption when they do not impose on the undertakings concerned unnecessary restrictions and when they do not give to undertakings the possibility to eliminate competition.[8]

An agreement needs to be assessed under Article 101 in two steps. The first step verifies whether an agreement between undertakings has either anti-competitive object or effects. If the agreement concerned is found to be anti-competitive, there is the second step which consists of searching potential pro-competitive benefits which are provoked by the agreements concerned and contemporarily are able to compensate for the anti-competitive effects, in order to grant the application of Article 101(3) to the concerned agreement.[9]

Moreover, the competence for the two concerned paragraphs of Article 101 is distinct. The Commission, being responsible for the implementation and orientation of EU competition policy, has exclusive competence to adopt decisions in implementation of Article 101(3);

[8] On article 101 of the Treaty of the Functioning of the European Union, see *ex multis* A. JONES, B. SUFRIN, N. DUNNE, "*EU Competition Law: Text, Cases, and Materials*", 7th Edition, 2019, Oxford University Press, Chapter 4 and 5 (pp.137-276); R. WHISH, D. BAILEY "*Competition Law*", tenth edition, 2021, Oxford University Press, Chapters 3 and 4 (pp-83-179)

[9] European Commission, Guidelines on the application of Article 101(3) TFEU (formerly Article 81(3) TEC), par. 11

however, the Commission does not have exclusive competence to apply Articles 101(1), sharing that competence with the national courts. The reason for this shared competence is that the first paragraph of Article 101 produces direct effect in relations between individuals and create rights directly in respect of the individuals concerned which the national courts must safeguard.[10]

An agreement between undertakings is capable of infringing competition when the undertakings commit themselves, even if the commitment is not materialized with an anti-competitive conduct.[11] An agreement exists under Article 101(1) even when the undertakings concerned have only agreed to behave on the market in a specific and common way.[12] In the Alborg Portland case, the Court of Justice of the European Union (CJUE) stated that "participation by an undertaking in anti-competitive practices and agreements constitutes an economic infringement designed to maximise its profits, generally by an intentional limitation of supply, an artificial division of the market and an artificial increase in prices." Anti-competitive agreements provoke the restriction of free competition and threaten the attainment of the common market, but they in particular provoke price increase and supply reduction, thus passing their harmful effects directly on to consumers.[13] An anti-competitive agreement is one of the type of collusions which can be prohibited under 101(1). This type of agreement reflects the common will of the parties to adopt a collusive and unlawful behaviour and it is realized through expressed manifestations of will (written or oral).[14] Article 101 applies whether a collusive practice between undertakings substitutes their autonomous commercial behaviour in the market. Collusion between undertakings is characterised by the common and conscious intention of the parties to alter market functioning and catalyse market power.[15] However, even parallel behaviour may be a collusion when there are no plausible explanation for such conduct.[16] When colluding, the undertakings know the behaviour of competitors and adopt uniform practices in a conscious way, threatening competition and altering the normal

[10] ECJ, Case C-234/89, Delimitis v. Henninger Bräu AG, ECLI:EU:C:1991:91
[11] GC, Case T-1/89, Rhône-Poulenc SA v Commission of the European Communities, ECLI:EU:T:1991:56, par. 107
[12] ECJ, Case T-41/96, Bayer AG v Commission of the European Communities, ECLI:EU:T:2000:242
[13] ECJ, 7 January 2004, C-204/00 P, Aalborg Portland A/S et. al. v Commission of the European Communities, ECLI:EU:C:2004:6
[14] S. LAMARCA, "*La disciplina dei cartelli nel diritto antitrust europeo ed italiano. Una guida teorico-pratica*", Giappichelli, 2017, p. 52
[15] *Ibid*., p. 49
[16] ECJ, Joined cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85, A. Ahlström Osakeyhtiö and others v Commission of the European Communities, ECLI:EU:C:1993:120, par 71

structure of the markets.[17] Collusion enables the undertakings involved to gain market power to the detriment of consumers, because collusion' consequences are mainly the increase of prices, supply reduction and the lack of incentive for innovation and research.[18] Secret collusions are the most severe violations of competition rules, prohibited by Article 101. Agreements involving price-fixing or market sharing are harmful for EU industry and for consumers. Moreover, those practices provoke increase of the prices of raw materials and weaken competitiveness.

The typical distinction for agreements is between horizontal and vertical agreements. The horizontal agreements involve two or more undertakings which operate at the same level of the productive or distributors process.[19] Thus, a typical example of horizontal agreement could be an agreement between two or more producers or between two or more distributors. Instead, the vertical agreements are those between undertakings which belong to different market levels but which are contemporarily linked, for instance an agreement between a producer and a distributor. Competition enforcers usually treat vertical agreements in a more favourable way than the horizontal ones. The reason is that the vertical agreements do not involve actual competitors and are likely to provoke efficiency benefits and pro-competitive effects.[20] However, as this chapter will demonstrate, not all the horizontal agreements breach competition law and, especially during the COVID crisis, the position of some categories of horizontal agreements have been revaluated. In fact, during the COVID crisis, most of competition authorities recognized the possibility for undertakings to coordinate between them in order to limit the shortages of essential products, anyway, impeding that the economic crisis could be used as a cover for cartels.[21]

Article 101(1) prohibits collusions which have as object or effect the restriction of competition. The ratio of Article 101(1) is not to prohibit tout court the cooperation between competitors, but rather to prevent collusive behaviours which are likely to alter in a significant way the competitive mechanism of the market and cause detriment to consumers.[22]

When a collusion restricts competition by object it means that the nature of the collusion is anticompetitive, and it is not necessary to do a concrete analysis to its effects. An agreement

[17] S. LAMARCA, "*La disciplina dei cartelli nel diritto antitrust europeo ed italiano. Una guida teorico-pratica*", Giappichelli, 2017, pp. 50-51
[18] *Ibid.*
[19] P. FATTORI, M. TODINO, "*La disciplina della concorrenza in Italia*", terza edizione, 2019, Il Mulino, p.96
[20] *Ibid*., pp. 130-131
[21] F. JENNY, "*Market adjustments, Competition Law and the Covid-19 Pandemic*", in Le concurrentialiste
[22] P. FATTORI, M. TODINO, "*La disciplina della concorrenza in Italia*", terza edizione, 2019, Il Mulino, p.58

restricting competition by object is presumed to be intrinsically anti-competitive and unlawful.[23] Practices which are usually considered to restrict competition by object, being hardcore restrictions, are: price fixing, market sharing, output restrictions, sales restrictions and information exchange on future prices and shares.[24] Those practices are thought to violate competition per se, without the necessity to analyse the effects that they produce. Some collusive behaviours, as price fixing cartels, do not require an analysis on their concrete effects on the market, because they have surely negative effects on prices, quantity and quality of the products.[25] However, it has also been affirmed that in order to define an agreement as a restriction by object, it is necessary a prior case-by-case analysis on the concrete circumstances.[26] An agreement is considered to restrict competition by object whether, in light of the economic context, it is likely that the competition would be weakened once the agreement concerned would enter into force.[27]

The best example of competition restriction by object is horizontal price fixing. It is considered as the most undesirable restrictive practice. Rarely in the past, it has been considered not as illegal per se, but rather as a source of stability and protection for firms against recession[28]. Instead, today it is a restriction of competition by object: EU case law assessed that price fixing agreement always restricts competition. In a really competitive market, the price of a good should not be the object of coordination or the outcome a collusion.[29] At national and European level, the anti-competitive collusions that affect price, are considered the most severe restriction of competition, because they impede the scope of competition which is to ensure that the price level keeps as low as possible.[30] Where cooperation is considered necessary due to the depressed circumstances of the market, it should be look at the possibility of applying Article 101(3). But price fixing agreements are unlikely to benefit from the exemption of Article 101(3), due to their elimination of the autonomy of strategic decision making and

[23] S. LAMARCA, "*La disciplina dei cartelli nel diritto antitrust europeo ed italiano. Una guida teorico-pratica*", Giappichelli, 2017, p.65
[24] European Commission, Staff Working Document, Guidance on restrictions of competition "by object" for the purpose of defining which agreements may benefit from the De Minimis Notice
[25] ECJ, 11 September 2014, Case C-67/13 P., Groupement des cartes bancaires (CB) v European Commission, ECLI:EU:C:2014:2204
[26] ECJ, 14 March 2013, Case C-32/11, Allianz Hungária Biztosító Zrt. and Others v Gazdasági Versenyhivatal, ECLI:EU:C:2012:663
[27] *Ibid.*
[28] I. RAKIĆ, "*Competition Law in the Age of Covid-19*", 30 April 2020, Anali Pravnog fakulteta u Beogradu, 2/2020, p. 33
[29] S. LAMARCA, "*La disciplina dei cartelli nel diritto antitrust europeo ed italiano. Una guida teorico-pratica*", Giappichelli, 2017, p. 134
[30] See for instance ECJ, Case C-48/69, Imperial Chemical Industries ("ICI") Ltd. v Commission of the European Communities., ECLI:EU:C:1972:70, par. 115; see also Cons. Stato, sent. 2006, n. 1397 (test diagnostici per diabetici)

competitive conduct. Moreover, price fixing is excluded from block exemption, but in few cases the Commission has allowed price fixing agreements under Article 101(3).[31] Even an exchange of information among undertakings which compete between them may constitute a restriction of competition by object when this exchange can concretely restrict competition, having regard of the particular legal and economic context in question.[32] The policy to adopt on the common market must be chosen and determined independently by each economic operator. This condition of independence avoids inappropriate contacts between undertakings, thus precluding influence between competitors or disclosure of intentions or decisions concerning their own conduct on the market. The object or effect of those exchanges of information would be to alter competition, considering the nature of the products or services offered and the dimension of the market.[33] However, information exchanges between undertakings do not constitute a collusion and they have been allowed during the pandemic. Knowing competitors' prices may encourage an undertaking to improve its efficiency and the competitiveness of its offer in order to attract the competitors' costumers. [34]

The agreements restricting competition by effect constitute a residual category of restrictions. In fact, an agreement, when is not considered a restriction by object, it is prohibited if produces effects which restrict competition. [35] For a correct distinction between a restriction by object or by effect, it is necessary to look at the content of the agreement, at its objectives, at its economic and legal context, at the nature of the products concerned, and at the real conditions of the market in question.[36]

Moreover, in order to fall under the prohibition of Article 101(1), the competition restraint deriving from a collusion having anticompetitive object or effect needs to affect trade between member states. It is even necessary that the collusion determine an appreciable effect on competition of EU market; if it does not, it is not able to reach the de minimis requisite. The de minims collusions are usually done by undertakings having insignificant market shares,

[31] R. WHISH, D. BAILEY, "*Competition Law*", Tenth edition, 2021, Oxford University Press, pp. 547-558
[32] Case law about exchange of information, see for example, ECJ, Case C-8/08 T-Mobile Netherlands BV v Raad van Bestuur van de Nederlandse Mededingingsautoriteit [2009] ECR I-4529, ECLI:EU:C:2009:343
[33] *Ibid*., par.32-33
[34] S. LAMARCA, "*La disciplina dei cartelli nel diritto antitrust europeo ed italiano. Una guida teorico-pratica*", Giappichelli, 2017, p.103
[35] On Case law about restriction of competition by effect, see for example, ECJ, Case C-234/89, Delimitis v. Henninger, ECLI:EU:C:1991:91
[36] Case law identifies the criteria in order to distinguish between restriction by object and restriction by effect, see for example ECJ, Case C-32/11, Allianz Hungária Biztosító Zrt. and Others v Gazdasági Versenyhivatal, ECLI:EU:C:2012:663

provoke insignificant effects on the market and are thus unlikely to cause an appreciable adverse effect on competition in the market.[37]

In conclusion, when an agreement satisfies all the conditions of Article 101(1), it must be prohibited. Avoiding anti-competitive collusions, which constitute serious violations of EU law, satisfies the general interest: they have to be discovered and sanctioned.[38]

2. AGREEMENTS DURING COVID: THE ENFORCEMENT OF ARTICLE 101 DURING THE CRISIS

Article 101 TFEU is the legislative reference for agreements between undertakings. It has two different sides: the prohibition in Article 101(1) and the exemption for some specific forms of cooperation satisfying particular requirements in Article 101(3). This chapter focuses on the enforcement of both sides of this Article during the COVID crisis. There will be a look in particular towards the solutions adopted at both EU and national level. Mainly, both follow the same direction, that is to say a general leniency and exemption for cooperative agreements which satisfy some specific conditions. The most important condition for the agreements to comply with were to be aimed at improving the supply of essential goods. Therefore, in Europe during the crisis, there was a temporary modification of the competition rules, deciding to allow agreements that in normal times would not have been sure. Generally, it emerged a relaxation of the first paragraph of Article 101 and an extension of the third paragraph of that Article for some type of agreements which were able to comply with some specific conditions. However, apart from this specific type of agreements, all the other anti-competitive agreements remained illegal, not benefiting of the relaxation. The anti-competitive agreements which severely restrict competition were unlawful even during crisis, while some specific agreements, in order to benefit both consumers and undertakings, were not recognized as enforcement priorities of the competition institution and authorities. The best example are some specific forms of horizontal agreements. Even if horizontal agreements between competitors are typically considered a delicate topic under antitrust, this type of agreement it is not inevitably restrictive. Actually, they may have a pro-competitive value, when, for instance, they provoke efficiencies or other benefits for consumers without threatening competition. [39] Even in normal times and not necessarily during the COVID crisis, for some specific cooperation agreements, the parties may be direct competitors even benefiting of

[37] Y. VARDHAN GARU, K. HARWANI, "*Crisis Cartel and State Aid: An Alternative to Competition Authority during COVID-19 Pandemic*", The SCC Online Blog, 10 August 2021

[38] See for instance, ECJ, C-204/00 P, Aalborg Portland A/S et. al. v Commission of the European Communities, ECLI:EU:C:2005:752, par. 54

[39] P. FATTORI, M. TODINO, "*La disciplina della concorrenza in Italia*", terza edizione, 2019, Il Mulino, p. 115

cooperation. Anyway, the agreements need to be assessed on a case-by-case basis, having regard of the particular circumstances of the market concerned and of the market position of the undertakings concerned.[40] Despite the necessity of assessing horizontal agreements and their compatibility with competition rules on an ad hoc basis, there are general yardsticks which help to assess them. Firstly, it is necessary to value the direct effects of the agreement on the market concerned, considering the market power which derives from the agreement. Then, the focus is about the possibilities of competitors to commercialize, assessing whether the agreement is likely to foreclose them. Thirdly it should be taken into account which is the market level in which the agreement operates. The reason is that an agreement between producers and wholesalers leaves more autonomy to the parties than an agreement between distributors and retailers; the latter is generally considered as a means of mere coordination of trade policies. Lastly, when the agreements concerned affect competition strongly, it is necessary to assess whether the objective of the cooperative project could be reached individually by the parties.[41]

During COVID crisis, some connections between competitors may be particularly desirable. In particular, some horizontal agreements may be a benefit for consumers and for the markets Cooperation practices allow to share costs and risks in order to pursue common objectives.[42] An example of a beneficial agreement may be an agreement between pharmaceutical companies aimed at developing a new and better medicine, combining research and development effort. With horizontal cooperation agreement, companies may share risk, save costs, increase investments, enhance product quality and variety, and innovate faster. Therefore, this type of agreement produces both restriction of competition and efficiencies gains, but the latter can surpass the former in many cases. Moreover, the benefits produced by cooperation among competitors may not be purely economic and valued very positively. During COVID crisis, despite the different approaches, competition authorities generally refused to prosecute horizontal cooperation agreements which were aimed at solving shortages for essential products during the crisis. [43]

[40] *Ibid.*
[41] *Ibid.*, pp. 115-116
[42] A. PAPPALARDO, "*Il diritto della concorrenza dell'Unione Europea*", Utet Giuridica, seconda edizione, 2018, p. 138
[43] See F. JENNY, "*Market adjustments, Competition Law and the Covid-19 Pandemic*", in Le Concurrentialiste; F. JENNY, "*Covid-19 and the Future of Competition Law Enforcement*", Competition Law International, 2020, Vol.16, Issue 1, pp. 7-20

A category of typical horizontal agreements which would become relevant during COVID crisis may be the R&D (research and development) agreements. During the COVID crisis, R&D agreement may consist in temporarily pooling resources and joining investment efforts with the aim to create a new product (for example, new vaccine, new treatment or medical equipment to treat severe and urgent cases) or to provide an innovative response to the crisis.[44] This type of agreement is allowed, according to the ratio that if firms combine their skills, experience and know-how in a cooperative R&D project, they are more efficient than individually. This type of agreement benefits of the exemption under Article 101(3) when it creates technical and economic progress and benefits to the consumers. Therefore, an NCA does not prohibit a cooperation between pharmaceutical firms that would be aimed at producing a vaccine against COVID.[45] Moreover, the Commission adopted a Block exemption for R&D agreements, according to which R&D agreements are likely to infringe Article 101(1) only when they are a tool to engage in a cartel, when the competitors have high market power or when they have as object the price-fixing.[46] Temporary Framework or ECN joint statement do not refer specifically to collaboration in the field of research and development (R&D) in respect to vaccines and medicines that are essential products to tackle the pandemic. However, this type of agreement should be considered as allowed and hoped for by the European authorities in order to recover for the crisis. Through the combination of efforts between the competitors there could be the development of new resources of which consumers may gain high benefit.[47]

The Commission has recognized that information exchange may generate efficiency gains in competitive markets, such as solving information asymmetries, helping companies to enable quicker delivery or to deal with unstable demand and improving choice for consumers. [48] Exchange of info may be a great benefit for competitors, consumers and the whole competitive process. The greater quantity of information that the competitors have at their disposal would allow them to easily make rational and effective decisions on their production and marketing strategies.[49] However, some types of information exchange may have the object of restricting competition. The competition concerns created by them are the possibility for undertakings to

[44] See OECD, "*Co-operation between competitors in the time of COVID-19*", 2020
[45] R. WHISH, D. BAILEY, "*Competition Law*" Tenth edition, 2021, Oxford University Press, p. 621
[46] R. WHISH, D. BAILEY, "*Competition Law*", Tenth edition, 2021, Oxford University Press, pp 620-626
[47] M. KOZAK, "*Competition Law and the COVID-19 Pandemic – Towards More Room for Public Interest Objectives?*", Utrecht Law Review, 2021, Volume 17, Issue 3, pp. 118– 129
[48] European Commission, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, par 57
[49] R. WHISH, D. BAILEY, "*Competition Law*" Tenth edition, 2021, Oxford University Press, p.568

predict each other's future behaviour and to coordinate their behaviour on the market.[50] For this reason the Commission has traditionally been suspicious of the exchange of commercial information between competitors. Exchanging information about competitors' market strategies may be a restriction of competition. High transparency in a market produces anti-competitive effects. Anyway, the unlawfulness of information exchange depends on which information is exchanged and in which market and is thus necessary to consider each case on its own merits in order to distinguish between the exchanges that have a beneficial (or neutral) effect upon efficiency which facilitate collusion, affecting negatively the competitive process.[51] Information exchange may be involved in a cartel. For instance, sharing information about future pricing or about capacity among competitors may amount to a cartel.[52] The exchange of info enables member of a cartel to be sure that each of them is complying with the agreed rules. Even a unilateral disclosure of strategic information can give rise to a unlawful collusion, because it is presumed that, by receiving an information from a competitor, a firm adapts its future conduct on the market. Similarly, any discussion among competitors about their prices is likely to be regarded as giving rise to an anti-competitive price fixing agreement. Two members of a cartel do not need to have explicitly agreed that they will increase their prices but the mere fact of exchanging information between them about future pricing behaviour is likely to be sufficient for a finding of an agreement on prices.[53]

An information agreement may satisfy the criteria of Article 101(3) when the information exchange is aimed at ensuring an optimal allocation of resources, reducing any mismatch between demand and supply.[54] A situation like that happened during COVID: with its Temporary Framework the Commission recognized information exchanges among competitors as necessary and helpful in order to ensure better allocation, increase production and distribution of essential COVID related products.[55] The EU Commission was perfectly conscious that exchanges of commercially sensitive information among competitors are normally a restriction of competition law, but contemporarily recognizing that during the COVID crisis these exchanges may facilitate production, stock management and distribution in the industry. However, these exchanges of information are still an enforcement priority of

[50] *Ibid.*, p. 570
[51] I.VAN BAEL & J. BELLIS, "*Competition Law of the European Union*", sixth edition, 2021, Kluwer Law International, pp. 408-409
[52] *Ibid.*
[53] R. Whish, D. Bailey, "Competition Law", Tenth edition, 2021, Oxford University Press, p. 572
[54] *Ibid.*, p. 574
[55] European Commission, Temporary Framework for assessing antitrust issues related to business cooperation in response to situations of urgency stemming from the current COVID-19 outbreak

the Commission unless they are temporary, necessary and proportionate for efficiently solving shortages of essential goods. [56]

2.1 COVID-RELATED EXEMPTIONS UNDER EU ANTITRUST LAW

Articles 101 and 102 TFEU do not allow exemptions during emergency periods and the antitrust enforcement is still active during a crisis. During the COVID crisis, both the European Commission and the EU NCAs, clarified that the antitrust rules remain applicable, and that the enforcement is stricter in order to avoid exploitative behaviours, especially from undertakings that operate in sectors in which COVID caused a very high demand. However, market settings created by the pandemic may cause the need of greater cooperation between undertakings, especially in some economic sectors. Cooperation between undertakings may be necessary to face the effects of the crisis and for this reason many NCAs clarified their will to adapt the competition rules to the exceptional circumstances caused by the pandemic, especially in the health care sector.[57]

For instance, with the Temporary Framework, the EU Commission identifies the criteria in order to analyse under art 101 the cooperation agreements that the undertakings want to establish in order to increase the production and contrast the shortage of essential products. The Temporary Framework distinguishes between some forms of agreements which, due to COVID, are now temporary lawful, and others that are still prohibited even during the emergency period. The Commission allows cooperation in the health sectors, guaranteeing exemptions for undertakings. Thus, they were allowed to coordinate joint transport for input materials, to identify those essential medicines for which, there are risks of shortages, join production, capacity and supply gap information, but anyway without exchanging individual company information. The aim of these concessions was exclusively to find allied solutions in order to meet demand, through stocks or by increasing production.[58]

The long-term benefits of protecting competition are lower and less important than sacrifice competition in the short run, allowing agreements which may help to meet the high demand of essential medicine with their sufficient supply and fairer distribution[59]. During a crisis like COVID, letting the competitive market adjust spontaneously is not possible. It is necessary to

[56] F. Jenny, "Market adjustments, Competition Law and the Covid-19 Pandemic", Le concurrentialiste, 2020
[57] L. CALZOLARI, "*L'influenza del Covid-19 sulla politica di concorrenza: difese immunitarie o anche altro?",* 26 April 2020, Sidiblog
[58] European Commission, Temporary Framework for assessing antitrust issues related to business cooperation in response to situations of urgency stemming from the current COVID-19 outbreak, par. 12
[59] F. JENNY, "*Introduction*", in Concurrences Review, special issue "Competition Law and Health Crisis", n. 2/2020

introduce short term disruption of the competitive process because the short run costs to consumers of letting the market autonomously adjust would be very high. Some jurisdictions even considered competition law inadequate and insufficiently flexible for collusion in a period of deep crisis and thus, and thus decided to suspend the application of the competition law in key sectors to facilitate the coordination between undertakings.[60]

2.2 THE APPROACH TOWARDS COMPETITORS' AGREEMENTS ADOPTED AT EU LEVEL: EUROPEAN COMPETITION NETWORK AND EU COMMISSION IMPLEMENTED THEIR SOFT-LAW POWERS

EU Competition law is a branch of EU law affected by both European enforcers and by the actions of the NCAs. Due to this characteristic, it is essential to look at the solutions and the policies adopted at both EU and national level. In particular, the Commission has been recognized as the antitrust law enforcers by the Regulation 1/2003, but with the purpose of effectively applying EU competition rules, the NCAs are empowered to apply Articles 101 and 102 on individual cases.[61] There is a dual aspect of competition law, which founds itself on the cooperation between Commission, which is the main enforcer at EU level, and the National competition authorities, with the aim to guarantee an efficient application and enforcement of competition law in EU.[62] Moreover, the Commission and the NCAs both cooperate within the European competition network. Therefore, this paragraph, being dedicated to the antitrust responses of the EU bodies, will consider the ventures of ECN and EU Commission. During the crisis they only adopted relevant soft-law measures in response to the emergency and to provide important information and clarification about the practice of Commission and NCAs during that difficult period. The focus of the paragraph will be on three antitrust soft-law documents adopted at EU level by the two EU bodies concerned since the beginning of the COVID crisis. The first document is the joint statement adopted by the European Commission and the national competition authorities within the European Competition Network. This statement, even being short, was aimed at providing a first guidance for undertakings during the first weeks of shock caused by the COVID crisis. It tried to let the undertakings know more about the focal issues of competition law during that period. The second document is the Temporary Framework adopted by the Commission. The content of the framework is more complete and more precise than the ECN statement and became the reference point for undertakings and NCAs during the crisis, informing them in a precise way

[60] F. JENNY, "*Market adjustments, Competition Law and the Covid-19 Pandemic*", Le Concurrentialiste, 2020
[61] See Council Regulation (EC) No 1/2003, in particular article 4 and Recital 6
[62] See Council Regulation (EC) No 1/2003, in particular article 11

about the dos and don'ts for antitrust issues during such a difficult period. The last document are the Guidelines adopted by the Commission. Those guidelines were aimed at guiding undertakings about how behave in order to guarantee the optimal and rational supply of medicines and to avoid shortages during the COVID-19 outbreak. Those guidelines combine perfectly with Framework, in order to steer the undertakings' behaviour towards the compliance of the fundamental aims of balancing demand and supply after their shocks and providing to consumers a sufficient supply of essential materials.

2.2.1 THE JOINT STATEMENT ON THE APPLICATION OF COMPETITION LAW DURING THE COVID-19 CRISIS ISSUED BY THE EUROPEAN COMPETITION NETWORK

The European competition network ("ECN") is a network through which the European Commission and the national competition authorities of all EU member states cooperate. In particular, it is the network of public authorities formed by the NCAs and the Commission, which provides a discussion and cooperation forum for the application and enforcement of antitrust[63]. The activities within ECN can help the NCAs to gain the powers they need in order to be more effective enforcers.[64]

The ECN was the first EU body that tried to regulate the antitrust policy in EU during COVID crisis publishing its policy statement on 23 March 2020.[65] This statement was of one page only and become a clear and useful guidance for both undertakings and NCAs, on how to face the COVID emergency as first impact. The statement is composed by only 6 bullet points, but each point is relevant to understand the position of the ECN about the competition policy to adopt in order to have an efficient reaction against the crisis. As the ECN is the network formed together by the Commission and the competition authorities of the Member States in quality of EU competition law public enforcers applying the Community competition rules in close cooperation, this document gains great value by virtue of being a joint document of both Commission and NCAs, thus providing information to undertakings about the EU antitrust policy during the COVID crisis. Even being a soft-law measure, distancing themselves from

[63] See Directive (EU) 2019/1 (the so-called "ECN+ Directive"), article 2; for more information about how the ECN works see R. WHISH, D. BAILEY, "*Competition Law*" 2021, tenth edition, Oxford University Press, p. 303; L. CALZOLARI, "*Il sistema di enforcement delle regole di concorrenza dell'Unione europea. Deterrenza, compensazione e tutela della struttura di mercato alla luce della dir. n. 2014/104/UE e della dir. (UE) n. 2019/1*", Giappichelli, 2019

[64] The Commission Notice on cooperation within the Network of Competition Authorities (2004) clarified the criteria of allocation of cases with community dimension between the Commission and the NCAs

[65] European Competition Network, Antitrust: Joint statement by the European Competition Network (ECN) on application of competition law during the Corona crisis, 23 March 2020

this guidance document would mean to go against a line of action upon which Commission and NCAs together have agreed.

The ECN started the statement by understanding that this crisis is not only a sanitary crisis, but it is equally an economic and social crisis that suddenly upset people's lives. The crisis does not delete the competition rules existing in Europe: even during a crisis, the competition law policy and its objectives must be still alive.

The ECN in its statement concentrate on 2 main issues for competition law: the cooperation between companies and the increasing of prices. In fact, the ECN is fully aware that during this situation of crisis, companies could need to cooperate between them. This cooperation could be helpful both for companies and consumers because it can allow companies to satisfy the huge demand of consumers for essential products. Due to the sudden crisis, most of companies could be unprepared to face the productions and distributions rhythms caused by the crisis. A possible solution could be to join their means, so as to try to fulfil the high demand and even avoid/reduce financial problems by splitting the costs. The ECN recognizes that those cooperative agreements between companies does not constitute a violation of EU competition law, in particular of Article 101. Thanks to the fact that those collaborations are necessary during a period of crisis and generate efficiencies, they will not be punished by the EC or by the national competition authorities as violations of 101. In fact, those forms of cooperation are created in order to provide to consumers a fast and fair supply of essential medical tools, so the competent authorities justify those collaborations.

The ECN members justified their non-intervention for the cooperative measures adopted during the COVID crisis with the unlikelihood that those measures cause problems to competition law, thanks to two alternative characteristics. First, those measures would not be qualified as restriction of competition under Article 101 TFEU; alternatively, they would produce efficiencies which reward any such restriction.

The ECN invited companies which are doubtful about the compatibility of cooperation initiatives with EU competition law to ask for informal guidance to the Commission or to the NCA concerned. In this way the ECN encourages for a constructive relationship between market players on one hand, and the regulators and the enforcers on the other, trying to address the former towards concrete solutions that would be necessary to recover from the crisis but that contemporarily do not violate any rules.

According to the statement, facilitating a fair distribution of goods or services may also justify the cooperation of competitors. Cooperation measures, necessary and temporary, which have as object that fair distribution, do not cause the intervention of the authorities because they do not constitute a restriction of Article 101 TFEU or they can generate efficiencies whose value rewards the restrictions.

The ECN inserted in the statement a criterion for distinguishing between what is anticompetitive and what instead contributes to economic progress, based on "the current circumstances". In fact, according to this criterion the distinction should happen taking into consideration the particular circumstances of the concrete case, which correspond to the main factor in order to decide about the legitimacy and the utility of an agreement between competitors. However, this idea contrast with the recent tendency because the line of action of most of the national competition authorities which cooperate within the ECN, when adopting infringement decisions regarding agreements, exchange of information or collusion cases over the last twenty years, was to consider horizontal practices as per se violations of competition law, without recognizing the possibility of an efficiency-based defence. Thus, the recent trend before the COVID crisis of the EU NCAs consists in not considering the circumstances in which the concerned horizontal practices were implemented.

From the words of the ECN statement is possible to deduce that the competition restrictions caused by the temporary horizontal cooperative measures between competitors aimed at avoiding supply shortages would be outweighed by the generated efficiencies. However, this justification is surprising because in the past, many EU NCAs did not recognise the creation of efficiencies to the agreements between medicine suppliers. They nor consider that these efficiencies were able to reward the restraints. For instance, the Spanish competition authority qualified an agreement between an association of pharmacists and a regional health service as an illegal market sharing agreement.[66] Anyway, the circumstances of this Spanish case were different from the today situation. In fact, the Spanish decision, but also other past decisions of the EU NCAs, were not influenced by a global pandemic. The COVID situation is not comparable to any other situation of the recent past, due to the fact that during COVID the markets for medical supplies are affected by massive shortages. Thus, the justifications of balancing supply and demand or of ensuring a fairer distribution of the medical services did not seem to be sufficiently credible during the past cases to outweigh the competition restraints

[66] Comisión Nacional De La Competencia, Resolución (Expte. 639/08 Colegio Farmacéuticos Castilla-La Mancha), 14 April 2009

that they caused. Moreover, they dealt with practices which restrict the expansion of output, while, during COVID, the agreements are aimed to expand the output of the participating firms and to alleviate the acute shortage. Therefore, it is not easy to compare past decisions with today due to the diversity of circumstances when there is a deadly pandemic and a huge short-term disequilibrium between supply and demand for essential products to face the pandemic.[67]

The last bullet point of the ECN joint statement, aiming at mitigating and avoiding unreasonable price rise at the distribution level, admit the possibility for manufacturers to set maximum prices for their products. Fixing a reasonable maximum resale price ceiling would allow consumers to buy the products at affordable prices. This ceiling would also guarantee that consumers are not exploited by the resellers. This provision tried to solve the problem of price spike of essential COVID related products, in order to control prices; however, in order to control the prices at the distribution level, the ECN is available to allow a practice that is normally unlawful: the resale price maintenance.[68] The ECN statement pointed out that also the existing rules on vertical agreements allow manufacturers to set maximum prices for their products. These expression "existing rules" in the ECN statement need to be applied carefully. Generally, even in normal times, vertical resale price is not prohibited as a vertical restraint. According to the EU Vertical Agreements Block Exemption, fixed resale price is qualified as hardcore restriction, instead a supplier can impose maximum prices above which its retailers or distributors may not resell the products. The conditions for allowing maximum resale price are that it does not amount to a fixed or minimum resale price and that provided the supplier and retailers remain have market shares below 30 percent.[69] Moreover, according to EU competition soft law, maximum prices may be a risk for competition when it is followed by most or all of the resellers and when it facilitates collusion between suppliers.[70] In fact, it may happen that, due to the strong market position of the supplier, the resellers may uniform to the

[67] F. JENNY, "*Competition Law Enforcement and the Covid-19 Crisis: Business as (Un)usual?"*, 20 May 2020

[68] For more information about Resale Price Maintenance, see A. FLETCHER, "*Resale price maintenance: Explaining the controversy, and small steps towards a more nuanced policy*", Fordham International Law Journal, 2009, Volume 33, Issue 4, pp. 1278-1299

[69] See Commission Regulation (EU) No 330/2010, article 3 and 4; For an overview on this topic see R. WHISH, D. BAILEY, "*Competition Law*", Tenth edition, 2021, Oxford University Press, p.681

[70] European Commission, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, par 227; see also A. FLETCHER, "*Resale price maintenance: Explaining the controversy, and small steps towards a more nuanced policy*", Fordham International Law Journal, 2009, Volume 33, Issue 4, pp. 1290-1291, according to which Resale Price Maintenance may risk to facilitate both upstream and downstream collusion: with regards to upstream collusion, producers can use RPM as a facilitating practice for collusion since it brings the publicly observable element of price under their control; instead, with regards to downstream collusion, resellers which want to collude can use the imposition of multiple RPM agreements by an upstream firm to facilitate downstream price collusion.

maximum price, finding difficult to deviate from it.[71] However, even when maximum resale prices cause appreciable anti-competitive effects, they can benefit from the exemption under Article 101(3) because, for instance, the imposition of maximum resale price on the retailer may be a solution for his too high pricing.[72] The vertical resale price agreement is promoted during COVID crisis by ECN and also by many NCAs. The Greek Competition Authority, in line with the EU legislation, allows the imposition of maximum resale prices or recommended resale prices where this does not amount to a minimum or fixed selling price due: thus, during the crisis and its correlated social and economic conditions, it expressly qualifies as acceptable the maximum retail prices set by the manufacturer of personal hygiene products and by the producer in a food distribution network.[73] The British Competition Regulator in its guidance for cooperation affirmed that manufacturers are allowed during the crisis to set maximum prices at which retailers may sell their products.[74]

Only few days after the publication of the joint statement by the European competition network, The International competition network ("ICN") adopted a very similar statement about the competition situation during crisis and in order to give some solutions on this field.[75] The ICN is a network composed by the national competition authorities of most of the countries of the world and whose aim is to help the cooperation between them.[76] Even if the ICN is an informal network, its statement is taken into considerations by its members states when adopting their respective competition policies. Even the Commission is part of the ECN so the ICN's statement can be very important for the EU NCAs. With its statement the ICN tried to provide a worldwide guidance for the NCAs and companies on how to manage in this particular situation of crisis.

In fact, the ICN is perfectly conscious of the exceptional situation, with a crisis that is both sanitary and economic. This circumstance will be particularly challenging for the work of the NCAs. The ICN highlights the reason why competition law is fundamental especially in a period of crisis: competition guarantees lower and competitive prices to consumers, so they

[71] *Ibid*., par. 228
[72] *Ibid.*, par. 229
[73] HCC, Press Release: Application of competition rules to supply contracts and distribution agreements (vertical agreements), 16 March 2020
[74] Competition and Market Authority, "CMA approach to business cooperation in response to COVID-19", 25 March 2020, par 2.7
[75] ICN, Steering Group Statement: Competition during and after the COVID-19 Pandemic, 8 April 2020
[76] For more information about the structure and the background of the ICN, see R. Whish, D. Bailey, "Competition Law", Tenth edition, 2021, Oxford University Press, pp.1-2 and 514

benefit from the incessant application of this sector of the law. The main message of this statement is that the authorities will remain vigilant about increasing prices[77].

The ICN recognized the possibility for competitors to temporarily cooperate in order to provide and distribute to consumers sufficient quantities of essential resources during the crisis. However, that cooperation has to be limited: it has to be temporary and proportionate for solving the issues created by the emergency. Allowing specific types of agreements does not mean that competition would be widely relaxed, because keeping competition enforcement alive during the crisis is necessary to favour consumers and market functioning. The crisis should not be an opportunity for exploitation and cartels; instead, during crisis, competition law must still be protected, allowing only few relaxations that would be functional to fundamental aims like the reduction of shortages and the consumer welfare. In fact, if a cooperation would allow to make available for consumers sufficient quantities of essential products at reasonable prices during a crisis, it should be allowed.

The ICN observed that the peculiar situation created by the COVID crisis can become an opportunity for anti-competitive conducts of companies that would try to exploit the crisis by cartelising or by abusing their dominant positions. In particular, these companies could excessively raise the prices of essential products, making them unfair and harmful for consumers. In addition to guaranteeing the fair and not excessive prices of essential products, it is also crucial/necessary to ensure their sufficient supply: in order to meet this huge demand, the NCAs should allow temporarily cooperation between competitors. Anyway, such joint efforts have to be limited in scope and duration necessary to assist those affected by COVID-19, have to be in line with applicable laws or specific guidance from authorities and may be a necessary response to protect consumers and provide products or services that might not be available otherwise.[78]

In conclusion, it is possible to say that the ICN and the ECN adopted a similar 2-sides approach: a moderate relaxation of specific collaborations which aim to provide a sufficient supply in order to meet the huge demand of essential products, and a strong contrast against possible abuses which try to exploit the crisis by purchasing excessive and unfair prices of essential products.

[77] ICN, Steering Group Statement: Competition during and after the COVID-19 Pandemic, 8 April 2020
[78] ICN, Steering Group Statement: Competition during and after the COVID-19 Pandemic, 8 April 2020

The ICN already pointed out the importance of the constant application of competition law in 2008, when the financial crisis shocked the world affecting most of the countries.[79] The ICN focus on the importance of the constant application of competition policy even during a difficult period of crisis because competition is a benefit for all: thanks to competition, the productivity increases, the economy grows and the prices for the consumers are lower. Therefore, even during a crisis, the national authorities should guarantee the enforcement of competition law in order to avoid that some companies exploit the crisis by purchasing excessive pricing to the detriment of the consumers.

In conclusion we can say that a crisis, that can be financial, economic, sanitary or social, cannot be an excuse for lowering the competition law standards and for a huge relaxation of competition law vigilance. Quite the opposite, the application of competition law during a crisis is even more important and crucial than during a static period, because there is the possibility that some economic operators try to take advantage from the crisis through illegal practices that in normal period would have been infringements of competition law. Especially during a crisis period, the competition law standards should be high, in order to protect both the consumers and the economic operators which play fairly.

The ECN statement, even having good premises, cannot be considered a satisfactory guidance. It is in fact too short and unprecise, and its content is uncertain. It is not exhaustive. The ECN presented this statement as a provider of useful guidelines for undertakings during the crisis period. But the document reveals to be ineffective because many aspects are not covered or not specifically analysed. It can be used by NCAs and undertakings as a starting point, but if something more specific is needed, this statement cannot be a good reference. The risk is that this document can distort the antitrust rules and create still more confusion, because its approach is to the lots of aspects not covered by the statement.

2.2.2 THE RESPONSE OF THE EU COMMISSION TO THE COVID CRISIS: THE TEMPORARY FRAMEWORK

The Temporary Framework was published by the EC in April 2020 and the Commission presented it as a useful guidance of dos and don'ts with regards to antitrust. It considers the antitrust issues related to both Article 101 and 102 TFEU. Through it the Commission executes its soft-law powers in order to inform undertakings about its practice during the crisis, triggering their expectations. The Commission used the Commission in order to guide the

[79] J. FINGLETON, "*The case for competition policy in difficult economic times*", 2009, ICN Steering Group

conducts of the undertakings with relation to antitrust rules during the crisis. Even if the Framework does not have binding force, the Commission expected the undertakings to behave according to the principles defined in that scheme. Thus, the undertakings were expected to follow the points of the Framework with relation to cooperation among competitors during the crisis.

2.2.2.1 ANTITRUST ISSUES RELATED TO COOPERATION BETWEEN COMPETITORS

The EU Commission is responsible for the implementation and orientation of EU competition policy, being the principal enforcer of the EU's competition rules. [80] The Commission shall ensure the application of Articles 101 and 102 TFEU, shall investigate any infringements and shall bring to an end those that are incompatible with the internal market. For this purpose, EU law give it power and responsibility to investigate suspected anticompetitive conduct, to issue prohibition decisions, to impose fines, and to conclude binding agreements with companies. The European Commission is the main executive body of the EU ensuring that the provisions of the TFEU, the regulations, the directives and the decisions are implemented in accordance with the principles of EU law, having also the power to adopt its own regulations pursuant to powers delegated by the Council. However, the powers of the Commission extend to soft-law, having the capacity to adopt non-legislative measures such as notices and guidelines, which provide useful do's and don'ts and clarificatory information about the Commission's practice.[81]

During the COVID crisis, the EU Commission, being the main enforcer of competition law in EU and implementing its soft law powers, published a Temporary Framework for assessing antitrust issues related to business cooperation in response to situations of urgency stemming from the current COVID-19 outbreak.[82] In this framework the Commission recognizes the shock that this pandemic has created and analyses its implications for the economy and for antitrust. The supply chains have been disrupted by the crisis and this caused a shock for both demand and supply. In fact, due to the interruption of the supply chains the supply that the companies can provide is much lower compared to the corresponding huge demand: the

[80] On the role of the Commission as enforcer see Court of audits, "Background paper: Enforcement of EU competition policy"; R. WHISH, D. BAILEY, "*Competition Law*", 2021, tenth edition, Oxford University Press, pp. 54-55-56; C. TELEKI, "*Due Process and Fair Trial in EU Competition Law",* Chapter 9, pp.189–209; even case law reminded the role of the Commission as main enforcer, see for example ECJ, Case C-234/89, Delimitis v Henninger Bräu AG, par. 44, ECLI:EU:C:1991:91

[81] See C. TELEKI, "*Due Process and Fair Trial in EU Competition Law*", Chapter 9, pp.189–209

[82] European Commission, Temporary Framework for assessing antitrust issues related to business cooperation in response to situations of urgency stemming from the current COVID-19 outbreak

sanitary emergency caused a steep rise in demand for some products and services, notably those related to the health sector (including e.g. pharmaceutical companies, medical equipment producers, and their distributors).[83] In the current circumstances, there was the necessity to put the companies in the conditions to provide a sufficient demand to satisfy the huge demand of consumers. For this reason, in this Temporary Framework, following the ideas expressed by both ECN and ICN in their respective statements, the Commission recognized to undertakings the possibility to cooperate in some specific cases. This framework became a sort of additional exception to the infringements of Article 101. In fact, in this Communication the Commission makes clear that some specific types of collusions between competitors are not qualified as contrary to Article 101.

The framework shows that DG COMP is willing to take a constructive approach towards certain types, very specific types of cooperative arrangements aimed at dealing with the COVID-19 crisis. The framework is in fact headed to solve COVID related problems even allowing agreements. The constructive behaviour of the Commission, searching for a point of agreement with undertakings, reflects a growing tolerance towards specific agreements whose objective is to be of help during the crisis. The Commission understands the crisis period and react to this event in a responsible rational and understanding way, trying to enforce antitrust law in a way that express sympathy to the necessities of the undertakings, without forgetting the competitive interest.

The Commission allows a variety of possible solutions by affirming that the response to emergency situations related to the COVID-19 outbreak might require different degrees of cooperation. The Temporary Framework recognizes that in the process of increasing supply and ensuring the fair distribution of that supply, it may be necessary for firms to engage in exchanges of information or commercially sensitive information and to coordinate in ways which might be anti-competitive.

Measures to adapt production, stock management and, potentially, distribution in the industry may require exchanges of commercially sensitive information and coordination between undertakings. Such exchanges and coordination between undertakings are in normal circumstances problematic under EU competition rules, but the Commission admits that in the current exceptional circumstances, due to the crisis caused by the pandemic, such measures would not be problematic under EU competition law or they would not be an enforcement

[83] See K. BODNÁR, J. LE ROUX, P. LOPEZ-GARCIA, B. SZÖRFI, "*The impact of COVID-19 on potential output in the euro area*", in ECB Economic Bulletin, Issue 7/2020.

priority for the Commission, to the extent that such measures meet three compulsory conditions:

- They are designed and objectively necessary to actually increase output in the most efficient way to address or avoid a shortage of supply of essential products or services, such as those that are used to treat COVID-19 patients;
- they are temporary in nature, thus only as long there is a risk of shortage during the COVID-19 outbreak;
- they do not exceed what is strictly necessary to achieve the objective of addressing or avoiding the shortage of supply. [84]

The Commission reminds its strict intention to monitor the competition law situation under 101 even after the framework. In fact, the possibility given to the undertakings by this framework does not mean that the undertakings become independent from the control of the Commission, undertakings should document all exchanges, and agreements between them and make them available to the Commission on request. The Commission will continue to provide guidance to undertakings with respect to specific cooperation initiatives with an EU dimension, that need to be swiftly implemented in order to effectively tackle the COVID-19 outbreak, especially where there is still uncertainty about whether such initiatives are compatible with EU competition law.[85] The Commission, exceptionally and at its own discretion, can provide such guidance by means of an ad hoc "comfort" letter. [86]

The Commission lists many cooperation measures that, thanks to certain conditions, do not create competition problems and help to stabilize demand and supply on markets. Example of allowed practices is the coordination of production and capacity information. This coordination consists of identifying supply gaps and find a solution between the competitors and meeting the demand. However, those practices must not entail the exchange and share of individual and sensitive information between the competitors. Thus, if there is no exchange of those type of information, such cooperation does not seem to be a problem for European competition law. However, the COVID crisis constitutes a great exception. In fact, during that crisis, the Commission went further recognizing even the possibility to exchange commercially sensitive information in order to satisfy the fundamental aim of increasing and optimising health sector output. The coordination of firms in the health sector during the

[84] European Commission, Temporary Framework for assessing antitrust issues related to business cooperation in response to situations of urgency stemming from the current COVID-19 outbreak, par. 15
[85] *Ibid.*, para. 17
[86] *Ibid.*, para. 18

COVID crisis would allow to meet the demand for urgently needed medicines: the Commission preferred a massive and timely re-allocation of essential medical products rather than pure competitive markets. Long run efficiency benefits were sacrificed during the COVID crisis, allowing coordination between competitors which entail exchange of commercially sensitive information and that would have been prohibited in normal times. Thus, the Commission adopted an exceptional policy for an exceptional period, in order to speed and facilitate the production and the distribution of essential products. On behalf of a superior aim, the Commission relaxed competition law in the short run, showing itself lenient towards short term cooperation expressly aimed at satisfying that aim.

However, the Commission expressly listed the conditions that the coordination practices must satisfy in order to be allowed during the COVID crisis. First, their objective must be to concretely increase the quantity of essential COVID related goods, filing their shortage. The second condition is that these measures are allied only during the temporary period of shortage caused by COVID. Lastly, the only aim that they satisfy is to address the shortage of supply during COVID crisis.

The Commission, by allowing cooperative agreements during COVID crisis, contradict its past practice. For example, with the Irish Beef judgement the Court held that anticompetitive agreements designed to remedy a crisis in a sector are per se violations of EU Competition law.[87] Instead, with the Temporary Framework, the Commission affirms that the agreements designed to increase supply of health products or services and ensure their fair distribution, that in normal times would be anticompetitive, during the COVID crisis benefit from the exemption of Article 101 (3): thus, the COVID-necessary agreements are considered to improve the production or distribution of goods or to promote technical or economic progress, while allowing consumers a fair share of the resulting benefit. Considering those agreements exempted under Article 101(3) is not uniform with the past practice of the Commission because the Commission has never accepted an Article 101 (3) defence during the last 20 years.

The Temporary Framework reverts the Commission's traditional approach when saying that, during COVID crisis, a cooperation which is encouraged by a public authority is likely to be not problematic under EU competition law or is likely to not represent an enforcement priority

[87] ECJ, 20 November 2008, Case C-209/07, Competition Authority v Beef Industry Development Society Ltd and Barry Brothers (Carrigmore) Meats Ltd., ECLI:EU:C:2008:643, par. 21

for the Commission.[88] This sentence reverts the Commission's traditional approach, because it expressly decided in the past that the governmental encouragement does not save an anticompetitive practice. For instance, in the Irish Beef case, an agreement formed during a crisis was not saved even having the support of the Irish government.[89]

2.2.2.2 THE RETURN OF COMFORT LETTERS: A GUARANTEE FOR AGREEMENTS IN LINE WITH COMMISSION'S PRACTICE DURING THE CRISIS

Normally, the undertakings do not ask to the Commission about the legality of an agreement: the undertakings should self-assess the conformity of their agreements with the antitrust rules. After the introduction of Reg1/2003, the undertakings do not need to ask to NCAs for the clearance of their horizontal cooperation agreements. Today, undertakings have to autonomously assess their agreements under Article 101, firstly determining whether the agreement is contrary to Article 101(1), and then analysing whether the agreement provokes any pro-competitive effects which allow it to benefit from the exemption under Article 101(3).[90] During the emergency the Commission decides to revive the tool of comfort letters, reintroducing them with the Temporary Framework.[91] The system of comfort letters of the Temporary Framework seems similar to the system that was in force before Regulation 1/2003, when the undertakings had to ask to the Commission for assess their cooperation agreements before that they could enter into force. In fact, during the previous regime (i.e. before the introduction of Regulation 1/2003), the undertakings had to notify a proposed agreement to the Commission which then decided about the compatibility of the concerned agreement with Article 101 TFEU.[92]

The ratio of the revival of comfort letters by the Commission during COVID crisis, was to create a system of cooperation with the undertakings, enabling them to ask directly to the Commission about the conformity of their practices with antitrust law, with special consideration for healthcare issues. It is no coincidence that the Commission adopted the COVID related system of comfort letter in the pharmaceutical sector for the first time for a project of Medicines for Europe, which is the association of the producers of generics

[88] European Commission, Temporary Framework for assessing antitrust issues related to business cooperation in response to situations of urgency stemming from the current COVID-19 outbreak 2020/C 116 I/02, par. 15
[89] F. JENNY, "*Competition Law Enforcement and the Covid-19 Crisis: Business as (Un)usual?",* May 2020
[90] R. WHISH, D. BAILEY, "*Competition Law*", Tenth edition, 2021, Oxford University Press, pp. 613-618
[91] European Commission, Temporary Framework for assessing antitrust issues related to business cooperation in response to situations of urgency stemming from the current COVID-19 outbreak 2020/C 116 I/02T, par 18
[92] L. CALZOLARI, "*L'influenza del covid-19 sulla politica di concorrenza: difese immunitarie o anche altro?",* 26 April 2020, Sidiblog

medicines.[93] The project was about the voluntary cooperation between manufacturers aimed at avoiding the shortages of medicines which are necessary to treat COVID patients. [94] This cooperation regards the supply of raw materials, the production of particular products and the distribution of eventual over-supply. The Commission assessed positively this cooperation agreement, affirming that it did not raise any concerns under Article 101, because it was temporary and proportionate to satisfy the fundamental aim of providing to the hospitals the most needed generics medicines.[95]

The Comfort Letter to medicines for Europe has been considered a means to support the pharmaceutical industry and to protect those who join the cooperation project. It was considered the first concrete response during the pandemic for the shortages of essential medicines. During the pandemic, the producers are allowed to cooperate between them with the aim of avoiding scarcity of essential products, to the advantage of European public health.[96]

In 2021, the Commission developed a second comfort letter about cooperation between companies. In particular, the companies touched by this comfort letter may be manufacturers of relevant raw materials, companies with relevant production capacities, or the developers and manufacturers of the vaccines. The Commission specified that any exchange of confidential business information needs be indispensable for effectively resolving the supply challenges; moreover, the sharing of any confidential business information between direct competitors, about competing products and relating to prices, costs, sales and commercial strategies, is excluded. [97]

However, the COVID related comfort letters are not mandatory, but they offer a chance to undertakings to ask for informal guidance to the Commission and to NCAs about their agreements. In fact, the problem related to the comfort letters is about legal certainty. In fact, these letters cannot be opposed to third parties. National Courts cannot be bound by those letters and can adopt a decision which do not follow them. They are a simply factual element

[93] 08/04/2020 COMP/OG – D(2020/044003), Medicines for Europe, "Comfort letter: coordination in the pharmaceutical industry to increase production and to improve supply of urgently needed critical hospital medicines to treat COVID-19 patients"
[94] R. WHISH, D. BAILEY, "*Competition Law*", Tenth edition, 2021, Oxford University Press, p. 644
[95] 08/04/2020 COMP/OG – D(2020/044003), Medicines for Europe, "Comfort letter: coordination in the pharmaceutical industry to increase production and to improve supply of urgently needed critical hospital medicines to treat COVID-19 patients"
[96] See for instance, Comunicato Stampa Covid-19: Häusermann (Assogenerici), "Ombrello Antitrust da il via al piano straordinario UE contro carenze farmaci destinati alle terapie intensive", 9 April 2020
[97] European Commission, "Comfort letter: cooperation at a Matchmaking Event – Towards COVID19 vaccines upscale production" COMP/E-1/ GV/BV/nb (2021/034137).

from which the national judges can distance themselves. Thus, receiving comfort letter does not guarantee to an undertaking its civil law immunity. Instead, this immunity could have derived from the Commission choice of adopting the tool of Article 10 Regulation 1/2003, which binds even third parties and national judges. However, this tool needs a more complete and intense preliminary activity, which makes it less proper to give prompt responses to undertakings during the crisis.[98]

2.2.3 GUIDELINES ON MEDICINES' SUPPLY TO AVOID SHORTAGES DURING THE COVID-19 CRISIS: ANOTHER SOFT-LAW MEASURE ADOPTED BY THE COMMISSION WITH THE AIM OF PROMOTING EFFICIENT ALLOCATION OF ESSENTIAL PRODUCTS DURING THE CRISIS, CONTEMPORARILY PRESERVING PUBLIC HEALTH AND THE INTEGRITY OF SINGLE MARKET

Following the same tendency and underlying logic of the Temporary Framework, the Commission published a Communication which entails a Guidance on the optimal and rational supply of medicines to avoid shortages during the COVID-19 outbreak[99], whose aim is "to protect public health and preserve the integrity of the single market, whilst ensuring that Europe has the supply of affordable medicines it needs during the COVID-19 outbreak"[100]. This Guidance regards the functional supply, allocation and use of medicines to treat COVID-19 patients. This detailed guideline states that the European Commission shall provide guidance and legal certainty to pharmaceutical companies who may need to coordinate to meet the high demand in the sector.[101] The aim of these EC guidelines was to avoid shortages of medicines during the COVID-19 outbreak, with reflections on competition. In fact, a better allocation of medical resources during the pandemic is a good way to avoid antitrust issues, because guaranteeing an equal allocation of medicines may help for example to reduce exploitative practices, and a way of guaranteeing this efficient allocation may be though competitors' collaborations.

Even this guidance realizes the exceptionality of the period, which encourages member states to take extraordinary measure to protect public health. In a certain way this guidance says that the unprecedented nature of this sanitary emergency allows to take exceptional measure for public health, even if they distort the market. The COVID-19 pandemic has in fact led to a

[98] L. CALZOLARI "*L'approccio pandemico alla politica di concorrenza*", Quaderni di SIDIBlog, 2020, Volume 7, pp. 211-226
[99] European Commission, Guidelines on the optimal and rational supply of medicines to avoid shortages during the COVID-19 outbreak (2020/C 116 I/01)
[100] *Ibid*, par. 1
[101] Y. VARDHAN GARU, K. HARWANI, "*Crisis Cartel and State Aid: An Alternative to Competition Authority during COVID-19 Pandemic*", The SCC Online Blog, 10 August 2021

significant increase in the demand for certain medicines. On the same line of the Temporary Framework, in the guidance the Commission exhorted the pharmaceutical industry to share information and anticipate any disruption in the supply of critical products in order to avoid shortages. The Commission required the pharmaceutical industry to increase production capacity for all high-demanded COVID medicines, and in particular for those for which there is a risk of supply shortages. The Guidance express the concept that a significant increase of production and manufacturing of essential medicines is necessary to react to the crisis. The necessity to guarantee a sufficient supply can require measures such as the reorganisation of the supply chain but also temporary cooperation between pharmaceutical companies in order to ensure continued care for COVID-19 patients. These forms of collaboration comply with EU competition rules, as considered by the Commission in the Temporary Framework.

As already clarified by the ECN Statement, the Guidance reaffirms that "it is of utmost importance to ensure that products considered essential to protect public health remain available at competitive prices"[102]. Thus, the prices charged on products like face masks, hand-sanitizers and essential medicines must not be excessive and unfair and so must not violate Article 102 a) TFEU.

The Guidance remarks the necessity to impede and reduce shortages: the fair distribution of supply must be ensured. Moreover, the Guidance suggests the temporarily limitation of online sales of essential medicines and tools as a possible solution to better control their supply to patients. It is important that Members States also identifies legally operating on-line retailers to avoid that patients buy falsified medicines from unauthorised sellers. This is what happened for example in Italy where the Competition Authority launched two investigations and ordered the shutdown of two websites which offered several medicinal products for sale, including Kaletra, without being authorised to supply drugs to the public online. In particular, Kaletra was advertised as a product with proven effectiveness against Coronavirus and offered at a price of €659 that the Authority has considered excessive. [103]

The Guidance on the optimal and rational supply of medicines to avoid shortages during the COVID-19 outbreak combines well with the Temporary Framework. They share the main principle and the aim of ensuring the supply and adequate distribution of essential scarce products during the COVID-19 outbreak and thus of addressing the shortages of such essential

[102] European Commission, Guidelines on the optimal and rational supply of medicines to avoid shortages during the COVID-19 outbreak (2020/C 116 I/01), par. 4(b)
[103] Autorità Garante della Concorrenza e del Mercato, PS11733-PS11735 - ICA: coronavirus emergency, the Authority orders the shutdown of the https://farmaciamaschile.it and http://farmacia-generica.it websites

products and services. Even if the Guidance does not consider directly antirust issues, by focusing on demand and supply of COVID products and on their better allocation, it found a link with competition law and pricing issues. In fact, the plans of action of businesses about cooperative agreements and pricing depend also on the levels of demand and supply. If there is too much demand and not sufficient supply the undertakings could for instance decide to cooperate in order to meet the high demand; they could even decide to raise the prices. Therefore, a better allocation of COVID products helps to not create (or to solve) competition law issues during the crisis period. Thus, the aim of the guidance to reach a better allocation of essential COVID resources, it is useful for antitrust also: a better and more rational allocation means better conditions for competitors and consumers.

In conclusion, the Framework is a very useful instrument to regulate Articles 101 and 102 TFEU issues during COVID crisis. This framework provides a guidance to which the undertakings refer in order to know the dos and don'ts during the crisis. Looking at this framework the businesses can be aware of whether and when they can cooperate, and of the repression by EC of exploitative practices. Through the framework, the EC, even more than before, guarantees its control over competition law issues, especially during this period of confusion and difficulties. The framework, being a soft law measure, shows to the undertakings the Commission's position regarding certain conducts which are in doubt of legitimacy during the crisis. It provides the undertakings instructions on how to benefit of the COVID-related exemption for cooperation that creates benefits for consumers and economic recovery during the crisis, without contradicting Commission's practice.

The framework is an ad hoc guidance, which effectively fulfils its aims. It revealed itself to be exhaustive and explanatory, especially if compared with the ECN joint statement. The impression is that the ECN joint statement and the Temporary Framework are part of a common EU antitrust plan: the ECN joint statement is the starting point that put the basis; the Framework is a better defined and more complete version of the ECN statement. We can say that the Framework clarified many points that the ECN statement had left uncertain, covering more contents and in a more specific way.

The part of the framework regarding cooperation agreements constitutes a sort of ad hoc exemption to Article 101 prohibition for certain cooperative practices. The framework explains in a complete way the conditions and circumstances in which competitors can legally cooperate between them. The cause of these cooperation is the COVID crisis and the aim

should be the rebuilding of the supply chains in order to guarantee sufficient supply of essential products, considering the very high demand.

This framework represents a sort of compromise between companies and the EC, because the latter was fully aware of the critical situation and decided to meet halfway with the formers giving them a possibility to cooperate. But the exemption that the EC grants to undertakings does not correspond to a full suspension of antitrust rules. Instead, the intent of the framework is to draw precise borders within which the cooperation benefit of the exemption is granted; instead, those anti-competitive practices which try to hide themselves behind the exemption of the framework and behind the crisis situation, are considered unlawful and not deserving of justification. The exemption is not a general one, but rather specific: it should not be considered as a free-for-all regarding agreements between competitors because it covers only agreements with pro-competitive and social benefits, that is to say allocative efficiency, consumerist advantages and economic recovery. The tolerance of the Commission for specific types of agreements must not be an opportunity to exploit the crisis, for example by cartelising. Therefore, the EC punishes any conducts which go beyond the borders fixed by the Framework.

Differently from the ECN in the joint statement, the European Commission in the framework recognizes that undertakings may be required to adopt behaviours that are usually considered to be anti-competitive. This recognition is explained by the necessity to achieve an adequate level of supply and distribution. However, due to the emergency of the situation and in view of their temporary nature, they are not considered as a priority of the Commission. In order to fulfil the public interest issue to protect the health of the people, the supply has to arrive to the people as soon as possible. So, in the name of health quality policy, the Commission decides to not intervene in those cases.[104] From the combination of the ECN statement and the Temporary Framework is possible to deduce a broader guidance for companies regarding information exchange between competitors during COVID crisis. The information should take into account two criteria. First it is important to consider the nature of the goods, because only products in shortage would benefit from the exchange. Then, the exchange of information should be limited and necessary to the pursuit of the objective, so without the possibility to share prices or marketing strategies. [105]

[104] See for example, speech of Frédéric Jenny in "Antitrust: Price-fixing, excessive prices, crisis cartel", 21 April 2020, Quarantine Webinar Series

[105] F. VIALA, D. KUPKA, "*Cooperation between companies in times of health crisis",* in Concurrences Review, special issue "Competition Law and Health Crisis", n. 2/2020

In addition, the Framework inspired also national measures and statements: for instance, the Communication of the Italian NCA on cooperation agreements and the COVID-19 emergency[106] is substantially a copy of the framework.

3. COMPETITION LAW ACTIONS ADOPTED TOWARDS AGREEMENTS BY THE SINGLE STATES DURING THE CRISIS: THE EXAMPLES OF ITALY AND UK

The EU competition law is formed by two parallel and complementary components: the community component and the national one. In fact, the enforcement of EU antitrust law is carried out by the NCAs in parallel to the Commission. The EU competition law feeds itself with both the contributions of the Commission and the NCAs.[107] It is crucial to find equilibrium between the two components and, in order to guarantee a uniform and harmonized enforcement of antitrust rules in EU, in this way not distorting competition in the internal market and not causing detriment for consumers and undertakings, the NCAs of Member States are empowered as public enforcers and apply effectively Articles 101 and 102 of the Treaty. The modernization of the application of those two Articles has promoted the decentralised application of antitrust rules by national competition authorities and national courts, which today have the power to fully enforce Article 101 of the Treaty. [108]

Therefore, when trying to find proper competition law solutions during the crisis which serve as paradigm, it is not possible to look only at the enforcement of the EU Commission but is necessary to extend the analysis to the national enforcement. When analysing and talking about the whole European antitrust practice, it is necessary to consider the actions of the EU bodies as much as those of the national enforcers. Due to the structure of EU competition law, only in this way it is possible to obtain an all-embracing view of antitrust application during the COVID crisis.

In order to not limit the analysis over the competition policy for COVID-related cooperation among competitors to the solutions adopted at European level, this paragraph will extend the focus even to MSs. In particular, the MSs under the magnifying glass are Italy and UK and it will be considered their respective approaches for cooperation among competitors during the

[106] Communication from the Autorità Garante della Concorrenza e del Mercato on cooperation agreements and the COVID-19 emergency

[107] On the interplay between the community dimension and the national dimension of competition law, and between the EU Commission and the NCAs, see P. FATTORI, M. TODINO, "*La disciplina della concorrenza in Italia"*, terza edizione, 2019, Il Mulino, pp. 18-25; R. WHISH, D. BAILEY, "*Competition Law*", Tenth edition, 2021, Oxford University Press, pp. 49-58 and 77-80; from the legislative point of view see Council Regulation (EC) No 1/2003 and Directive (EU) 2019/1

[108] P. FATTORI, M. TODINO, "*La disciplina della concorrenza in Italia*", terza edizione, 2019, Il Mulino, p. 21

COVID crisis[109]. Even if UK is no more a Member State of EU, it is interesting to include it in the analysis of competition policies anyway for two reasons. First, on the basis on the agreement regarding Brexit, UK was still subject to EU law when the COVID crisis outbroke and thus the UK NCA had to apply the national competition rules in parallel with EU competition law. However, even if today UK is no more a MS, the competition rules in force in the country still feel the effect of community legislation in this field. Second, the antitrust law is a branch of Anglo-Saxon derivation and thus the UK's enforcement it is likely to be a useful example of antitrust practice and policy, serving as paradigm for other countries.

Like the Commission, both the Italian and the British competition authorities decided to adopt soft-law measures aimed at letting the undertakings know their practice during the emergency. Those soft-law instruments allowed to being aware about the exceptional way of antitrust enforcement adopted by the single NCA during the crisis, in addition to the Commission's enforcement line explained through the Temporary Framework. Italy decided to provide guidance to undertakings with a Communication which substantially recalls the Commission Temporary Framework. The British NCA provided to the undertakings its approach towards cooperation during crisis, even introducing some specific exemptions for particular sectors, allowing them to move away from the existing competition rules. Both Italy and UK decided to follow the general line marked by the Commission and which is based on the relaxation of the competition enforcement towards agreements. This relaxation consists of not identifying the agreements between competitors which are motivated by the COVID crisis as an investigative priority for the enforcers. Like the Commission, even the NCAs are empowered to identify investigative priorities, selecting the single cases which deserve more attention, on the basis of criteria such as seriousness and actuality of the alleged breach.[110] This power of the NCAs guarantees more effective antitrust enforcement by them, prosecuting conducts which pertain to the investigative priorities of both the Commission and the NCAs.

Apart from soft-law powers, the NCAs enforced competition rules even in an executive way during the crisis, with regard to agreements between undertakings. For instance, the AGCM

[109] For the solutions adopted by other MSs, so having a more complete framework about the whole situation in the whole EU, see inter alia T. JANSSENS, D. SWANSON, L. CORDOVIL, "*The reactions of competition authorities to the COVID-19 pandemic – an IBA Contribution*", IBA Antitrust Committee, June 2020; Latham & Watkins, "*Impact of covid-19 - new exemptions under antitrust law*", 1 February 2021; Allen & Overy "*Covid–19 coronavirus update: Global application of antitrust rules*", 2020; Lex Mundi "*Global Competition Measures in Response to COVID-19*", 2020

[110] See Directive (EU) 2019/1 (the so-called "ECN+ Directive), art. 4, par. 5; see also G. CODACCI PISANELLI "*Questioni di priorità: la Direttiva Ecn + e la discrezionalità dell'Autorità di concorrenza nella selezione dei casi"* in Mercato Concorrenza Regole, 2021, Fascicolo 1

applied its COVID-related Communication for assessing positively the compatibility of two agreements related with the COVID emergency.

3.1 ITALY DECIDED TO EMULATE THE EU COMMISSION'S TEMPORARY FRAMEWORK: THE COMMUNICATION AND ITS CONCRETE APPLICATION IN TWO CASES

With regard to Italy, the attention will be to the Communication adopted by the "Autorità Garante della Concorrenza e del Mercato" (AGCM) in April 2020. Due to the epidemiological emergency, the Authority decided to recalibrate its enforcement priorities adopting a special Communication. Acting in this way, the AGCM enjoys two powers that it has since being a NCA within the ECN: it is allowed to adopt soft-law measures, and it is empowered to establish its enforcement priorities[111]. The AGCM Communication was aimed at outlining the priorities of intervention in the application of the antitrust discipline during the COVID crisis. In particular, the Communication clarified the non-hesitation of the Authority to use all the instruments at its disposal to take action against companies that will try to take advantage of the current emergency situation. Thus, through this soft law instrument the Italian Authority stated its intolerance towards exploitative conducts, opposed to the inclusive approach reserved for (specific types) of agreements among competitors. Speaking of which, this Communication imitated the Temporary Framework of the Commission, aiming at providing a useful guidance for undertakings about the allowed cooperation during the COVID crisis, especially with regard to pharmaceutical products. The two most relevant application of this Communication that are going to be described in the next paragraphs are the agreement between the two main Italian associations of pharmaceutical distributors (ADF and Federfarma), and the agreement reached at an association level by Associazione Italiana del Credito al Consumo e Immobiliare (ASSOFIN). This last agreement, even not regarding the health sector, is exemplificative of the AGCM tendency during COVID towards cooperation agreements which pursue superior aims.

3.1.1 THE AGCM COMMUNICATION ON COOPERATION AGREEMENTS DURING COVID CRISIS

During the COVID crisis, the AGCM provided informal guidance about the compatibility with antitrust law of COVID related agreements. The AGCM recognized that, due to COVID pandemic, competitors may need to cooperate in order to solve problems related to scarcity of products which are essential for consumers' health. For this reason, in April 2020, the authority

[111] See the Directive (EU) 2019/1 (the so-called "ECN+ Directive)

decided to publish a Communication, which recalled the Commission Temporary Framework. In line with this framework, the AGCM confirmed its willingness to tolerate some specific types of cooperation measures taken by the undertakings, which fulfil some specific aims and conditions.[112] This Communication provides the general criteria on how to assess cooperation agreements during COVID. The agreements involved are those aimed to solving shortage and favouring distribution of essential pharmaceutical and agri-food goods during the emergency. A characteristic of those agreements is to be temporary. Anyway, the Communication clarifies that the exempted agreements during the crisis are of three types. First, are allowed the agreements which coordinate the distribution of raw materials. The second category of agreements between competitors that the Communication qualifies as exempted from the antitrust prohibition are those which tackle the shortage of medicines, medical devices and food. The last category is that of cooperation agreements involving exchange of information about production and capacity. Therefore, the AGCM Communication may consider lawful the exchanges of sensitive information and the coordination between competitors if they are aimed at increasing production and supply of essential and thus alleviate their shortages in a temporary and proportionate way.

This Communication provides guidelines to undertakings on how to cooperate between them during the COVID crisis. The allowed measures are aimed at solving scarcity and fastening distribution of essential goods in the pharmaceutical and agri-food sectors. Temporary and proportionate measures against shortages of supplies benefits from the non-intervention of the authority. The difference between this AGCM Communication and the Temporary Framework is that the latter is expressly addressed towards the pharmaceutical and medical items, while the former seems to involve not only the health sector. The AGCM recognized a lawful necessity of cooperation, not only for avoiding the shortages of supplies,[113] but also for guaranteeing the fair distribution of essential products to all the consumers.[114] Thus, the intervention of the AGCM may regard not only the sanitary field, but also the agri-food sector and all the sectors affected by the crisis and which are important for consumers.[115] The authority showed flexibility for cooperation agreements between competitors which are necessary to facilitate production of medical devices and food. As the Commission in the

[112] Communication from the Autorità Garante della Concorrenza e del Mercato on cooperation agreements and the COVID-19 emergency, par 5
[113] Communication from the Autorità Garante della Concorrenza e del Mercato on cooperation agreements and the COVID-19 emergency, par 5
[114] *Ibid*., par. 2
[115] See F. GHEZZI, L. ZOBOLI, "*L'antitrust ai tempi del Coronavirus: riflessioni sulle esperienze internazionali e sulle iniziative italiane*" in Rivista delle società, 2020, n. 2/3

Temporary Framework, even the AGCM with its Communication decided to introduce comfort letters through which provide useful indications to companies about proposed agreements. In particular, with those comfort letters the authority assesses the antitrust compatibility of cooperation agreements, before that they enter into force. Moreover, the AGCM, as the ECN joint statement, allow companies to set prices ceilings, so limiting unreasonably high prices.[116]

The AGCM strongly confirmed that the crisis cannot be an excuse to violate competition law. For this reason, as stated by the Temporary Framework, the relaxation of the Communication cannot be a cover for cartels and the AGCM held a strong position against cartels (even "crisis cartels") during the crisis.[117] Cooperation agreements are allowed as far as they are necessary and proportionate against COVID shortage and unless they are a cover for prohibited and very harming measures, which are even non-essential for tackling shortages, like price fixing.[118] Relaxation of competition law and authorization for competitors to cooperate in specific cases do not mean deregulation and escamotage for illegal practices.

3.1.2 THE CONCRETE APPLICATION OF THE AGCM COMMUNICATION DURING THE CRISIS: THE ADF-FEDERFARMA AND THE ASSOFIN AGREEMENTS

The first time that the AGCM applied its COVID Communication was with regard to the cooperation agreement between ADF and Federfarma, which are the two main Italian associations of pharmaceutical distributors. The agreement had as object a joint-purchase of single use masks and their subsequent pro- quota sharing to the distributors. The purchase price for distributors was unitary and was negotiated with suppliers. The agreement was thought to stay alive until 30 June 2020, so its duration was about one month. The AGCM valued this agreement in a positive way because it realized that as the agreement's aim of organizing an efficient and homogeneous supply of surgical masks all over Italy, due to an emergency situation and for a proportionate period of time. [119]

[116] Communication from the Autorità Garante della Concorrenza e del Mercato on cooperation agreements and the COVID-19 emergency, par 17

[117] See A. GRIFONE "*Antitrust, la pandemia riscrive le regole della concorrenza*", Italia Oggi, 2020, N.121, pp.1-2

[118] Communication from the Autorità Garante della Concorrenza e del Mercato on cooperation agreements and the COVID-19 emergency, par 20

[119] Autorità Garante della Concorrenza e del Mercato, Press release COV1-DC9901, "Verificata la compatibilità concorrenziale degli accordi di cooperazione tra imprese per distribuzione mascherine e dello schema di moratoria per credito al consumo predisposto da Assofin"

The Italian antitrust law establishes the possibility to notify agreements between undertakings to the AGCM. In fact, the undertakings may communicate to the authority the agreements created between them, in order to receive the recognition of the lawfulness of their cooperation.[120] Thus, the agreement between ADF and Federfarma was voluntarily submitted by the two associations to the AGCM for review.

The project of the agreement consists in a cooperation for the distribution of surgical masks through pharmacies and parapharmacies. The reasons way the AGCM valued positively the agreement were: the fact that the cooperating associations decided to voluntarily submit it to the AGCM for a review; the temporary nature of the agreement, only for one month; the aim of the agreement, which is fundamental during a pandemic. In fact, guaranteeing a sufficient supply of an essential product during a pandemic, would not be impeded by the authority which, instead, with its Communication, showed its openness to agreements satisfy this main aim. Moreover, the AGCM consulted with the EC about the legality and usefulness of this cooperation agreement.

The Authority valued the project as aimed at satisfying a fundamental aim during the pandemic: provide a sufficient, effective and uniform supply of surgical masks throughout the national territory, ensuring easily to citizens supply of essential products. The cooperation tried to solve the problem of products shortage, coordinating the purchase and distribution of face masks in order to meet the huge demand with significant supply. In fact, the agreement is aimed at purchasing masks and then distribute them among distributors. Dealing with both necessary phases to provide masks to consumers, the cooperation agreement aims to successfully guarantee a significant quantity of resources and allocate them at a reasonable price. Providing a significant quantity of masks to pharmacies would allow consumers to have access to those essential products. Due to the exceptional situation caused by the health crisis, and due to the essential aim that the agreement pursues during this period, the cooperation agreement between ADF and Federfarma was considered completely lawful and consistent with the AGCM Communication.

The AGCM, during the crisis, decided to accept and to value positively another agreement, even if it was not directly related to the health sector. In fact, the agreement concerned, even regarding the banking sector, benefited from the emergency and thus it was not prohibited. The agreement was reached at an association level by Assofin (an association which brings

[120] The rule to which refer is the article 13 of the Italian Competition Act i.e. Legge 10 ottobre 1990, n. 287 - Norme per la tutela della concorrenza e del mercato (Gazzetta Ufficiale del 13 ottobre 1990, n. 240)

together the main banking and financial operators of consumer credit) aimed at postponing payback obligations for credit holder.[121] Thanks to its temporary nature and to the particular circumstances caused by the COVID crisis, the agreement was recognized as non-problematic under competition law by the AGCM. Even for this agreement, the AGCM consulted the European Commission and then decided that there were no reasons to prohibit it. Moreover, the agreement, which consisted in a common moratorium scheme for consumer credit between ASSOFIN members, was aimed at supporting the most harmed categories by the COVID emergency, and in particular those categories which do not benefit from the aid measures provided by the government in response to the pandemic. Thus, the beneficiaries of the agreement are the credit holders who are in a difficult financial situation specifically caused by the COVID crisis. The authority decided to not launch an in-depth investigation, so de facto clearing this agreement, due to the extraordinary emergency, but expressly clarified a mandatory condition that the agreement must respect in order to survive: the agreement concerned must not involve the direct or indirect exchange of sensitive information between businesses, but it should be limited to the exchange of information which are objectively necessary and proportionate to achieving the aims of the agreement.[122] Therefore, the Authority reminded the limits that the agreements must respect, even benefiting from the exceptional exception of the COVID Communication. The exchange of sensitive information (direct or indirect) is considered as something very harmful for competition and thus it would not be permitted neither during a crisis period when relaxation of rules was (in part) allowed.

In both the cases ADF-Federfarma and ASSOFIN, the AGCM considered not necessary to launch an investigation into the agreements, in light of the time-limited nature of the agreements and the exceptional circumstances.[123]

3.2 HOW THE BRITISH NCA ENFORCE ANTITRUST LAW FOR COOPERATIVE AGREEMENTS DURING THE CRISIS

Despite Brexit and the fact that UK exited the EU on 31st January 2020, by virtue of the transition period in the Withdrawal Agreement, EU Law continued to apply in and in relation to the UK until the 31st December 2020[124]. Therefore, during the first period of the COVID

[121] Autorità Garante della Concorrenza e del Mercato, Press release COV1-DC9901, "Verificata la compatibilità concorrenziale degli accordi di cooperazione tra imprese per distribuzione mascherine e dello schema di moratoria per credito al consumo predisposto da Assofin"
[122] See the Latham & Watkins, "*Impact of covid-19 - new exemptions under antitrust law*", 1 February 2021
[123] See Allen & Overy "*Covid–19 coronavirus update: Global application of antitrust rules*", 2020
[124] Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (2019/C 384 I/01)

crisis, the UK was still subject to EU competition rules in parallel with its national competition rules.

After that the COVID crisis started, UK undertook several measures which were all directed towards the relaxation of competition rules for agreements between undertakings. From the solutions adopted by the UK government and by the Competition and Market Authority ("CMA"), it emerged a spirit of tolerance and permission for cooperation agreements. As first solution, the UK government adopted a legislation which temporarily relax competition law for retailers. This Order modified the Competition Act 1998 and was addressed to supermarkets, which, thanks to it, were allowed to undertake various measures that in normal times would have been prohibited. [125] In fact, thanks to this Order, the supermarkets had the possibility to share data with each other on stock levels and to cooperate in order to keep shops open. Moreover, supermarkets could share distribution depots and delivery vans and they could coordinate the range of groceries being supplied to consumers, especially in areas of UK which are facing high shortages. The Order also allowed exchange of information between logistical service providers, that could facilitate storage and distribution. The order exempts agreement which are aimed at preventing or mitigating disruption in the supply groceries to consumers in the UK due to reasons related to the COVID-19 pandemic. The CMA made clear that a coordination between two suppliers with the aim to limit purchases by consumers of particular groceries during the crisis period, when there is a market failure, is not prohibited under the Competition Act. The reason for the exemption is the purpose of the agreement to prevent or mitigate shortage in the supply of groceries during COVID crisis. However, the suppliers are still obliged to not share information about costs and pricing, because this practice would still be categorized as a competition restriction. [126]

One of the measures related to competition law that the UK government took, going beyond the simple relaxation of antitrust rules, was the decision to suspend competition law in relation to ferry transport. The CMA in fact allowed competitors to secure essential ferry transport between the mainland and the Isle of Wight. A similar measure was taken in Norway during the crisis, where the government introduced a temporary exemption for the transport industry, suspending the ban on cooperation of the Competition Act. [127]

[125] Competition Act 1998 (Groceries) (Coronavirus) (Public Policy Exclusion) Order 2020
[126] *Ibid*.
[127] See the Press Release of the Norwegian Competition Authority "Transportation Sector is Granted Temporary Exception from the Competition Act"; see also in Concurrences "The Norwegian government grants the transportation sector a 3-month temporary exception from the competition act as a special measure due to covid-19"

The UK government even relaxed temporarily the application of UK competition law to National Health Service (NHS) bodies and other independent providers of health services to the NHS.[128] Therefore, the CMA was conscious of the need for health services providers to act freely, without certain competition law restrictions that would have impeded them to provide their services in an efficient way. The CMA recognized an exemption from competition law to the National Health Service, due to the great emergency caused by the pandemic.

The UK government relaxed temporarily competition rules to the dairy industry, allowing it to address the current market challenges and maintain productive capacity to meet demand. In particular, specific types of cooperation in the dairy sector received an exemption from competition rules.[129] The agreements towards which competition law would not apply were those involving producers of dairy products and dairy logistics providers. Even information sharing were included in the exemption, but only on limited matter such as surplus milk quantities and stock levels. The ratio of this exception for information sharing was the necessity to address supply chain issues caused by the COVID-19 pandemic. During the crisis, two agreements done by a UK trade association for operators in the dairy processing sector benefited from this exemption. Those agreements regarded to surveys on forecast milk disposals and spare capacity used to monitor industry progress and observe potential unused industry capacity to recover stocks of milk, facing the demand fell during the temporary closure of cafes, restaurants, and pubs.

The exemptions of which benefited the dairy sector, the National Health Sector and the groceries were involved in the five public policy exclusion orders that the UK secretary State made. These Orders aim was to temporarily exclude from the UK competition law prohibition, cooperation trying to face problems of scarcity or over production caused by the pandemic. The Cma valued positively the agreements which are temporary and strictly limited to what is necessary. They could be even indispensable given the lack of alternatives in the short-run and alleviate shortages: they become a benefit for both undertakings and consumers.

As a great response to the COVID pandemic the CMA provided guidance and its approach to business cooperation in response to COVID-19.[130] The CMA recognized that the extraordinary

[128] Competition Act 1998 (Health Services for Patients in England) (Coronavirus) (Public Policy Exclusion) Order 2020
[129] Competition Act 1998 (Dairy Produce) (Coronavirus) (Public Policy Exclusion) Order 2020
[130] Competition and Market Authority, CMA approach to business cooperation in response to COVID-19, 25 March 2020

situation may trigger the need for companies to cooperate in order to ensure the supply and fair distribution of scarce products affected by the crisis to all consumers. For this reason, the CMA decided to not enforce competition law towards temporary measures of coordination among competitors. The CMA's guidance was useful for undertakings, containing the CMA's approach towards cooperation agreements and the way in which the exemption is applied. In fact, the CMA clarified that, in order to benefit from this exemption, the cooperation measures taken by businesses have to comply with some requirements listed by the CMA. In particular they have to be appropriate and necessary in order to face critical issues that arise as a result of the COVID-19 pandemic, especially the shortage of supply. They have to be clearly in public interest, benefiting consumers. As last condition, their duration should not be longer than is necessary to deal with these critical issues. At the same time, the CMA made a list of practices that would not benefit of the COVID exemption and that would still be unlawful even during the crisis. The practices non-exempted are those non-essential collusion which try to benefit from the crisis exploiting it. Thus, the CMA clarified that it would not tolerate information exchanging on future pricing or business strategies among competitors, if the exchanges are not necessary to meet the needs of the current situation. The CMA would not relax competition rules for collusions between competitors aimed at alleviating the commercial consequences of a fall in demand by artificially increasing prices to the detriment of consumers. Lastly, the CMA exemption would not involve coordination between undertakings which are not proportionate for solving the critical issue concerned: for instance, the CMA would not tolerate a coordination which has a wider scope because extends to the distribution or provision of goods or services that are not affected by the COVID-19 pandemic.[131]

Still with aim of facing the COVID pandemic, the CMA launched a COVID-19 taskforce. One of the tasks of the COVID-19 taskforce was to advise the Government on finding a compromise between competition law and legitimate measures that protect public health and support the supply of essential goods and services. Therefore, the Taskforce tried to ensure that competition law does not impede the introduction of useful measures which guarantee to consumers the protection of the public health and a sufficient availability of essential products.

The CMA differs from EU because it prioritized public interest considerations like the protection of vulnerable consumers and because it decided to apply the exemption for

[131] *Ibid*.

agreements in a very favourable way, with the aim to solve shortages during the COVID-19 crisis.[132]

The blanket exception introduced in UK with regard to competition rules about cooperation among competitors during the COVID crisis may provoke too many temptations for firms to collude, being impossible to clearly distinguish between lawful and prohibited cooperation. During the COVID crisis, a not well-defined exception to competition, without clear boundaries, risked to stimulate the creation of anticompetitive agreements.

4. ANTI-COMPETITIVE AGREEMENTS DURING THE COVID CRISIS: THE CRISIS CARTELS

During the COVID crisis, pro-consumer agreements which do not create severe damages to competition were allowed. Thus, the Commission and the national authorities defined and clarified the difference between those agreements that were allowed during the crisis, and those that were not. For instance, the Temporary Framework distinguishes between some forms of agreements which, due to COVID, are now temporary lawful, and others that are still prohibited even during the emergency period.

It will be seen some types of anti-competitive agreements, in particular the macro category of cartels, which are the archetype of agreements contrary to competition law.[133] Fighting cartels is aimed at protecting competition on the market as a tool to increase well-being of consumers and ensure efficient allocation of resources.[134] Cartels have a bad reputation, because they undermine the open market economy which forms the very basis of our community: for this reason, they have been regarded as "*cancers on the open market economy*".[135]

The analysis for cartels will regard their approach in normal times and during past and present crises. During sectoral or global crises, it emerged the theme of crisis cartels, which are usually arrangements between competitors aimed at limiting the damages of the crisis with capacity restructuring and organization.

[132] F. JENNY, "*Market adjustments, Competition Law and the Covid-19 Pandemic*", Le Concurrentialiste, 2020
[133] S. LAMARCA, "*La disciplina dei cartelli nel diritto antitrust europeo ed italiano. Una guida teorico-pratica*", Giappichelli, 2017, p. 50
[134] See A. FRIGNANI, R. PARDOLESI, "*La concorrenza*" in *Trattato di diritto privato dell'Unione Europea*, Vol. 7, p.28
[135] M. MONTI, "Fighting Cartels Why and How? Why should we be concerned with cartels and collusive behaviour?" 3rd Nordic Competition Policy Conference Stockholm, 11-12 September 2000, Speech/00/295

4.1 AN OVERVIEW OF CRISIS CARTELS' EXPERIENCE DURING PAST CRISES: DEFINITION AND CONCRETE APPROACH

At the same time of the European sovereign debt crisis of 2011, and short time after the severe worldwide economic crisis of 2008, the EU Commission has defined crisis cartels as industrial restructuring agreements between competitors which join effort in order to solve the common problems caused by the crisis.[136] Crisis cartels may take the form of agreement fixing prices which are aimed at avoiding market exit of some companies. The problem with crisis cartels is that, even if their aim is to save an industry from the collapse, a cartel is anyway aimed at making profit. The direct interest of a cartel is the recovery of the undertakings involved and the improvement of their financial situation, not the consumers. The problem of crisis cartels is that they are still cartels: even trying to pursue a social aim, their first aim is economic and regarding the financial balance of the firms. The consumer welfare is only a secondary aim. Cartels cannot be allowed, even during a crisis, because the benefits that they provoke in the short-term are not able to outweigh the advantages of maintaining competition in the long-term. Such a great distortion of competition cannot be allowed, even during a crisis, because the benefits that it takes for consumers are not sufficient and are less than the benefits that consumers would receive from keeping a sustainable level of competition during the crisis. The instrument of crisis cartel has been often recalled during previous crises, either global or sectoral, by many undertakings. The aim of this tool was to form an agreement which would save the undertakings of a specific sector from bankruptcy, pursuing the redistribution of the capacity due to overcapacity of the undertakings or a severe crisis of their sector which would impede them to do business in a profiting way. In many cases it was even aimed at recovering a sector or an industry that was in a huge crisis due to external factors.

The enforcement of competition law by competition authorities should be pragmatic in periods of crisis, aimed at minimizing adverse effects on competition. Competition policy must be able to address sudden exogenous shocks and their implications to the markets, finding a balance for economic and market stability, and to ensure long-term consumer welfare.[137] Thus, during extraordinary crisis, the competition law enforcement should be flexible enough to account for changing market conditions and the competition authorities have to take actions which are appropriate in the context of ensuring the health, saving lives and economic

[136] See the contribution of EU Commission at the OECD Roundtable on Crisis Cartels, 2011, pp. 109-120
[137] I. KOKKORIS, *"Should crisis cartels exist amid crises?*", The Antitrust Bulletin, 2010, 55(4):727-758.

security.[138] This flexibility consists in selecting priorities justified by the community interest, choosing to prosecute only those conducts which are anti-competitive and goes to the detriment of consumers, giving an exemption under specific conditions to others. During a severe crisis competition law could demonstrate available to accommodate beneficial cooperation and collaborations between competitors, safeguarding the general public interest and ensuring proper functioning of the markets in the short run. However, the competition authorities, even adapting competition law enforcement to the new crisis environment, would not change their standards: this relaxation of competition law would be temporary, conditional and proportionate to reach a superior aim. For this reason, the lenient approach towards practices like cooperation agreements which helped both undertakings and consumers during the crisis, is counterbalanced by a strongly intransigent one towards abusive practices and cartels, because they represent exploitations of the crisis.

Previous crises such as the Great Depression of 1929 and the global financial crisis of 2008 provide examples on how the competition authorities reacted regarding competition law enforcement and in particular towards crisis cartels. In many cases, competition authorities decided to adapt their approach in light of the crisis, relaxing competition law enforcement towards agreements during crisis. The past experience demonstrates that large relaxations of competition enforcement delayed the recovery from financial and economic recessions.[139] For instance, during the Great Depression, in USA antitrust law was suspended and most of cartels received legalization, even those price fixing. That lenient policy towards cartels delayed economic recovery. That suspension of most antitrust enforcement in the 1930s permitted industries to coordinate prices, production, and investment: the government's inclination toward cartels, which should have solved the economic depression, ended up reducing consumption, investment, and output.[140] Luckily, Over the years, the tendency of the EU Commission to recognize positively the crisis cartels has radically changed with the most recent crises. Cartels and antitrust violations must always be prohibited, during normal times but also during crises, because they are a great harm for both competition and economy.[141] The lenient approach towards antitrust violations, which was adopted by USA during Great Depression, was not undertook during the global financial crisis of 2008. During that crisis,

[138] I. RAKIĆ, "*Competition Law in the Age of Covid-19*", 30 April 2020, Anali Pravnog fakulteta u Beogradu, 2/2020
[139] OECD, Roundtable on Crisis cartels, 2011, pp. 51–52
[140] H. A. SHELANSKI, "*Enforcing Competition during an Economic Crisis*", Antitrust Law Journal, 2010, Volume 77, Issue 1, p.234
[141] See the contribution of USA at the OECD Roundtable on crisis cartels, 2011, p. 218

governments, conscious that the reduction of competition law impedes financial recovery, decided to not tolerate competition law breaches. Therefore, past crises are the clear proof that the relaxation of competition policies during them would not be the appropriate solution because it would not promote economic recovery. [142] Differently from the Great Depression, during the 2008 financial crisis, there was no relaxation in EU of competition law enforcement towards anticompetitive agreements in particular cartels. During 2008 financial crisis, the Commission clarified its unwillingness to tolerate crisis cartels, especially when markets are expected to autonomously recover. The position of the Commission during that crisis was to vigil on cartels, because the latter can be a great temptation for undertakings during a crisis. With a very decreased demand, reducing competition through crisis cartels would be a disaster, because the consequences may be increasing consumer harm, discourage recovery and incentivize the future creation of cartels. Softening excessively competition law, allowing crisis cartels, is not the proper solution. [143]

COVID caused a deep economic crisis which can be compared to that of 2008, and thus the activities of competition authorities should be inspired by those during that crisis. However, the COVID crisis situation is very different from that of 2008. COVID crisis is not totally comparable with past crisis like that of 2008. COVID crisis is a dual crisis, being contemporarily economic and sanitary. Sanitary problems affect the economic side, and vice versa. The two sides of the crisis are strictly linked. [144] Instead, the 2008 global economic crisis was caused by reasons which were purely financial. COVID crisis has a medical origin, which has as consequence the economic downturn. The pandemic disrupted the supply chain, whose consequence is the supply and demand shock. Unlike during the 2008 crisis, the main problems of the crisis related to health of people and there are particular issues with medical equipment.

An important case concerning crisis cartels is the Irish beef case, in which the court expressly said that a cartel, even if it is done during a crisis and as a way to alleviate the effects of this crisis, it is still prohibited. The court stated that in order to assess whether an agreement is prohibited by Article 101(1), it is necessary to look at the objectives of this provision. Thus, the court said that, even if an agreement is aimed at remedying the effects of a crisis in a specific sector, it may be considered as a restriction by object. In fact, pursuing also other

[142] See C. SHAPIRO, "*Competition Policy in Distressed Industries*", speech at ABA Antitrust Symposium: Competition as Public Policy, 13 May 2009
[143] See for instance, N. KROES, "Tackling cartels - a never-ending task", Speech/09/454, 8 October 2009
[144] See F. GHEZZI, L. ZOBOLI, "*L'antitrust ai tempi del Coronavirus: riflessioni sulle esperienze internazionali e sulle iniziative italiane",* Rivista delle società, 2020, n. 2/3

legitimate objectives instead of aiming solely to restrict competition, does not automatically exempt it from being a restriction of competition.[145] It is irrelevant that the intention of the parties was to remedy the effects of a sectoral crisis rather then restricting competition: an agreement should be qualified as a restriction by object even when it pursues other legitimate objectives.[146] Only if the agreement and the matters which involve it comply with Article 101(3), the agreement concerned may be saved from the prohibition of Article 101(1) and be exempted by Article 101(3). [147] However, cartels are considered as the classic infringements of EU competition law. They consist of cooperation between competitors whose object or effect is to reduce competition for prices and markets and thus, they are usually targeted as hardcore restrictions of competition prohibited by Article 101(1) and very unlikely to benefit from the exemption under Article 101(3).[148] The cartel of the case concerned hindered the independence of the conduct on the market of some beef processors. Moreover, the proposed agreement was also accused by ECJ to be not proportionate to combat the crisis, obstructing other proportionate and less-restrictive means. Maintaining intense competition between market players would be better and more efficient to recover from the crisis, even because the proposed agreement was found to be likely to not help the output increase.[149] Thus, in this judgement, The ECJ qualified the proposed agreement as a restriction of competition by object within the meaning of Article 101(1) TFEU.

Another crisis cartels that, even having as objective the recover from a crisis, was prohibited by the competition authorities, is the Greek example of 2008, when the five national strongest fishing farming requested to the Greek NCA (the "HCC") to benefit from the exemption of Article 101(3) because their cooperation project was aimed at jointing the effort to cope with the crisis in the aquaculture sector. In particular, the agreement was aimed at facing overproduction and oversupply of aquaculture products, in a situation worsened by the general financial crisis of that year. The parties alleged a severe downturn in the aquaculture sector, with consequent decrease of sales, prices and demand, all factors that would have caused the exit of many undertakings from the market. The Greek NCA affirmed that the agreement concerned directly violate the firms' freedom of choice for determine their sale prices. This

[145] ECJ, 6 April 2006., Case C-551/03, General Motors BV v Commission of the European Communities, P. ECLI:EU:C:2006:229, par. 64
[146] See the contribution of EU Commission at the OECD Roundtable on Crisis Cartels, 2011
[147] ECJ, 20 November 2008, Case C-209/07, Competition Authority v Beef Industry Development Society Ltd and Barry Brothers (Carrigmore) Meats Ltd, ECLI:EU:C:2008:643, par. 21
[148] I. VAN BAEL, J. BELLIS, "*Competition Law of the European Union*", sixth edition, 2021, Kluwer Law International, chapter 4, pp. 369-436
[149] See the contribution of EU Commission at the OECD Roundtable on Crisis Cartels, 2011

limitation was considered a restriction of competition by object under Article 101(1). The Greek NCA affirmed also that, as the agreement determine the quantities of sales, this constituted a restriction of competition by object under 101 (1) because it did not allow to companies to freely choose the level and method of selling the products. Moreover, the Greek NCA denied the possibility of the agreement to be exempted under Article 101(3) because it recognized that this agreement was primarily aimed at safeguarding the parties' interest and not that of consumers. The measures concerned were not aimed at restructuring in the long-term, but they were only trying to increase prices by controlling quantities in the short-term. The primary objective was not a real recovery from a deep crisis. The measures were not necessary nor proportional to achieve the efficiencies, they were not the less restrictive measures available to undertakings. The HCC also explicated that competitors are not allowed to exploit cooperation between them in order to artificially keep higher prices until the market recover because the undertakings have to impose their prices and choose their business strategies independently from their competitors, even during crisis period and when there is a supply and demand shock. [150] The HCC took a stricter view on crisis cartels, claryfing that agreements constitute a restriction of competition by object even when they are aimed at addressing a crisis and even when they do not have the immediate intention to restrict competition: collusive behaviour like cartels, even if trying to recover from a crisis, may impede competition by object and therefore, the HCC qualified the fish farming cartels as a violation of Article 101(1). [151] The Greek cartel case is another example of how little the European authorities tolerate the crisis cartel: even if aimed at fighting a crisis, in most of cases the characteristics of those agreements make impossible for authorities to clear them and to not prohibit them as restriction by object under 101(1).

4.2 CORONA CRISIS CARTELS

COVID provoked serious disruptions in all areas of private, public and economic life, forcing companies to face unprecedented challenges. However, cartels cannot be a solution for rescuing industries and consumers from the crisis. One of the reasons is that the COVID crisis was characterized by a huge shortage of essential products and crisis cartels would not be able to improve this situation. In fact, cartels do not increase the capacity of undertakings and they do not improve production and distribution of undertakings. They do exactly the contrary.

[150] Hellenic Competition Commission (Epitropi Antagonismou), Nireus Aquaculture S.A., Dias Aquaculture S.A., Hellenic Fishfarming S.A., Andromeda Fishfarming S.A. and Selonda Aquaculture S.A., Case n° 492/VI/2010, 23 June 2010

[151] L. VITZILAIOU, "*Crisis Cartels: For Better or For Worse?",* Competition Policy International Antitrust Chronicle, 2011, Vol. 2

They allow undertakings to agree about prices, quantities and stocks of products. Crisis cartels would not solve shortages, they would worsen it. In fact, undertakings cartelizing do their businesses and do what is more convenient for them, rather than for consumers. This could provoke that the undertakings would produce and sell restricted quantities of essential product, setting also very high prices for those products. The aim of the cartels would not be to give to consumers sufficient quantities of essential products and at reasonable prices. The direct objective of crisis cartels is that undertakings do not go into bankruptcy during crisis and that they recover making profits again.

The long run benefits caused by protecting competition are less important than those created by the agreements which increase supply of essential products and which facilitate a fairer distribution of them and which limit the short-run in the massive market disruptions: if they do not, the immediate benefit would be to protect competition in the short-run and they do not produce enough satisfactory efficiencies. In the latter case, horizontal agreements between competitors cannot be allowed.

Cooperation between competitors caused by COVID but which go beyond the necessary temporary relief are not allowed. The relaxation adopted at the EU level is addressed to the cooperation which try to tackle supply shortage for undertakings unable to meet the demand. This situation is called undercapacity, while crisis cartels during past crises often repaired overcapacity situations.[152] Those agreements were in fact aimed to reduce and limit production capacity and are typical for economic crisis. However, they are considered to be anticompetitive by object and EU case law does not give them special relief. The crisis cartels are in principle illegal, because they imply prohibited restraints of Article 101 TFEU like exchanges of competitively sensitive information between competitors, limitation of production and fixing of prices.[153]

Competition authorities reminded that the economic crisis could not serve as excuse for cartels. However, coordination between firms may help to alleviate shortages of essential products during COVID or to discover a new vaccine. The competition authorities were trying to meet halfway between allowing horizontal cooperation that could increase supply of essential products and softening too much their rules. Therefore, the relaxation of competition

[152] For more information about the relationship between capacity and antitrust, with a particular focus on overcapacity or excess capacity see S. SACHER, J. SANDFORD, "*The role of capacity in antitrust analysis*", Journal of Competition Law & Economics, Volume 12, Issue 4, 2016, pp. 661–700

[153] I. RAKIĆ, "*Competition Law in the Age of Covid-19*", 30 April 2020, Anali Pravnog fakulteta u Beogradu, 2/2020

rules could not be a free-for-all, but it should be a lenient approach towards positive and useful collaboration, and a strong as ever approach towards cartels. Undertakings should cooperate finding proper solutions during the crisis, because a crisis time is a time for collaboration, not competition. For instance, the development and distribution of vaccines need a great effort of all the players involved, but also that they coordinate between them.[154]

4.2.1 COMPETITIVE AND ECONOMIC ADVANTAGES OF ADOPTING AND ALLOWING CRISIS CARTELS DURING THE COVID CRISIS

Crisis cartels may be accepted only if they are aimed at reducing capacity issues, without restricting commercial freedom of the members of the agreement. The Commission admitted in the past that, under certain adverse circumstances, crisis cartels may be exempted under Article 101(3), as long as the concerned agreements do not involve either price or quotas fixing.[155] Structural overcapacity occurs when undertakings do not have the possibility to recover in the medium-term from a situation of fallout output demand and reduction in capacity utilization. Agreements aimed at reducing overcapacity in a sector as a whole may be condoned, as long as they may allow specialization in order to solve capacity issues and as long as they do not restrict free decision making of undertakings and they do not involve price or quota fixing. For instance, an agreement was initially not approved by the Commission because it contained restrictions of competition as price fixing, but after the exclusion of these restraints from the agreement, the Commission exempted it.[156] In Stichting Baksteen case, when the brick industry was suffering recession due to a fall in demand, the Commission exempted a crisis cartels considering it the only way to reduce capacity and consequently balancing supply and demand.[157] The application of Article 101(3) needs a prior case by case analysis depending on the conditions surrounding the agreements concerned. One of the criteria of Article 101(3) entails that an agreement deserves exemption whether it guarantee a fair share of the benefit to the consumers. In Stichting case, the production improvement gave to consumers both short term benefits, because they continued enjoying the advantages of continuing competition, and long-term benefits, because the restructured industry may guarantee competitive supplies. Moreover, this agreement provoked benefits for consumers because, causing a structural adjustment, it eliminated obsolescent firms, guaranteeing a

[154] K. SCHWAB, "*What We Must Do to Prevent a Global COVID-19 Depression*" World Economic Forum, 13 April 2020
[155] European Commission, VIII Report on Competition Policy § 2(1)(13) (1978)
[156] I. KOKKORIS, "*Should crisis cartels exist amid crises?*", The Antitrust Bulletin, 2010, 55(4):727-758.
[157] On this decision see 94/296/EC: Commission Decision of 29 April 1994 relating to a proceeding under Article 85 of the EC Treaty (IV/34.456 - Stichting Baksteen)

sufficient number of competitive firms with healthy capacity, which are able ensure to consumers both supply choice and security.[158]

In the Royal Asturienne judgement, the ECJ prohibited a long-lasting cartel among competitors aimed at coordinate products supply. The Court clarified it was not permitted to competing producers to create a cartel without a definite duration and regarding supply of unlimited quantities of products. However, the ECJ added that an agreement like that could be allowed only if its object was to escape from a situation where its circumstances are so exceptional to consider it as a real emergency or a real crisis.[159]

As the case law illustrates, crisis cartels are likely to appear in industries in which production facilities are durable and specialized and consumer demand falls due to adverse market conditions.[160]

The Commission and the European Court may authorize a restructuring plan involving sectoral agreements if they believe that the Article 101(3) criteria have been met. These criteria will be met if the reduction in the capacity of the sector will in the long-term lead to more efficient capacity utilization, enhancing the competitiveness of the sector, and thus benefiting consumers. Thus, a detailed plan of plant closures as well as avoidance of creation of new capacity are also necessary factors for the agreement's being accepted by the Commission. In addition, the agreement must constitute an indispensable means of achieving the necessary capacity reduction. The limited duration of the agreement, the existence of firms in the industry that are not party to the agreement, and the fact that the coordinated reduction in capacity is only one element in the business strategy of firms constitute reassurances that competition will not be eliminated. In particular, crisis cartels may benefit from the exemption of Article 101(3), thanks to the first criterion of that Article, according to which the agreement restricting competition is not prohibited under Article 101(1) when it improves the production or distribution of goods or promote technical or economic progress. As crisis cartels were historically thought to solve overcapacity and helping production or distribution in sectors which were suffering downturns, maybe this could be the way to justify them. Moreover, this criterion could also be the way to justify COVID crisis cartels, which are aimed at solving undercapacity by coordination aimed at increasing production and better allocating output. However, this possibility of exempting crisis cartels has been denied because the damages that

[158] I. KOKKORIS, "*Should crisis cartels exist amid crises?",* The Antitrust Bulletin, 2010, 55(4):727-758.
[159] ECJ, C-29/83, Compagnie Royale Asturienne des Mines SA v. Commission of the European Communities, ECLI:EU:C:1984:130, par. 33-35
[160] I. KOKKORIS, "*Should crisis cartels exist amid crises?*", The Antitrust Bulletin, 2010, 55(4):727-758.

they create for competition, for markets and for consumers are much higher than the benefits that they create. They constitute a severe restriction of competition which in most cases cannot be exempted. [161]

There are some old Commission decisions when the Commission exempted crisis cartels under Article 101(3). The Commission thought that those types of agreements, which are concluded between competitors to ensure a reduction of capacity between the undertakings which were operating in an industry in crisis, may produce concrete efficiencies. According to the Commission, crisis cartels may remove inefficient capacity from the industry and increase capacity utilisation rate. [162] Moreover, the Commission was convinced that those agreements may provoke social benefits. For instance, in case Synthetic Fibres, it assessed positively under Article 101(3) an agreement among competitors aimed at reducing capacity, because this reduction allowed the restoration of competitive structure and the improvement of technical efficiency in the market, by enabling the undertakings to specialise. [163]The Commission in the past accepted that agreements which limit production may not be contrary to Article 101 and may deserve exemption under 101(3), thus having a positive consideration of crisis cartels. The reason was that these cooperation between undertakings operating in industries suffering severe crisis, allowed to reduce overcapacity. The rationalisation of capacity may outweigh the negative externalities of short-term reduction of competition. Anyway, the restructuring which involves price fixing or market sharing agreements would not be allowed. Another requisite of the crisis cartels in order to be lawful is to be temporary and proportionate to the concerned crisis. [164]

Apparently, during a severe crisis such as the COVID one, temporary crisis cartels may be helpful for both competition and consumers. According to this idea, crisis cartels may impede severe consequences of a crisis, such as the exit from the market of many undertakings, higher prices for consumers combined with less quantities of products. A cooperation between supermarkets or medicine wholesalers, consisting of sharing stock data, coordinating supply networks and distribution depots, could increase the supply of medicines and food in order to meet the very high caused by the crisis.

[161] A. JONES, B. SUFRIN, N. DUNNE, "*EU Competition Law: Text, Cases, and Materials*", 7th Edition, Chapter 5, pp.207-276
[162] *Ibid*.
[163] 84/380/EEC: Commission Decision of 4 July 1984 relating to a proceeding under Article 85 of the EEC Treaty (IV/30.810 - Synthetic fibres)
[164] A. JONES, B. SUFRIN, N. DUNNE, "*EU Competition Law: Text, Cases, and Materials*" 7th Edition, Chapter 9, pp. 642-702

The reduction of capacity made by competitors through cartels, would restrict competition and violate competition law. However, this reduction may allow companies to operate more profitably and to stabilise markets in turbulent times, re-balancing demand and supply in the market and thus even satisfying the interests of consumers.

During market crisis, a cartel may seem an alternative in order to face the challenges necessary to survive in the economy. Crisis cartels, in most of cases during previous crisis, mainly dealt with structural overcapacity in specific sectors, that is to say a scenario in which consumer demand decreases, undertaking reduces their capacity utilization while increasing losses, without possibility to recover soon. Crisis cartels are temporary agreement among competitors whose aim is to reduce overcapacity caused by exogenous shocks. [165] Over the years, many undertakings have tried to create crisis cartels, cooperating between them in order to find a common solution for a general financial crisis or for crisis of specific sectors, in order to be forced to exit the market. In fact, crisis cartels may have the object to agree on capacity or prices to prevent market exit and may be justified because without these agreements which try to reduce capacity, many firms incur losses and exit the market, consequently reducing consumers' choices and products' quality. They would be authorised as long as they reduce capacity, contemporarily increasing profitability and restoring competitiveness in the long run.[166]

The Commission showed itself lenient sometimes towards agreements which restrict competition, but which contemporarily have as sole aim the coordinate reduction of overcapacity in particular sectors which are suffering deep problems. Moreover, these agreements, in order to be condoned, must guarantee free decision making of the firms involved.[167]

However, the COVID crisis cartels may not be considered as common crisis cartels, there are differences between them. Common crisis cartels are aimed at helping a specific sector during a crisis which causes demand decrease and the consequent excess of unsold supply. In this circumstance, temporary cooperation between competitors may help them to coordinate a scaling back of production. Thanks to this type of cartels, the undertakings involved may save costs and avoid losses, maintaining their stable position in the market and preventing their exit. Instead, corona crisis cartels are aimed at reducing excess demand rather than excess

[165] Y. VARDHAN GARU, K. HARWANI, "*Crisis Cartel and State Aid: An Alternative to Competition Authority during COVID-19 Pandemic*", The SCC Online Blog, 10 August 2021
[166] European Commission, XXIII Report on Competition Policy 1993, par. 85
[167] Commission of the European Communities, Twelfth Report on Competition Policy (1982), para. 39.

supply: their objective is the exact opposite of that of common crisis cartels. However, even during COVID crisis there were problems related to excess supply, for example for milk and cars. In those particular sectors, national agencies allowed exemption to coordination, enabling undertaking to scale down production. However, those exemptions contrasts with the objective of general COVID related exemption, which stimulated availability and allocation of essential healthcare products, requiring undertakings to increase their production and combining it with affordable prices. The common crisis cartels are justified by the need to contrast overcapacity; instead COVID crisis cartels face undercapacity. Common crisis cartels are designed to help specific sectors which are suffering a crisis, and this crisis provoked a deep decrease demand and a consequent excess of unsold supply. In order to solve this problem, and avoid excessive overproduction, crisis cartels help the undertakings to coordinate production. Instead, even COVID crisis cartels help the undertakings in their production coordination, but with the aim to meet the very high demand. Corona crisis cartels aim to reduce excess demand, not excess supply[168]. During COVID crisis, there is no sufficient supply to meet the large demand of essential products: thus, through a cartel, competitors may coordinate their commercial behaviours in order to provide sufficient demand. However, as cartels coordinate usually even on prices, they may become an exploitation of the crisis: cartelists may stabilize prices but then increasing them gradually in order to make profits. The priority of cartelists, even during the COVID crisis, is to gain profits and not to guarantee benefits to consumers. This is the reason why most of competition authorities responded to the COVID-19 pandemic with a generous exemption from for any companies that aim to solve pressing scarcities through collaborations that restrict competition.[169] However, the authorities refused to grant exemption to cartels. On the contrary, most of them clarified that horizontal cooperative agreements may be allowed, as long as they do not give rise to cartels. Cartels would represent a means to exploit the crisis in order to make profits, rather than a means to help consumer and recover from the crisis.

[168] M. P. SCHINKEL, A. D'AILLY, "*Corona Crisis Cartels: Sense and Sensibility*", Amsterdam Law School Legal Studies Research Paper No. 2020-31
[169] *Ibid*.

4.2.2. THE REASONS WHY CRISIS CARTELS ARE VERY HARMFUL FOR COMPETITION AND SHOULD NOT BE ALLOWED DURING THE COVID CRISIS

Therefore, relaxing the cartels prohibition during turbulent economic times, in order to create crisis cartels, could cause more harm than benefit for competition. Cartels are a very blunt instrument, whose impact on the market is difficult to measure.[170]

The EU Commission does not have a lenient approach towards crisis cartels: as undertakings are required to act independently in the market, and as cartels are perceived as restriction of competition by object, crisis cartels cannot be justified. As the name tells, crisis cartels are cartels formed during deep economic recession.

The cooperation agreement during COVID crisis may be aimed at limiting the harmful consequences of the crisis. In particular, COVID related collaboration may have as objective to address the huge shock of supply and demand, so it may be aimed at an immediate revival of manufacturing, supply and distribution of products and at recovering supply and distribution chains from disruptions. Such cooperation may be a fast and effectively solutions in the short-run against shortages and economic failures of specific sectors of products, as the market self-correction may be too slow: waiting for long run market equilibrium, may be very risky and have negative economic and social externalities; instead allowing specific types of cooperation projects among competitors would help to limit the negative effects of the crisis in the short run. Since the beginning of COVID crisis, many jurisdictions guided undertakings about cooperation among competitors, in order to increase legal certainty for them. The guidance was provided with soft law or with clearance in concrete cases. However, the authorities, even conscious that agreements during COVID crisis may generate efficiencies, agree that hard core restriction such as price fixing cartels, are still prohibited during the crisis.[171]

Even when the crisis cartels have been encouraged or even pressed by national governments with the objective to recover from crises, they cannot be cleared. The best example is the Irish beef case, when the CJ declared an agreement as prohibited due to the fact of restricting competition by object, even if the Irish government was conscious of the agreement and the parties' intention was not to harm consumers but to recover from the industry's crisis. It seems

[170] S. O'KEEFFE, "*Competition in a time of Corona: Primum non nocere*", in Concurrences Review, special issue "Competition Law and Health Crisis", n. 2/2020

[171] OECD, "*Co-operation between competitors in the time of COVID-19*", 26 May 2020; for more information about the harmfulness of price fixing (especially during an economic crisis) see A. STEPHAN, "*Price Fixing in Crisis: Implications of an Economic Downturn for Cartels and Enforcement*", World Competition Law and Economics Review, Volume 35 Issue 3, pp. 511-528

clear from the facts of the case the high level of government involvement in this agreement, of which the Irish Government was a strong and active supporter. The involvement of the Government does not in itself preclude, or indeed influence, the application and interpretation of Article 101(1) of TFEU. The Irish Competition Authority took an independent line from its own Government. One could wonder, however, if a tough line on competition law is maintainable in the future if the economic crisis will continue to exert pressure on governments and competition authorities alike.[172]

The Commission realized that only in rare circumstances the parties of a crisis cartels may be able to benefit from the exemption of Article 101(3), because it would be very difficult for them to demonstrate that an agreement reducing capacity is necessary to achieve efficiencies and that consumers receive benefits from it.[173] The industrial restructuring agreements constitute in principle and by nature a restriction of competition by object within the meaning of Article 101(1) TFEU. It is very difficult for undertakings to prove that a crisis cartel provokes more pro-competitive benefits than competition restraints. A cartel is considered by its nature to have the potential of restricting competition, even during a crisis. Moreover, they are considered to not deserve the exemption of Article 101(3), because most of times they are considered superfluous and unnecessary as the competitive process alone is normally able to remove excess capacity from the market.[174]

Another reason for not allowing COVID crisis cartels is that the Commission Temporary Framework expressly excludes cartel from the competition law relaxation. The Commission put some guiding principles about cooperation agreements during the crisis. In particular, the Commission clarified that pharmaceutical manufacturer are allowed to cooperate if this cooperation is temporary and if receive the approval of the Commission itself. In particular, the Framework reminds the importance to guarantee more than ever competition law protection to undertakings and consumers during this crisis. For this reason, the Commission's monitoring and investigations to market developments during the crisis is close and active and punishes anti-competitive agreements, in particular exploitative conducts which cover anti-competitive collusion. Moreover, the Commission invites to not interrupt cartels reporting

[172] T. VAN DER VIJVER, "*The Irish beef case: Competition Authority v Beef Industry Development Society and Barry Brothers (Carrigmore) Meats (C-209/07), European Court of Justice*", in European Competition Law Review, 2009, Vol.30, Issue 4, p. 198-201
[173] A. JONES, B. SUFRIN, N. DUNNE, "*EU Competition Law: Text, Cases, and Materials*", 7th Edition, Chapter 9, pp. 642-702
[174] See the contribution of EU Commission at the OECD Roundtable on Crisis Cartels, 2011

during the crisis.[175] Therefore, after reading the words used by the Commission in the framework, there is neither a small opening for COVID crisis cartels. The ECN and the Commission, since the beginning of the crisis, introduced derogations from competition rules for necessary and temporary measures aimed at solving supply shock and products shortages[176] or at rebalancing specific markets and sectors[177], but they confirmed their strict vigilance on cartels. In fact, the Commission, being allowed to adopt temporary derogations from certain EU competition rules in situations of severe market imbalances[178], adopted such derogations for the milk, flowers and potatoes sectors. These derogations allowed operators to self-organise and implement market measures at their level to stabilise their sector: for example, the milk sector was allowed to collectively plan milk production and potatoes sector was allowed to withdraw products from the market. However, the Commission clarified that consumer price movements and any possible partitioning of the internal market were monitored closely to avoid adverse effects.[179] Thus, anti-competitive agreements like cartels were not benefiting from the derogation.

Since the beginning of the COVID crisis, the general responses at national and international level, with regard to cartel enforcement, consisted of issuing temporary guidelines, in order to make undertakings aware about permitted collaboration. Due to demand and supply shocks, most of competition agencies declared to allow cooperation aimed at solving those shocks. In fact, those types of temporary solutions, which are not cartels, do not impede competition and the efficiency gains that they provoke are likely to offset any potential harm. For instance, after the outbreak of the COVID crisis, the Netherlands Authority for Consumers and Markets (ACM), declared its intention to apply of competition rules in a more lenient manner during the emergency, deciding to allow supermarkets and medicine wholesalers to exchange information within their respective categories about their stocks and about the number of products sold. This would be normally prohibited. In particular, due to the pandemic, the ACM allowed temporary agreements and exchange information among undertakings, in order to

[175] European Commission, Temporary Framework for assessing antitrust issues related to business cooperation in response to situations of urgency stemming from the current COVID-19 outbreak, par 20
[176] European Competition Network, Antitrust: Joint statement by the European Competition Network (ECN) on application of competition law during the Corona crisis, 23 March 2020
[177] European Commission, "Coronavirus: Commission adopts package of measures to further support the agri-food sector", Press release, 4 May 2020
[178] See article 222 of Regulation (EU) No 1308/2013 of the European Parliament and of the Council of 17 December 2013 establishing a common organisation of the markets in agricultural products and repealing Council Regulations (EEC) No 922/72, (EEC) No 234/79, (EC) No 1037/2001 and (EC) No 1234/2007
[179] European Commission, "Coronavirus: Commission adopts package of measures to further support the agri-food sector", Press release, 4 May 2020

effectively allocate and distribute food and medicines.[180] ACM said nothing about crisis cartels during COVID. Generally, the prohibition on cartels in Dutch law allows no express exception for crisis cartels and in a judgement of 2001, the Dutch court assured that prices fixing between competitors is not an appropriate response to difficult market situations and to crisis.[181] Capacity issues are also rejected as justification for a breach of the prohibition of Article 101(1).

Crisis cartels are considered equally harmful as ordinary cartels under EU competition law. Even during a recession, the EU Commission did not change its idea that market problems should be solved by autonomously and that the cartels do not deserve to benefit from exemptions under Article 101(3). Thus, in Europe is generally difficult for businesses to coordinate their actions through cartels, even when they are suffering demand shock and problems due to crisis.[182] During past crises, competition authorities have stressed that is important that firms comply with competition law, not exploiting the situation through cartels. The crises cannot be used as a shield against competition law enforcement. Cartels usually cause serious offences as, reductions in output and price increases, which impede recovery and contemporarily increase consumer harm. Authorities made clear that during the crisis there was high alert on cartels, because they could be tempting for firms during troubled times. On one hand, some firms may collude to avoid risky competition between them in sectors characterized by demand fallout and where they need to solve the issue of excess capacity. On the other hand, the cartels may be a temptation for firms which may price fix, exploiting the augmented demand and emergency public purchasing.[183]

Three of the reasons which have been proposed to encourage or admit corona crisis cartels may be: urgency of production, fairness of allocation, and public health externalities. However, each of those justifications should be denied, confirming the lack of exemption for COVID crisis cartels. Firstly, during the crisis, the demand for specific healthcare products reached a peak, provoking shortages. In this situation, collusion between firms should not be considered as the best solution. In fact, during a shock of supply and demand, undertakings are incentivized to increase their production and their capacity. Competitiveness maintains this type of incentives for firms, thus allowing competitors to collude between them is not a

[180] M. SNOEP, "*Competition Enforcement in Times of Crisis – A Perspective from the ACM*", Journal of Antitrust Enforcement, 2020, Volume 8, Issue 2, p. 268
[181] Decision of the Rotterdam Court, Stichting Saneringsfonds Varkensslachterijen, 4 December 2001
[182] Y. VARDHAN GARU, K. HARWANI, "*Crisis Cartel and State Aid: An Alternative to Competition Authority during COVID-19 Pandemic*", The SCC Online Blog, 10 August 2021
[183] A. JONES, "*Cartels in the time of COVID-19*", Journal of Antitrust Enforcement, 2020, 8, pp. 287–289

better solution. Collusion does not incentivize suppliers to adopt a fair distribution, but rather incentivizes them to gain profits by limiting production and increasing prices, consequently having negative social consequences because of impeding people to afford essential products. The increase of output corresponds to price decreasing. Governments and national authorities have to intervene, changing market allocations and thus prioritizing hospitals or some parts of the population. It is not possible to expect fair allocation from collusions, thus collusions and crisis cartels are not the right solution to solve shortages and to ensure fair allocation during the COVID crisis.[184]

Moreover, competition can help to decrease prices of essential products faster than collusive practice. In fact, when colluding, firms are incentivised to increase prices. The forms of cooperation which are allowed and even encouraged by competition authorities during crises are those contributing to solve supply problems. Instead, profit maximizing cartels should not be encouraged because they do not help increasing the availability of essential products. For instance, even if the cartelists coordinate in relation to the production of face masks, improving their properties, they would also increase prices causing a decrease of the use of face masks. Thus, as cartels are discouraged with regard to essential products are because they do not favour a positive allocation, the best solution is to rely on competition. The latter can fast increase both supply and quality, meeting the high demand and lower prices as consequence of market fluctuations. As firms are motivated by profits, and profits incentivize them to produce less, increase prices and not improve quality, corona crisis cartels, whose first aim is profit, are discouraged. In a public health crisis together with a deep economic crisis, private profits cannot be the priority.[185] Crisis cartels have to be prohibited also because they help inefficient firms to stay in the market. Low-cost producers may curtail their own output during times of low demand in order to ensure the viability of inefficient cartel members and saving them from bankruptcy.[186]

However, during COVID crisis, the competition authorities, even confirming their wall against cartels, at the same time they did not demonstrate 100% confident towards competition. Thus, they prohibit cartels, but at the same time assured that normal competition would not be sufficiently flexible. The only possible solution was halfway: relaxation of competition law, but not for cartels, but only for cooperative agreement whose aim is to solve problems related

[184] M. P. SCHINKEL, A. D'AILLY, "*Corona Crisis Cartels: Sense and Sensibility*", Amsterdam Law School Legal Studies Research Paper No. 2020-31
[185] *Ibid*.
[186] M. ESWARAN, "*Cartel Unity over the Business Cycle*", Canadian Journal of Economics,1997, Volume 30, Issue 3, p 645

with shortages, unfair allocation and high prices. Making cartels benefits of exemption during COVID crisis, it would have been a disaster: they would have contributed little to solve the crisis, but at the same time they would have caused heavy damages to competition and consumers.[187] The ECN promoted the non-intervention during COVID crisis against necessary and temporary measures which are aimed at avoiding supply shortages, recognizing that, even during crisis, the European authorities have to intervene against exploitative and anti-competitive practices like cartels.[188] In fact, the aim of this intervention is the idea of guaranteeing a level playing field for companies, which instead cartels are likely to jeopardize.

The Commission, during previous financial crisis, declared its unwillingness to guarantee the crisis cartel defence. In particular, starting from the 2008 financial crisis, decided to not modify nor relax the application of competition rules, but instead decided to speed up the procedure, prioritising sectors which affect more people's money and relevant sectors for productivity. Thus, the Commission, reminding the importance of ensuring competition even in times of COVID and encouraging undertakings and citizens to report cartels, has been coherent with pre-existing rules and procedures, even being flexible in their application, due to the financial context.[189] The Commission was reluctant to condone agreements aimed at solving overcapacity during general or sectoral crises. However, the Commission showed openness for agreements whose undertakings demonstrate the inability of market forces to alone deal with the crisis and solve the capacity problem. Moreover, the Commission may guarantee exemption to crisis cartels on efficiencies grounds, when the undertakings involved may prove that the problems of excess capacity are caused by a sectoral and economic crisis to which the undertakings alone cannot put remedy; then, the undertakings concerned need to prove that the cartels reducing capacity provoke benefits enjoyed directly by consumers, and that these benefits are caused by the cartel concerned. In order to eventually benefit from an exemption under Article 101(3), crisis cartels need to be assessed on a case-by-case analysis. In particular, the agreements should be aimed at reducing overcapacity and at provoking pro-competitive benefits directly for consumers, and those benefits have to outweigh the competitive restraints that the agreement provokes. However, in most of past cases, cartels, even those aimed at recovering from crises, have been considered to not deserve the exemption under Article

[187] M. P. SCHINKEL, A. D'AILLY, "*Corona Crisis Cartels: Sense and Sensibility*", Amsterdam Law School Legal Studies Research Paper No. 2020-31

[188] European Competition Network, Antitrust: Joint statement by the European Competition Network (ECN) on application of competition law during the Corona crisis, 23 March 2020

[189] F. GHEZZI, L. ZOBOLI, "*L'antitrust ai tempi del Coronavirus: riflessioni sulle esperienze internazionali e sulle iniziative italiane*", Rivista delle società, 2020, n. 2/3

101(3), because they cause hardcore restrictions which impede them to be cleared. Even though each case and crisis is different, and leads to diverging effects in different industry sectors, the situation and approaches of the authorities towards COVID crisis cartels does not seem different from the past.[190]

A crisis cartel cannot satisfy the Article 101(3) criteria as such cartels usually involve hardcore restraints as price fixing, output restrictions and market division. The Commission, on several occasions, clarified that crisis cartels, in order to benefit from the exemption of Article 101(3), need to satisfy the criteria of that Article.[191] In most of cases the Commission showed itself unwilling to exempt crisis cartels under Article 101(3). Thus, sometimes, the maintenance of employment has been used as a justification during an economic crisis in order to exempt agreements under Article 101(3).[192] However, this justification, may not justify industry-wide crisis cartels under Article 101(3), and the maintenance of employment is not expressly mentioned by Article 101(3).[193] A crisis cartel may not satisfy the consumer benefit criterion under Article 101(3). With a crisis cartel, undertakings coordinate in order to reduce capacity, but in this way are likely to restrict or eliminate competition.[194]

In conclusion, a health crisis like COVID, cannot not represent the chance for allowing measures which are unnecessary or disproportionate for overcoming this crisis. Cartels are the archetype of anti-competitive agreements, and a crisis cartel is thus still an illegal cartel: if an agreement exceed the limits of what is necessary to address the shortage of essential goods, it cannot be permitted.[195] During COVID crisis, cooperative agreements may be allowed, provided that they do not correspond to cartels: cartels are not allowed during crisis nor in normal times. Thus, the relaxation of competition rules adopted during the crisis towards cooperative agreements, which was aimed at increase supply of essential products and consequently the wellbeing of consumers, must not be intended as a chance for cartelizing. This relaxation does not regard cartels. The competition authorities consider that during a

[190] C. RITZ, M. SCHLAU, "*Crisis Cartels in times of Covid-19: Lessons from former crises teach a cautious approach*", in Concurrences Review, special issue "Competition Law and Health Crisis", n. 2/2020
[191] I. KOKKORIS, "*Should crisis cartels exist amid crises?*", The Antitrust Bulletin, 2010, 55(4):727-758
[192] ECJ, Case 26/76, Metro v. Commission, 1977, ECLI:EU:C:1977:167
[193] S. HORNSBY, "*Competition Policy in the 80's: More Policy less Competition?*", European Law Review, 1987, Vol. 12, Issue 2, p.93
[194] I. KOKKORIS, "*Should crisis cartels exist amid crises?*", The Antitrust Bulletin, 2010, 55(4):727-758
[195] F. VIALA, D. KUPKA, "*Cooperation between companies in times of health crisis",* in Concurrences Review, special issue "Competition Law and Health Crisis", n. 2/2020

severe recession, market forces, and not a group of undertakings through collusion, have to solve the capacity issues.[196]

The enforcement of antitrust by competition authorities should be pragmatic in periods of crisis and the competition law prohibitions should not regard all cooperation between competitors when cooperation have wider benefits, which may be not purely economic and that are valued by society at large.[197] Authorities could accept cooperation and information exchange between competitors only during a crisis, as the cooperation concerned provoke some broader benefits which outweigh the benefits of competition enforcement.[198] Crisis cartels have been demonstrated to be useless in order to reduce the negative effect of an economic crisis (global or sectoral); they could even worsen the emergency situation. [199]

During COVID crisis, many concerns emerged about the capacity shortages. The cooperation between competitors was necessary and aimed at providing urgent instruments during the pandemic such as vaccines, medicines and medical equipment. When assessing a cooperation project, in order to decide whether to prohibit it or not, the negative effects which competition enforcement may cause during the crisis should be considered. It should be decided which one to prioritize between competition, societal welfare and health protection. During the crisis, most of competition authorities decided to find a compromise: for instance, the Commission allowed to form cooperation aimed at solving shortages of medicines in an efficient way through the improvement of supply and distribution and the increase of production for those medical items. The measures concerned have also to be necessary to achieve those aims. During sectoral or global crisis, it is possible to allow horizontal cooperation agreements which are usually prohibited, in order to recover from the crisis, as long as these agreements do not result in cartels. Prosecuting illegal cartels is thus necessary during economic crises as during normal and prosper times.[200]

[196] A. DE MONCUIT, "*How might the Covid-19 crisis change the dynamics of competition law?*", in Concurrences Review, special issue "Competition Law and Health Crisis", n. 2/2020
[197] R. WHISH, D. BAILEY, "*Competition Law*", Tenth edition, 2021, Oxford University Press, p. 613
[198] M. KOZAK, "*Competition Law and the COVID-19 Pandemic – Towards More Room for Public Interest Objectives?*", Utrecht Law Review, 2021, Volume 17, Issue 3, pp. 118– 129
[199] See the contributions of different jurisdictions at the OECD Roundtable on Crisis Cartels, 2011
[200] I. RAKIĆ, "*Competition Law in the Age of Covid-19*", 30 April 2020, Anali Pravnog fakulteta u Beogradu, 2/2020, p.45

5. THE AGREEMENTS BETWEEN COMPETITORS AND THEIR CORRELATION WITH CONSUMER PROTECTION

EU competition enforcement protects consumer welfare and markets have to work for consumers. The aim of the Commission is to protect competition in the market as a means of enhancing consumer welfare and ensuring an efficient allocation of resources.[201]

Consumer welfare is the standard the Commission applies when assessing infringements of the treaty rules on cartels. Hardcore restrictions like cartels are considered very harmful for consumer welfare. For this reason, they cannot benefit even from normal exemption like the De minimis exception. Horizontal agreements are qualified as something that go to the detriment of consumers, therefore they do not deserve of any exemption which would permit them to survive and the Article 101(1) always applies.[202]

Article 101 has a bifurcated structure, a part is about prohibition, another part providing an exemption to the previous prohibition. Due to this structure, the consumer interest is taken into account at two different stages. First, the consumer interest is protected by prohibiting an agreement which has as its object or effect, the restriction of competition. Second, the exemption of the third paragraph of Article 101 protects also consumer interest by exempting from the prohibition of the first paragraph those agreements which improves production or distribution of goods or promotes the technical and economic progress. The consumers benefit from this exemption, and the agreements exempted are not very harmful for competition.[203]

In the T-Mobile case the ECJ stressed that Article 101 TFEU is designed to protect not only the immediate interests of individual competitors or consumers but also to protect the structure of the market and thus competition as such.[204] In this case the ECJ approach is to protect the economic interests prohibiting an agreement. The priority of competition law should be for consumer interest and consumer welfare, thus the prohibition of Article 101(1) TFEU should not apply only to behaviour having a direct influence on consumer prices, but also in cases where consumer harm is not evident.

[201] See for example the declarations of the Commissioners for Competition, M. Vestager, Speech of 29 November 2018; N. Kroes, Speech of 15 September 2005

[202] I. VAN BAEL, J. BELLIS, "*Competition Law of the European Union*", sixth edition, Kluwer Law International 2021, p. 371

[203] On the relationship between article 101 TFEU and consumer interest, see M. IOANNIDOU, "*Consumer Involvement in Private EU Competition Law Enforcement*", Oxford University Press, 2015, pp. 28-34

[204] ECJ, Case C-8/08 T-Mobile Netherlands BV v Raad van Bestuur van de Nederlandse Mededingingsautoriteit, ECLI:EU:C:2009:343, para 38

The court, in the GlaxoSmithKline case, described the objective of Article 101(1) as the prevention of the restriction of competition by undertakings and of the reduction of consumer's welfare. The court in this case proposed a different view: in order to decide whether an agreement has its object or effect the restriction of competition, it should be looked at the consumer welfare. In fact, the welfare of consumers is viewed as the guiding principle of Eu competition law and the main aim of Article 101 (1).[205] Therefore, if the agreement leads to a reduction of consumer welfare, it has to be considered as a restriction by object of competition. The Glaxo case confirms the combination between competition law and consumer welfare, thanks to the ability of competition law to promote consumer interest in favour of consumer welfare, especially in markets where there is a deep impact of anti-competitive practice on consumers, as for instance the pharmaceuticals market.

As consumer welfare is considered the primary aim of competition law, an agreement restricts competition by object when it is capable, from its content and the legal and economic context, of reducing consumer welfare. When an agreement does not restrict competition by object, it could have negative effects on competition. In this case the interest of consumers may be assessed by looking at the impact of the agreement on prices, output and innovation. Market integration and consumer interest work together. As indicated in the Guidelines on the Application of Article 101(3) TFEU: "*The objective of Article 101 is to protect competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources. Competition and market integration serve these ends since the creation and preservation of an open single market promotes an efficient allocation of resources throughout the Community for the benefit of consumers*."[206] Therefore, an agreement having negative effects on competition and reducing market integration, would be considered also contrary to consumers' benefits. Instead, agreements which favours market integration and an efficient allocation of resources, are not prohibited by Article 101(1), thanks to the benefits that they provide to consumers.

Article 101(3) admits the possibility that there are agreements which could be exempted from the prohibition of Article 101(1) if they generate economic benefits outweighing their negative effects on competition. However, the agreements benefit from the exemption when they provoke efficiencies for consumers or at least they have a neutral effect upon consumers. Thus,

[205] ECJ, 6 October 2009, Joined Cases C-501/06P, C-515/06P and C-519/06P, GlaxoSmithKline Services Unlimited v Commission of the European Communities, ECLI:EU:C:2009:610

[206] European Commission, Guidelines on the Application of Article 81(3) of the Treaty (2004) OJ C 101, para 13

an agreement producing dynamic or qualitative efficiencies but provoking negative effects on consumers cannot deserve the exemption of Article 101(3). When the agreement provokes efficiencies and these are passed on to consumers, the agreements it is likely to be cleared under Article 101(3) benefiting from the relative exemption. Article 101(3) recognizes the possibility for agreements to be kept alive when they have a positive impact especially on consumers.[207] The positive effects of an agreement must be balanced against and compensate the negative effects on consumers, as consumers are not harmed by the agreement. Anti-competitive agreements about prices cannot be defended. Less competition cannot be justified by the higher quality of the products: those collusions cannot be justified by efficiencies because they cause price increases and quality reductions, thus reducing the consumer welfare.[208] An agreement may be positive for the society as a whole when it causes a more efficient allocation of resources: this happen when the agreement concerned provoke efficiencies which allow to produce greater quantities of more valuable products.[209] This factor may be crucial during COVID crisis: in a period of severe shortage of essential products, guaranteeing a more efficient allocation of resources would cause a great benefit for consumers; thus, agreements among competitors that would reach this objective, would deserve to be exempted under Article 101(3).

The primary aim of competition law is consumer welfare. Consumer welfare, in a broad sense, may include the health and wellbeing of consumers. In this sense, competition law and health policies may go side by side, aimed at satisfying consumer interests. Thus, by relaxing competition rules towards agreements during the COVID crisis, choosing to focus their means on other issues, the enforcers were simply serving consumer interests, enabling people to obtain sufficient supply of essential goods at affordable prices.[210] The main objective of this alternative selection of antitrust enforcement priorities, excluding cooperation agreements from them, is to safeguard the consumer welfare, providing sufficient supply of essential goods to consumers at reasonable prices. Thus, this specific relaxation of competition rules pursues one of the core aims of competition law, that is to enhance consumer welfare thanks to an efficient allocation of resources. Cooperation agreements should be oriented towards the

[207] M. IOANNIDOU, "*Consumer Involvement in Private EU Competition Law Enforcement*", Oxford University Press, 2015

[208] See for instance, Autorità Garante della Concorrenza e del Mercato, Relazione Annuale sull'attività svolta, 2001

[209] See for instance, Guidelines on the application of article 81(3) of the Treaty, par. 85

[210] M. KOZAK, "*Competition Law and the COVID-19 Pandemic – Towards More Room for Public Interest Objectives?",* Utrecht Law Review, 2021, Volume 17, Issue 3, pp. 118–129

pursuit of this aim, especially during a crisis which causes scarcity of products.[211] The actions taken by the EU Commission and NCAs regarding agreements during the crisis, took into consideration the consumer welfare. In order to accept crisis cartels, it is necessary that they comply with the criteria of Article 101(3). However, non-economic goals, that is to say public interest objectives, may be considered in order to exclude the application of the prohibition of Article 101(1) TFEU to a specific agreement. Thus, during COVID crisis, a cooperation agreement may be justified by considering consumer welfare and public interest goals such as those related to health and safety of people.[212] The authorities, during the crisis, have at their disposal a certain margin of discretion about public interest goals and about the decision to allow cooperation which are normally prohibited. A broader application of the concept of public interest goal may allow to easily condone cooperative agreements aimed at fighting shortages in the market or at developing new products (for example a drug, a vaccine). Anyway, the non-economic objective, in order to be a valid justification for agreements, has to be clearly and specifically formulated, and the agreement needs to be necessary and proportionate to achieve the public interest goal concerned.[213]

During COVID crisis, when deciding what to do with agreements among competitors, the NCAs and the Commission decided to expressly prioritize the consumers. For instance, the CMA put as its priority during the COVID outbreak the cases which protect consumers, in particular those in vulnerable circumstances.[214] In fact, the key factor for the enforcement approach of the CMA during the crisis is the potential for the coordination to cause harm to consumers or to the wider economy. Where the coordination is necessary, for example, to ensure that consumers have access to essential supplies, it is highly unlikely that it would cause harm to consumers. Extraordinarily, a coordination could be accepted when, even causing the reduction in the range of products available to consumers, it contemporarily avoids supply shortages of relevant product. The agreements among competitors, in order to be allowed, must not be an excuse to exploit the crisis and causing the increase of prices of essential products. Collusions which exploit and harm consumers are always prohibited, even more so during the crisis when consumers are more vulnerable.

[211] See K. J. CSERES, "*Competition Law and Consumer Protection*", Kluwer Law International, 2005, p. 307.
[212] M. KOZAK, "*Competition Law and the COVID-19 Pandemic – Towards More Room for Public Interest Objectives?"*, Utrecht Law Review, 2021, Volume 17, Issue 3, pp. 118–129
[213] *Ibid*.
[214] F. JENNY, "*Market adjustments, Competition Law and the Covid-19 Pandemic*", Le Concurrentialiste, 2020

CONCLUSIVE REMARKS

This chapter shows the approach towards the agreements among competitors during the COVID crisis. Vertical agreements are allowed even in normal times if they comply with some conditions. Instead, horizontal agreements are often considered as restrictions to competition, but during the crisis their prohibition benefited from a soft relaxation. The European antitrust enforcers recognized the shortage of products as the main problem. In order to solve it, exceptional measures could have been necessary. Therefore, most of them decided to extraordinarily exempt agreements and exchange of information among competitors. However, these agreements needed to be limited to solve the COVID related issues, being thus temporary, related to particular fields and proportionate to the pursued aims. The main aim of the allowed agreement would be to increase the supply of some specific essential products in order to comply with the huge demand, contemporarily guaranteeing a fair allocation and distribution of the essential products for consumers.

The solutions taken at both European and national level showed a preferential treatment of the enforcers toward this type of agreements. Soft law measures clarified the possibility for competitors to cooperate without running into the competition law prohibition when the agreements facilitate the productivity and the efficient allocation (especially for essential products which are in scarcity), without harming consumers. As demonstrated, the enforcers did not only provide to undertakings a guidance about cooperation, but when the consumeristic and pro-competitive requisites were satisfied, the agreements receive the approval, being considered consistent with the COVID-related practice of the enforcers. Instead, the agreements which do not satisfy the requisites and go beyond go beyond the limits established by the authorities, they would not be allowed and they would have been prohibited under Article 101(1) as a restriction of competition. COVID crisis could not stand in as general exemption which would have granted amnesty even to collusive practices which are normally considered as strongly anti-competitive and anti-consumeristic.

An example of agreements prohibited even during the crisis and that would not benefit from any exemption were the cartels. Neither those cartels created specifically for the crisis, the so-called crisis cartels, which would have had as one of their aims the solution of undercapacity or overcapacity, were allowed during the crisis. Cartel is always considered as a restriction of competition per se, as a severe violation of competition which is not possible to save from the prohibition granting it an exemption. Moreover, the cartels have as primary aim the cartelists' interests, while the consumers' interests are only correlative. Cartels do nothing in concrete

for consumers' interests, there are no concrete guarantees about their ability to solve crisis problems like shortages of goods, or rather it is likely that they worsen that issue, even provoking price increase. Consumer protection would be threatened by cartels, especially during a severe crisis like COVID which affected both economy and health. Cartels are in contrast with the competition law's goal of protecting consumer and of pursuing their welfare. Agreements have to be consistent with consumer protection and those which are contrary cannot be allowed.

In light of what has been seen in this chapter, the authorities and bodies at European and national level feel the necessity to safeguard, in relation to the agreements between competitors and together with competition, the consumer welfare. Consumer protection is strictly related to competition and it is in fact recognized as one of the superior aims of competition law, even more during a period of shock and consumer's vulnerability. This correlation will emerge even in the next chapters regarding exploitative pricing practices during the COVID crisis, where consumer protection has a primary role.

Therefore, the link between cooperative agreements and consumer protection is strict. The agreements have to comply not only with competition law but also with consumer protection rules, guaranteeing compliance with both competition and consumer welfare. Although COVID crisis allowed a soft relaxation of competition rules, permitting competitors to benefit of special exemptions for specific types of agreements, the agreements which hinder consumer protection cannot benefit from this lenient treatment. the exempted agreements have to be those which produce economic benefit, but especially those which have as objective the safeguard of consumer welfare and interest. During the crisis, with regard consumer interests, the critical threshold is even higher than before, due to the fact that such a crisis could be a threat for consumers interests.

Anti-competitive collusions cause in most of cases detriments to consumers, and, vice versa, the agreements with negative effects on consumers violate competition law. For this reason, the evaluation of the competitive legality of cooperative practices involves also their impact on consumer protection. It is perceived a great need of safeguarding free competition, but at the same time also the protection of consumer welfare. Protection of competition with relation to agreements among competitors ends up regarding inevitably the protection of consumers, and the European and national authorities commit growing attention to this principle when dealing with the competition conformity of cooperative practices. Competition enforcement nor consumer protection can be excluded for favouring profitable behaviours of competitors

and measures which severely damage consumers and competition are not permitted, whatever would be the economic implications.

CHAPTER II: EXPLOITATIVE PRICING AND COVID

The COVID-19 crisis has had an exceptional and long-lasting negative impact on health and economies, and one of its consequences was the disruption of supply chains and a consequent widely reported shortages of specific goods. In fact, when the pandemic started, European countries were not well prepared to face COVID emergency due to the insufficient stocks of the essential products to protect people from the infection and reduce the spread of the virus, which provoked in the first weeks of the emergency, the combination of enormous demand with insufficient supply of the medical devices.[215] In turn, this combination caused a temporary shortage and a potential high risk of exploitative high prices for a narrow set of food and hygiene products, which would have been very harmful for customers and consumers.[216] This price rise may be an issue for competition law and distinguishing legitimate from illegitimate pricing practices creates substantial challenges for competition authorities. In fact, even if the ability to charge high prices is arguably what drives businesses to want to increase their market power, the practice of charging unfairly high selling prices may be an abuse of dominant position according to Article 102(a) TFEU, which prohibits abusive behaviour by companies holding a dominant position on any given market.[217] The general overview of excessive pricing in the EU is given by the Article 102 TFEU and by the case law, which both represent the legal framework for this particular matter in EU. The main pillars of case law for excessive pricing are the United Brands judgement, which represents the landmark ruling for excessive pricing, and the Opinion of the Advocate General ("AG") of the Court of Justice Wahl, who developed a modern and definitive way of solving excessive pricing cases.

In light of the topic of the previous chapter, it is possible to realize that the shortages of essential products created two different issues: the incentive for undertakings to cooperate between them and to provide the concerned products in sufficient quantities. However, in this situation it is necessary to prevent two different anti-competitive conducts, which both have as object to profit from the COVID crisis: the anti-competitive cooperation between competitors and the exploitatively excessive pricing. Contrary to the lenient approach towards the cooperative agreements, permitting those aimed at increasing the production and the

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[215] OECD, "*The face mask global value chain in the COVID-19 outbreak: Evidence and policy lessons*", 2020

[216] OECD, "*Exploitative pricing in the time of COVID-19*", 2020; see for instance D. EDWARD, R. LANE, L. MANCANO, "*EU law in the time of COVID-19*" European Policy Centre,2020, according to which Covid gave dominant undertakings many possibilities to profit, the most obvious would be to profit of shortages of vital products or services which consumers will buy irrespective of price and where there is limited competition in supplying them by charging them higher prices.

[217] On this point see J. VAN DE GRONDEN, C. S. RUSU, "*Competition Law in the EU: Principles, Substance, Enforcement"*, Edward Elgar Publishing, 2021, Chapter 6

distribution of COVID essential products, there was stronger attention towards exploitative pricing practices. As the crisis is not a free-for-all and an excuse to violate competition and to exploit consumers, the EU antitrust enforcement approach during the COVID crisis has been thus two-fold, counterbalancing different interests and underlying the importance and necessity to ensure fair competition and protection of consumers during the emergency.

The main issue of this chapter will be the enforcement of antitrust law with regard to high prices of essential products for the protection from the virus, such as face masks, hand sanitizers and medicines. It aims to discover whether there are alleged practices of exploitative pricing in relation to those products and whether it is possible to enforce Article 102 TFEU. Moreover, as the crisis highly increased consumers' vulnerability that needs to be protected from unfair pricing practices, there will be attention for consumer protection during the crisis, and its relation with the concerned practices.

This chapter aims to show that the antitrust monitoring activity does not stop during a crisis, but instead the attention is even higher than usual. This is because the markets are not able to self-correct in a critical period as a pandemic. The consequent necessity is to intervene and adjust heightened prices. The latter cannot be targeted as a natural development of the market, and it is right that the authorities intervene trying to keep them lower. Therefore, the chapter will consider whether and how to enforce competition law against high prices of COVID related products. It discusses the enforcement of antitrust law, explaining how the competition authorities can intervene against excessive prices during the crisis. In particular, it considers the toolbox that the NCAs have at their disposal for antitrust law enforcement, weighing the pros and cons of enforcing antitrust law in this exceptional situation. The competition law tools seem to not be very effective to fight exploitative pricing during the crisis. Even the possibility to recognize temporary dominance caused by the circumstances of the crisis, admitted by the EC in its Temporary Framework, may have been a good idea, but turned out to be untested and ineffective.[218] The application of Article 102 (a) seems not to be the right method against COVID-related excessive pricing due to the conceptual and practical difficulties in its application, which do not permit to deliver a swift and efficient response during the crisis, forcing to focus on other means that competition authorities and governments can use to deal with the virus-profiteers. As it will emerge, thanks to the fact that many EU

[218] As it will be seen within this chapter, temporary dominance was given for the first time by the Commission decision "ABG" and means that the company is recognized as dominant only for a limited amount of time, and its dominance may be caused by a sudden event such as a pandemic or an economic crisis which alters the pre-existing market setting.

NCAs have at their disposal powers of consumer protection, through their recourse to these tools they were able to prevent excessive pricing practices, protecting consumers from exploitations. The consumer protection may be a complementary legal basis and regulatory tool which constitutes an alternative to competition law enforcement in order to solve the excessive pricing problem. Unlike Article 102 TFEU, consumer protection allows to face non-dominant companies and simple resellers, guaranteeing a more complete protection for consumers, who are very vulnerable during a crisis. The consumer vulnerability which emerges during the pandemic, provokes the need to rebalance the traditional relationship between competition and consumer protection when it comes to enforcement.

Enforcing consumer protection rules is less burdensome on agencies, it can be achieved in a more timely manner and helps to go beyond the complexity and length of enforcing competition law for excessive pricing cases, in particular the difficulty of detecting dominant positions. In fact, Articles of the Unfair Commercial Practices Directive (UCPD) and of its national implementations, allow to scrutinize excessive pricing practice, even when the price is charged by a non-dominant company. The NCAs have the possibility to choose the most suitable basis for a single case. The aim of this study is to demonstrate that during the COVID crisis, due to the need of immediate responses against exploitative pricing, Article 102 does not provide a useful solution against this type of practices. Instead, consumer protection represents an efficient way to limit the effects of potential exploitative pricing practices and satisfy the fundamental goal of protecting consumers. It also stresses the need to consider exploitative pricing under both consumer protection and competition law as legal basis: the consumer protection tools have the priority, unless a dominant position may be detected. Next chapter will strengthen this idea and these concepts by showing that the actions adopted as solutions to COVID-related exploitative pricing by the single NCAs and by the EU bodies follow this plan.

1. EXPLOITATIVE PRICING UNDER EU COMPETITION LAW: ARTICLE 102 TFEU AND CASE LAW

In this section there is the introduction of the EU legal framework about excessive pricing, in order to have a summary on how this particular type of conduct is contemplated by the EU competition law. The attention will be on how the excessive pricing is regulated in the EU, looking at specific Articles of the treaties and at some developments of case law. The Article 102(a) of TFEU qualifies the practice of a dominant company that charges unfair selling prices as an exploitative abuse of that dominance. Thus, the Treaty states that selling products at an unfair price is an abuse. But the treaty does not specify what is meant by unfair price. The needed help arrived from subsequent developments of case law, which tried to define when a high price is considered unfair in the meaning of Article 102 letter a. In fact, a very recent approach, adopted in the Opinion of AG Wahl, gives a definitive approach regarding the methods for discovering an unfair price.

1.1 THE BASIS OF EXCESSIVE PRICING IN THE TREATIES: ARTICLE 102 TFEU

The legal basis of excessive pricing is Article 102(a), according to which an abuse of dominant position may consist in "directly or indirectly imposing unfair purchase or selling prices"[219]. The prohibition of unfair prices in this Article means the prohibition of excessive prices. In fact, there is no doubt, as a matter of law, that excessive prices may violate Article 102, but the unlawfulness of an excessive prices under Article 102 does not depend only on its excessiveness but also on its unfairness. Thus, in addition to be excessive, a price has to be unfair in order to be qualified as abusive and in order to prohibit the price imposition under Article 102. [220] For the prohibition of Article 102 to apply, one or more undertakings, holding a dominant position within the internal market or a substantial part of it, must abuse that dominance having effect on inter-State trade.[221] Dominance has been defined by the European Court of Justice in the case United Brands Company v Commission (United Brands) as *"a position of economic strength enjoyed by an undertaking which enables it to prevent effective*

[219] Consolidated version of the Treaty on the Functioning of the European Union [2012] *OJ C 326*, Article 102 (a)

[220] Z. AYATA, "*A Comparative Analysis of the Control of Excessive Pricing by Competition Authorities in Europe"*, The Tulane European and Civil Law Forum, 2020 Vol. 35, p.111; see also R. WHISH, D. BAILEY, "*Competition Law*", tenth edition, 2021, Oxford University Press, p. 760; see also the two case-law developments which are taken into consideration in this chapter, that is to say United Brands and AKKA/LAA, which both states the concept of the unlawfulness of a high price not only when excessive, but necessarily also when unfair. As it will be seen, in these judgements the Court tried to explain when a price is excessive and unfair.

[221] A. JONES, B. SUFRIN, N. DUNN, "*EU Competition Law: Text, Cases, and Materials",* 7th edition, Oxford University Press, 2019, p.280

competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers"[222]. Moreover, the Commission in its enforcement guidance of 2009, defined dominance as a position of economic strength enjoyed by an undertaking on a relevant market, equating dominance to market power.[223] Thus, to assert whether an undertaking is dominant, it is firstly necessary to define the relevant market[224]. The definition of the relevant market is a case-by-case analysis because in every case the dynamic and the structure of a market can be different.[225] This definition is necessary for the identification of the actual competitors because an undertaking cannot be dominant in abstract[226]. According to the notice on the relevant market of 1997, the definition of a market is a combination between the product and the geographic dimension[227]. The first dimension includes all the products that, due to their properties and prices, the consumers consider substitutable between them.[228] The second dimension involves the area where the undertakings homogeneously compete between them.[229]

After the definition of the relevant market, it is necessary to identify factors which are indicative of dominance. A first useful indication is the market shares: the higher the market shares are and the longer is the period of time over which they are held, the more likely it is that it constitutes an important preliminary indication of the existence of a dominant

[222] ECJ, 14 February 1978, Case 27/76, United Brands Company and United Brands Continentaal BV v Commission of the European Communities, ECLI:EU:C:1978:22, para 65

[223] Communication from the Commission - 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), para 10.

[224] Commission Notice on the definition of relevant market for the purposes of Community competition law [1997] OJ C 372, para 2; in 2020 the Commission launched a public consultation on the Evaluation of this Notice which ended in 2021 with the publication of a Staff Working Document summarising the findings of the Evaluation. According to the evaluation, areas where the Market Definition Notice might not be fully up-to-date include: (i) digital markets, in particular with respect to products or services marketed at zero monetary price and to digital 'ecosystems'; (ii) the assessment of geographic markets in conditions of globalisation and import competition; (iii) quantitative techniques; (iv) the calculation of market shares; and (v) non-price competition (including innovation).

[225] J. VAN DE GRONDEN, C. S. RUSU, "*Competition Law in the EU: Principles, Substance, Enforcement*", Edward Elgar Publishing, 2021, Chapter 6

[226] Commission Notice on the definition of relevant market for the purposes of Community competition law [1997] OJ C 372, para 2

[227] *Ibid*., para 9

[228] *Ibid*., para 7

[229] *Ibid*., para 8

position[230]. The 40% of market shares are considered index of dominance, but they must not be viewed as an absolute index.[231]

To fall within the application of Article 102, the dominant position is to be held in the EU internal market or a substantial part of it. This requirement is directed to exclude from the Article's scope purely localised situations lacking Union interest. This requirement determines the limit of the EU's jurisdiction and reminds the necessity that the abuse of dominance has an effect on trade between Member States.[232]

Once dominance is established, the firm should compete in the market as if it is non-dominant and as if there is free competition in the market.[233] The undertaking concerned has a special responsibility not to allow its conduct to impair genuine undistorted competition on the market[234]. In fact, Article 102 does not prohibit the dominant position of an undertaking on a market, but rather the abuse of this position. The existence of a dominant position is not in itself against the rules of competition.[235] The concept of abuse derives from the case Hoffmann-La Roche & Co. AG v Commission, where the ECJ defined the abuse as the conduct of a dominant undertaking which, by using methods not belonging to normal competition, alter the structure of a market, reducing the competitiveness of the latter.[236] There are two types of abuses: exploitative and exclusionary. While an exploitative abuse consists in the conduct of the dominant undertaking which takes advantage of its market power to exploit its customers[237], exclusionary conduct harms consumers by preventing competition on the market.[238] Excessive pricing is an example of exploitative abuse.[239]

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[230] European Commission, Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, para 13-15

[231] *Ibid*., para 14

[232] A. JONES, B. SUFRIN, AND N. DUNN, "*EU Competition Law: Text, Cases, and Materials"*, 7th edition, Oxford University Press 2019, Chapter 6, p.287

[233] E. M. FOX, "*We Protect Competition, You Protect Competitors*", World Competition, 2003, Volume 26, Issue 2, pp. 149-165

[234] GC, Case T-203/01, Manufacture française des pneumatiques Michelin v Commission of the European Communities, ECLI:EU:T:2003:250, par. 55

[235] Commission Report on Competition Policy, 1994, par. 207; however, see A. FLETCHER, "*Resale price maintenance: Explaining the controversy, and small steps towards a more nuanced policy*", Fordham International Law Journal, 2009, Volume 33, Issue 4, pp. 1286-1287, according to which, differently from article 101, under article 102 it is not presumed that every behaviour of dominant firms is roughly lawful.

[236] ECJ, Case 85/76, Hoffmann-La Roche & Co. AG v Commission of the European Communities [1979], ECLI:EU:C:1979:36 para 91

[237] A. JONES, B. SUFRIN, N. DUNN, "*EU Competition Law: Text, Cases, and Materials*", 7th edition, Oxford University Press, 2019, Chapter 6, p.361

[238] ECJ, Case C-209/10, Post Danmark A/S v Konkurrencerådet, ECLI:EU:C:2012:172, para. 20

[239] See L. BRUCE, "*The Paradox of the Exclusion of Exploitative Abuse*", CCP Working Paper No. 08-1, 2007: exploitation of consumers is the textbook abuse by a dominant firm which can raise price to enhance profits

Article 102(a) prohibits excessive prices when they reflect the abuse of a dominant position and not the general profiteering of a situation of necessity. The simple fact of charging very high prices is not considered unlawful within the meaning of Article 102.[240] Even though the evident intention of the drafters of EU Treaties was to prohibit excessive pricing[241], the European Commission used to not consider the enforcement of Article 102(a) in cases of exploitative conducts and of excessive pricing as a priority[242]. The Commission has often been reluctant to act as price regulator, given the difficulties in calculating the excessiveness of the price, and in case law there are not many cases which recognise exploitative pricing.[243] Recently, the trend has changed. In 2016, the competition Commissioner Margaret Vestager stressed that the EC would seek to "intervene directly to correct excessively high prices."[244] In recent years, there has been a revival of the concept of unfair prices, as evidenced by the growing number of cases handled by the national competition authorities and the Commission, and by the cases brought before the Court.[245] Most of those cases have concerned the prices of medicines: for instance, the recent excessive pricing cases in pharmaceuticals as Aspen in Italy (Case A-480)[246], Phenytoin in the UK (Case CE/9742-13)[247] and CD Pharma in

because consumers cannot easily switch to an alternative source of supply. Thus, consumers lose out by having to pay more and buy less, and there is a consequent distortion in the allocation of resources.

[240] Commission Report on Competition Policy, 1994, par. 207: the Commission in its decision-making practice does not prohibit the high level of prices as such, but rather it examines the behaviour of the dominant company aimed at preserving this dominance, which may result in an exploitative violation of competition, even directly against competitors or new entrants who would normally bring about effective competition and the price level associated with it.

[241] Opinion of AG Wahl in Case C-177/16 Autortiesību un komunicēšanās konsultāciju aģentūra /Latvijas Autoru apvienība v Konkurences padome, ECLI:EU:C:2017:286, para 2

[242] Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, para 7

[243] M. IOANNIDOU, "*Consumer Involvement in Private EU Competition Law Enforcement*", Oxford University Press, 2015

[244] M. Vestager, "Protecting Consumers from Exploitation" (Chillin' Competition Conference, Brussels, 21 November 2016); however, see also I. VAN BAEL, J. BELLIS, "*Competition Law of the European Union*", sixth edition, Kluwer Law International, 2021, Chapter 12, pp. 1527–1561, which observes that the Commission have focused its attention on the importance of balancing excessive pricing investigations with the need to encourage and protect innovation in pharmaceutical sector, without excluding the possibility of prosecuting innovative companies for charging excessive pricing in the future.

[245] Opinion of AG Pitruzzella in Case C-372/19 Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v Weareone.World BVBA, Wecandance NV. [2020], ECLI:EU:C:2020:598, para 21

[246] A480 – PRICE INCREASE OF ASPEN'S DRUGS Measure No. 26185, AGCM decision of *14 October 2016*

[247] However, already in 2001 there was in UK a case involving excessive pricing in pharmaceuticals: in 2001, in the Napp case, the UK competition authority determined the excessiveness of the prices charged by Napp for its morphine product in the retail pharmacy market applying the United Brands test and comparing Napp's prices with competing products and with the prices charged by Napp in the hospital market and for export to other countries.

Denmark[248] inaugurated a new trend which recognizes growing importance to excessive pricing cases, especially in this particular field.

1.2 EXCESSIVE PRICING IN EU CASE LAW: THE UNITED BRANDS CASE AND THE AG WAHL'S OPINION IN AKKA/LAA

The case law of the Court of Justice of the EU seems quite pliable to cover excessive pricing, and to outline more in details the EU legal framework with regard to this type of anti-competitive practice. The ECJ has identified methods to solve excessive pricing cases which have been granularly specified in the development of case-law, helping to understand what an excessive price is and how it can be proved. In the light of this established case-law, it is therefore possible to build a fairly detailed picture of the methods and criteria that must be used to classify a price as unfair and contrary to point (a) of the second paragraph of Article 102 TFEU. These derived firstly from the already mentioned case United Brands, and then were covered more in depth by Advocate General Wahl in his Opinion in Autortiesību un komunicēšanās konsultāciju aģentūra — Latvijas Autoru apvienība(AKKA/LAA).[249]

The CJEU in this case introduced a clear test to assess how and when an excessive price may be considered unfair within the meaning of Article 102(a) TFEU.[250] The Court evidenced the privileged position of the dominant firm which could use its market power to charge higher prices to its customers and to gain benefits that in a situation of effective competition would have been impossible to obtain.[251] The ECJ defined a price as abusive when "it has no reasonable relation to the economic value of the product"[252]. In order to detect the lack of this reasonable relation, the ECJ elaborated a two-limb test, which considers whether: (i) the price cost margin is excessive and (ii) the price imposed is either unfair in itself or when compared to competing products. This test is cumulative, so both the limbs have to be fulfilled. This two-step test determines whether a price is reasonably related to the economic value of the product supplied. The concept of the economic value of a certain product is an abstract concept, which can be actualized only through the twofold test. Not every high price charged by an

[248] On this case see for example Chapter 12 of I. VAN BAEL, J. BELLIS, "*Competition Law of the European Union*", sixth edition, 2021, Kluwer Law International: in 2018, the Danish competition authority issued a decision against a pharmaceutical distributor, CD Pharma, for abusing its dominance by dramatically raising the price of syntocinon drug, when the parallel trader with whom the Danish procurement agency AMGROS had concluded a supply agreement was unable to fulfil its orders.

[249] Opinion Of Advocate General Pitruzzella, 16 July 2020, Case C-372/19(SABAM), para 27-28

[250] ECJ, 14 February 1978, Case 27/76, United Brands Company and United Brands Continentaal BV v Commission of the European Communities, ECLI:EU:C:1978:22

[251] *Ibid*., para. 249

[252] *Ibid*, para. 250

undertaking in a dominant position in a given market is, therefore, excessive and contrary to Article 102 TFEU, but only those prices that are disproportionate or exorbitant.

According to the first limb, the selling price of the product should be compared with its cost of production: the difference between the price and the cost of the product should be done as to obtain the profit margin[253]. If this profit margin is high, this could be a first index of a disproportion of the product's selling price. This first step of the test tries to define how much a profit margin should be and to find a border between the reasonable profit and the excessive profit. But this border is different from an industry to another one and depends on many factors: high profit margins may be the expected compensation for the risk associated with large upfront investment costs or research and development expenditure.[254] Prices may legitimately reflect the needs of consumers, the competitive market situation and satisfy the need of the undertakings to earn profits[255]. However, even if the undertakings are clearly not obliged to sell below profit, the profits earned should be reasonable and justified by the corresponding necessary costs.

An inefficient dominant firm should not be considered in the analysis of the rationality of its excessive prices if the true reason for its high prices are the high costs due to its own inefficiency. Thus, the relevant costs for the purposes of the assessment of Article 102(a) are those of an efficient firm.[256] In the United Brands case the ECJ, even though recognising a very substantial profit due to the higher prices charged in other MSs than the prices charged in Ireland, it also recognized that the prices charged in Ireland had produced a loss.[257] Therefore, the prices charged are not evidence of excessive profits, because these prices should be compared to the cost of production. So, according to the first step of this test, the prices of UBC were not excessive.

According to the second limb, the selling price of the product concerned should be compared with the price of competitors' products in order to determine whether the price is excessive in itself or in comparison to competitors' products.[258] In United Brands, the price of Chiquita

[253] *Ibid*, para. 251

[254] R. O'DONOGHUE, J. PADILLA, "*The Law and Economics of Article 102 TFEU*", Bloomsbury Publishing, third Edition, 2019, Chapter 6

[255] ECJ, Case 66/86, Ahmed Saeed Flugreisen and Silver Line Reisebüro GmbH v Zentrale zur Bekämpfung unlauteren Wettbewerbs eV, 1989, ECLI:EU:C:1989:140, para. 43

[256] ECJ, Joined Cases 110/88, 241/88, 242/88, Lucazeau v SACEM, 1989, ECLI:EU:C:1989:326, para. 29

[257] ECJ, 14 February 1978, Case 27/76, United Brands Company and United Brands Continentaal BV v Commission of the European Communities, ECLI:EU:C:1978:22, para. 260-261

[258] *Ibid*, para. 252; this second limb became object of attention in Phenytoin case: the UK competition authority conducted an investigation into Pfizer and Flynn Pharma, deciding that a significant increase in the price of the

bananas was 7% higher than the price of bananas sold by rivals. The Court of Justice concluded that this difference could not be regarded as excessive[259], but it did not explain how much the percentage of this difference should be, as to define the price as excessive. Anyway, comparing the prices charged by different competitors is difficult, since differences in price may simply reflect differences in quality. Higher prices should be justified if they correspond to high quality products of more efficient firms.

In the United Brands case, the comparison was also made between the prices charged in other geographic markets by the same dominant undertaking: the prices charged to customers in Denmark was 138% higher than in Ireland. Despite this huge difference in prices, the prices charged in Denmark were not considered excessive because the prices charged in Ireland, which were lower, caused losses for the company.[260] Thus, the only fact that a lower price charged in a geographic market caused a loss for the company was sufficient to justify the very higher price charged in another geographic market. This type of geographic comparison is the "comparative market test", comparing the prices charged by the undertaking that has market power in a certain area with the price charged in other areas where markets are open to competition.[261]

The ECJ in the United brands case provided a test that can be used for calculating and deciding whether a price is excessive and unfair within the meaning of Article 102(a). The test developed in United Brands has been used as reference in successive cases, becoming a sort of reference point for the NCAs, the EU Commission and the Courts for solving excessive pricing cases. However, United Brands test is not the only method by which to assess when the price charged by a dominant firm breaches Art. 102(a) TFEU and other ways may be devised of selecting the rules for determining whether the price of a product is unfair.[262] A valid alternative to the price-cost comparison may be benchmarking, which consists in

parties' off-patent phenytoin sodium capsules was excessive and violated Article 102. This decision was overturned by a judgment of the UK Competition Appeals Tribunal (CAT), which found that the decision incorrectly applied the second limb of the United Brands test, putting too much emphasis on a cost-plus approach to assess whether the price was unfair, and disregarding other evidence of the product's economic value, including the pricing of the comparable tablet form of the medicine supplied by other companies (see for example chapter 12 of I. VAN BAEL, J. BELLIS, "*Competition Law of the European Union*", sixth edition, 2021 Kluwer Law International)

[259] ECJ, 14 February 1978, Case 27/76, United Brands Company and United Brands Continentaal BV v Commission of the European Communities, ECLI:EU:C:1978:22, para 266

[260] *Ibid*., para 260

[261] J. W. VAN DE GRONDEN, C. S. RUSU, "*Competition Law in the EU: Principles, Substance, Enforcement*", Edward Elgar Publishing, 2021

[262] ECJ, 14 February 1978, Case 27/76, United Brands Company and United Brands Continentaal BV v Commission of the European Communities, ECLI:EU:C:1978:22, para 253

comparing the allegedly abusively excessive price with a benchmark price and which can help to prove a case of unfair pricing. The possibility of using the benchmarking comparison derives from the activity of both the CJEU and the EU Commission: the CJEU jurisprudence and the Commission's practice have endorsed several valid benchmarking methods, based on a comparison between the price allegedly unfair and various benchmarks.[263] The benchmark price varies on the basis of the benchmarking methods adopted for the particular case at hand, it is chosen on the basis of its specific characteristics, and it is used as terms for comparison with the allegedly excessive price, with the aim to discover whether the latter is effectively unfair and abusive under Article 102: in fact, the result of the comparison may be an indicator of the violation of competition rules for excessive pricing. After having identified suitable benchmark method(s), the competition enforcer should assess whether the price charged by the dominant firm is "excessive" in comparison to the benchmark price, in order to be considered "unfair" under Art. 102(a) TFEU.[264]

In 2017, many years after the United Brands case and the creation of its test, the Advocate General of the CJEU Wahl, while giving his opinion during the Latvian Copyright case, developed a modern way on how to react to excessive pricing and how to solve its cases. His opinion and the creation of a new way of regulating excessive pricing may be useful even today to solve excessive pricing COVID related cases.

1.2.1 THE AG WAHL'S OPINION IN AKKA/LAA: THE DEFINITIVE APPROACH FOR EXCESSIVE PRICING?

The ECJ has identified methods to solve excessive pricing cases which have been specified in the development of case-law. In the light of that case-law, it is possible to build a fairly detailed picture of the methods and criteria that must be used to classify a price as unfair and contrary to point (a) of the second paragraph of Article 102 TFEU. [265] These were covered more in depth by Advocate General Wahl in his Opinion in Autortiesību un komunicēšanās

[263] See the Opinion of AG Wahl in Case C-177/16 Autortiesību un komunicēšanās konsultāciju aģentūra /Latvijas Autoru apvienība v Konkurences padome, ECLI:EU:C:2017:286, according to which, even if the United Brands test is the general test for excessive pricing, virtually all benchmarks for excessive pricing have some limitations and therefore multiple benchmarks should be used. In fact, the EU institutions, national competition authorities, and courts have elaborated and applied over the years four principal benchmarks to implement the Court of Justice's two-stage test in United Brands: i) price-cost comparisons, ii) price comparisons across markets or competitors, iii) geographic price comparisons, and iv) comparisons over time.

[264] See R. WHISH, D. BAILEY, "*Competition Law*", tenth edition, 2021, Oxford University Press, p. 760: it is not only the excessiveness of the price that makes it unlawful, but the price has to be also unfair. This means that unfairness is something beyond excessiveness, and that both have to be proven in a case on abusively high prices.

[265] Opinion of AG Pitruzzella in Case C-372/19 Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v Weareone.World BVBA, Wecandance NV. [2020] ECLI:EU:C:2020:598, paras 27-28

konsultāciju aģentūra — Latvijas Autoru apvienība (this case is also called "AKKA/LAA")[266], a case regarding tariffs of collective management organisations. The AG Wahl's Opinion embraces the most important developments and precedents of EU case law on exploitative pricing, developing a modern and definitive way on how to regulate it and how to solve the relative cases. In other words, the AG Wahl endeavours to set out a comprehensive "theory of everything" for excessive pricing under Article 102 TFEU.[267] In his Opinion he recognizes that the competition authorities, when considering excessive pricing, have a wide margin of appreciation [268]. The AG Wahl opines that the price has to be measured with respect to a benchmark price which should reflect the prices in conditions of effective competition [269]. In fact, a price can be qualified as an abuse under Article 102 TFEU only if it is significantly and persistently above the benchmark price[270] and if no rational economic explanation can be found for the high price applied by a dominant undertaking[271]. AG Wahl listed various methods of calculating the benchmark price[272], considering, for instance, the prices charged in other markets by the dominant undertaking, the prices charged by other undertakings in the same or related markets, or the evolution of pricing over time[273]. A competition authority has to choose the approach which is most appropriate for particular circumstances of the case concerned [274]. Since every method used to assess a case of unfair pricing has some weaknesses and limitations, the competition agency should verify its findings in relation to unfair pricing through the use of multiple methods and thus the competition authorities should prefer an approach for exploitative pricing cases based on the combined use of several methods. The AG Wahl opined that, in the absence of an all-embracing test, the competition authorities should solve a case by combining several methods among those of the court's case law which are generally accepted, and which appear suitable in the specific situation. In conclusion, the

[266] See Opinion of AG Wahl in Case C-177/16 Autortiesību un komunicēšanās konsultāciju aģentūra /Latvijas Autoru apvienība v Konkurences padome, ECLI:EU:C:2017:286

[267] See for instance R. O'DONOGHUE, J. PADILLA, "*The Law and Economics of Article 102 TFEU*", Bloomsbury Publishing, third Edition, 2019, p. 754

[268] Opinion of AG Wahl in Case C-177/16 Autortiesību un komunicēšanās konsultāciju aģentūra /Latvijas Autoru apvienība v Konkurences padome, ECLI:EU:C:2017:286, para 35

[269] *Ibid*, para 17

[270] *Ibid*, para 106

[271] *Ibid*, para 131

[272] *Ibid*, para 18

[273] *Ibid*, para 19; see also OECD, roundtable on excessive pricing, background paper of Oecd's Secretariat, which stated that these benchmarks, either geographic, historic or related to other companies providing identical or similar products or services, could be based on a direct comparison of prices, a comparison of profitability or a comparison of price-cost mark-ups. A direct price comparison can, for instance, be based on a price of a company offering similar products in another geographic market that is subject to a higher level of competition. Similarly, profitability analysis or price-cost mark-ups, can use the profitability or price-cost mark-up of firms in other, more competitive geographic markets.

[274] *Ibid*, paras 42-43

AG Wahl says that there is no unanimous method, but rather the method applicable for an excessive pricing case depends on the facts and circumstances of the single case. It is necessary to do a case-by-case analysis and the NCA should apply the method considered as the most suitable.

After having introduced the general legislation and the related case-law of excessive pricing in the EU, this dissertation focuses on excessive pricing during the COVID crisis, wondering whether the price spikes of many essential products constitute violations of Article 102(a) and whether it is necessary to enforce competition law, or whether it is better to have recourse to consumer protection.

2. COVID AND EXPLOITATIVE PRICING: WHAT TO DO?

The pandemic and the collateral disruptions of the supply chains have led to difficulties in the production and distribution of a number of essential products to protect from the virus. This scenario was an opportunity for companies to significantly increase the prices of these products.[275] When there are exploitative price increases, especially in delicate sectors as healthcare materials, it is impossible to let the market self-correct. This impossibility emerges even from a recent opinion of the AG Giovanni Pitruzzella, which is relevant for the COVID related pricing issues[276]. Therefore, it is necessary to intervene. Competition law enforcement may be one way to intervene, maybe by using its tools such as interim measures. Even price regulation will be considered as an alternative policy to limit the effects of exploitative pricing. Competition law enforcement may be the most suitable way to solve excessive pricing during the COVID crisis, but the requirement of dominance may jeopardize the enforcement of Article 102 TFEU. Thus, two ways of overcoming this obstacle may be taken into account. The first one is the recognition of temporary dominance, in the light of a dated Commission decision and of the recent EC Temporary Framework. The second way to overcome the obstacle of dominance and effectively and promptly solve the exploitative pricing issues during the COVID crisis is consumer protection. Thanks to the fact that many EU NCAs are competent for both competition law and consumer protection, these two competences can be used as complementary legal basis for exploitative pricing practices: the tools that the

[275] OECD, "*Exploitative pricing in the time of COVID-19*", 2020

[276] Opinion of AG Pitruzzella in Case C-372/19 Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v Weareone.World BVBA, Wecandance NV. [2020] ECLI:EU:C: 2020:598, this Opinion may be explanatory with regard to excessive pricing during Covid because Pitruzzella considered the non-intervention of competition authorities to adjust prices of essential medicines as detrimental for competition, because the issue of unfair prices is deeply felt in the pharmaceutical sector, especially during an economic crisis which makes not possible to wait for market self-correction

competition authorities have at their disposal to restrain firms from exploiting under market conditions affected by the virus may act in overlap and complementary to consumer protection regimes.[277] This complementarity means that the body of rules to enforce for an alleged excessive pricing practice may be inferred from a case-by-case analysis and depends on the circumstances of the particular case. For instance, in order to choose which is the set of rules to enforce between competition law or consumer protection, it may be appropriate to focus on dominance: while problems do not arise when an already dominant undertaking practices excessive pricing, when dominance is not clear consumer protection is probably a better choice and it might be better suited to tackle this sort of practices.

2.1 IS IT POSSIBLE TO RELY ON MARKET SELF-CORRECTION?

High prices are usually considered as self-correcting by economists because they attract new entrants[278], standing in as advertisement of potential opportunities for companies, incentivizing their entry.[279] High prices tend to be self-correcting as they encourage investment and the reallocation of resources to those activities and markets that the consumers value the most. Instead, competition policy enforcement could interfere with the competitive process, reducing consumer welfare.[280] This intervention may risk chilling innovation, while the fundamental goal of competition is that rivalry and price competition should force firms to maximise their output[281]. If a company increases its prices, and customers choose to pay, this

[277] See for instance F. COSTA-CABRAL, L. HANCHER, G. MONTI, A. RUIZ FEASES, "*EU Competition Law and COVID-19*", 2020, Tilburg Law and Economics Center Discussion Paper DP 2020–007; see also F. JENNY, "*Introduction*", in Competition law and health crisis, Concurrences N° 2-2020, which suggests that, having realized that competition law enforcement is not the best instrument to deal with excessive prices, it may be wise to rely on the complementary consumer protection function of which many competition authorities are entrusted, in order to enlarge their ability to intervene against exploitative pricing practices.

[278] M. MOTTA, A. DE STREEL, "*Exploitative and Exclusionary Excessive Prices in EU Law*", in Claus-Dieter EHLERMANN and Isabela ATANASIU, European Competition Law Annual 2003, What Is an Abuse of a Dominant Position?, Oxford, Hart, 2006, p.15; see also the Opinion of AG Wahl in Case C-177/16 Autortiesību un komunicēšanās konsultāciju aģentūra /Latvijas Autoru apvienība v Konkurences padome, ECLI:EU:C:2017:286, par 4, according to which in a free and competitive market, with no barriers to entry, high prices should normally attract new entrants and the market would accordingly self-correct, while, in markets with legal barriers to entry, intervention may make more sense.

[279] F. HAYEK, "*Competition as a Discovery Procedure*", New Studies in Philosophy, Politics, Economics and the History of Ideas, University of Chicago Press, 1968

[280] See D. NEVEN, M. DE LA MANO, "*Economics at DG Competition, 2009–2010*", Review of Industrial Organization, 2010, Vol. 37, Issue 4

[281] R. O'DONOGHUE, J. PADILLA, "*The Law and Economics of Article 102 TFEU*", Bloomsbury Publishing, third Edition, 2019, p.626; instead, the EU Commission's Report on Competition Policy Competition of 2019 found that EU competition enforcement in the period between 2009 and 2017 helped maintain the level of innovation in the pharmaceutical sector by intervening against practices that could have distorted the incentives to innovate.

is a free choice, and competition is working properly.[282] Thus, a significant number of economic scholars consider that competition authorities should take action against excessive pricing only in exceptional circumstances[283].

However, it is not possible to know how much time the market will take to self-correct. In normal times, thanks to the long-run benefits of competitive markets, short term disruptions of the competitive process are not justified. In the case of the COVID-19 pandemic, letting the market self-adjust is highly costly for consumers, due to the slowness of market self-correction.[284] Thus, the adjustments applied by the NCAs constitute an adaptation of competition law enforcement practices justified by the goal of maximizing consumer welfare in an exceptional situation.[285] Especially during the COVID crisis period, the high prices may severely risk of exploiting and damaging consumers and, thus, it is not possible to rely on market self-correction.[286] Even if high prices attract new entrants in the market, the pandemic and the crisis damage the entire economy. In this dramatic scenario, the investments are chilled and it is difficult to imagine many players ready to enter into damaged markets.[287] High prices cannot be the only incentive for them to enter, but they need other incentives and guarantees from the governments, from the regulators and from the national authorities as to be convinced to enter new markets. The prediction that the future entry of new competitors will correct the actual high prices observed in the short run may not be a valid reason for non-intervention.[288]

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[282] J. KILLICK, A. KOMNINOS, "*Excessive Pricing in the Pharmaceutical Market – How the CAT Shot Down the CMA's Pfizer/Flynn Case*" Journal of European Competition Law & Practice, 2018, Vol. 9, No. 8, pag.532; see also M. IOANNIDOU, "*Consumer Involvement in Private EU Competition Law Enforcement*", Oxford University Press, 2015, according to which the EU approach to exploitative abuses is guided by a short-term consumer welfare rationale that could adversely impact on long-term consumer welfare. If there are no high or insurmountable barriers to entry, it might well be that high prices are actually likely to be, with a longer-term perspective, good for consumers. There is much more for consumers to gain through increased competition than a mere decrease in prices because competition brings more choice, scope for differentiation in quality, innovation.

[283] D. GERADIN, A. LAYNE-FARRAR, N. PETIT, "*EU Competition Law and Economics*", Oxford Competition Law, 2012, Chapter 4; see also for example the Introductory Presentation of John Davies on excessive pricing interventions in times of crisis OECD Competition Division, Webinar on "Antitrust in Times of Crisis" 28 May 2020: John Davies, Head of the Competition Division of the OECD, having an economic approach, supports the non-intervention during the COVID crisis, arguing that high prices are a way of rationing goods in times of scarcity. Thanks to high prices, the goods go to those who value them most. Thus, according to Davies, high prices are a way to help recovery, and through them the markets would self-correct.

[284] F. JENNY, "*Covid-19 and the Future of Competition Law Enforcement*", Competition Law International, 2020, Vol. 16, Issue 1, pp.7-20

[285] F. JENNY, "*Market adjustments, Competition Law and the Covid-19 Pandemic*", Le Concurrentialiste, 6 July 2020

[286] F. JENNY, "*Competition Law Enforcement and the COVID-19 Crisis: Business As (Un)usual?*", 28 May 2020

[287] P. GIOSA, "*Exploitative Pricing in the Time of Coronavirus—The Response of EU Competition Law and the Prospect of Price Regulation"*, Journal of European Competition Law & Practice, 2020, Volume 11, Issue 9, p. 505

[288] F. JENNY, "*Abuse of Dominance by Firms Charging Excessive or Unfair Prices: An Assessment*", 11 September 2016; on this sense see also S. S. FUNG, S. ROBERTS, "*Covid-19 and The Role of a Competition*

Moreover, excessive prices in themselves do not attract new entry, and so self-correction cannot justify non-intervention[289]. The prohibition of excessive pricing may encourage, rather than discourage, entry[290], thanks to the copious advantages of competition. In fact, competition guarantees a better allocation and distribution of resources, with an increase of productivity thanks to the higher number of players; competition can help ensure more stable distribution of essential goods and even when disruption in supply chains occurs, it may be corrected by competitors' entry. When shocks (such as COVID) affect supply chains, those economies where competition is vigorous are less likely to suffer disruptions.

Competition is the driver of economic growth, which leads to fairer prices and higher quality of goods.[291] It is important that the prices are determined in an autonomous way by the undertakings, but the efficient allocation is indispensable to obtain a better distribution, linked with productivity and the ability of the undertakings to adapt themselves.[292] This is even crucial during a pandemic, when it is necessary for consumers to guarantee a full and efficient allocation of essential products at competitive prices.

Therefore, non-intervention is not the right method because during a heavy crisis caused by unpredictable circumstances, it could have some dangerous consequences such as the collapse of the economic sectors that are not able to autonomously recover in a short time and heavy damages for consumers due to high prices and insufficient supplies. The duty of the competent authorities and institutions is to monitor and to adjust prices when those are considered exploitative and not justified by market fluctuations.

Authority: The CMA's Response to Price Gouging Complaints", Journal of European Competition Law & Practice, 2021, Volume 12, Issue 10: even if price may represent a signal for suppliers to respond, it does not mean that any arbitrarily high price is necessary to cause efficient entry and expansion of production, because demand growth and normal profit margins are sufficient to induce expansion. Intervention does not undermine efficient market response and thus the correct way is to intervene avoiding the exploitation of market powers and the price spikes because they would lead to consumer harm.

289 A. EZRACHI, D. GILO, "*Excessive pricing, Entry, Assessment, and Investment: Lessons from the Mittal Litigation*", Antitrust Journal, 2010, Volume 76, Issue 3, p. 880

290 A. EZRACHI, D. GILO, "*Are excessive prices really self-correcting?",* Journal of Competition Law & Economics, Volume 5, Issue 2, June 2009, p. 251

291 OECD (2020), The role of competition policy in promoting economic recovery, p.7

292 Cons Stato 2008 n. 102 ("prezzo del latte per l'infanzia"); see also C. JANSSEN, E. KLOOSTERHUIS, "*The Wouters case law, special for a different reason?",* European Competition Law Review, 2016, Volume 37, Issue 8, pp.336-337: intervention, even based on non-economic grounds like the protection of consumers, is a response to a market failure, which is instead characterised by inefficient distribution of goods and services in the free market, and thus aimed at allocative efficiency.

2.1.1 OPINION OF AG PITRUZZELLA IN SABAM CASE

The intervention of NCAs, in order to adjust the market and re-establish fair competition, is necessary. This option finds evidence in the Opinion of the Advocate General Pitruzzella in the SABAM case, which concerned the remuneration charged to music festivals by a Belgian copyright management body (SABAM).[293] In his Opinion, AG Pitruzzella did not agree with the possibility of accepting non-intervention, letting the market self-correct. The AG recognized that, as preferred by the economists, competitive markets are normally self-correcting: high prices attract new entrants, so the increase of supply causes lower prices[294]. But this cannot be a binding rule. In fact, sometimes markets do not self-correct. For example, the self-correctness of the markets could be hindered by some factors such as consumer habits, the absence of alternatives, and consequently the entrance of new competitors would be difficult[295].

AG Pitruzzella opines that people are willing to pay any price charged for products like essential medicines, even very high.[296] Consumers might be unwilling to stop buying a medicine, because they are dependent on it for their treatment. Due to this dependence, they cannot easily switch to other products.[297] The sudden price increases of pharmaceutical products would result not only in a loss of consumer welfare, but they can also raise more sensitive issues such as consumer well-being.[298] The possible unlawfulness of a conduct must be assessed in concrete terms on the basis of its effects on consumer welfare.[299] Therefore, EU competition law intervention is justified and even owed for excessive pricing in pharmaceuticals[300]. As AG Pitruzzella affirms, the non-intervention of competition authorities

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[293] Case C-372/19, Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v Weareone.World BVBA and Wecandance NV, ECLI:EU:C:2020:959

[294] Opinion of AG Pitruzzella in Case C-372/19 Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v Weareone.World BVBA, Wecandance NV. [2020] ECLI:EU:C: 2020:598, para 23

[295] *Ibid*., para 24

[296] *Ibid*., para 25; in this sense see S. S. FUNG, S. ROBERTS, "*Covid-19 and The Role of a Competition Authority: The CMA's Response to Price Gouging Complaints*", Journal of European Competition Law & Practice, 2021, Volume 12, Issue 10, arguing that the consumers' willingness to pay for the essential products it is likely to be inflated by scarcity of these goods inducing consumers to buy higher quantities. Retailers may exploit that fear of shortage imposing higher prices and all these factors would worsen the problem, provoking regressive distributions of essential goods.

[297] See for instance the Note by the European Union in OECD, Excessive Pricing in Pharmaceutical Markets, 2018

[298] Z. AYATA, "*A Comparative Analysis of the Control of Excessive Pricing by Competition Authorities in Europe*", The Tulane European and Civil Law Forum, 2020 Vol. 35, p.120

[299] V. MELI, "*Il public interest nel diritto della concorrenza della UE*", Mercato Concorrenza Regole, 2020, Fascicolo 3, pp.453-456

[300] M. BOTTA, "*Sanctioning unfair pricing under Art. 102(a) TFEU: yes, we can!",* European Competition Journal, 2020, Volume 17, Issue 1, p.159; see also R. DE CONINCK, E. KOUSTOUMPARDI, "*Excessive*

to adjust prices of essential medicines would be a great damage for fair competition. Indeed, as the affordability of essential medicines is considered an intrinsic aspect of being part of a community, this non-intervention can be qualified as an attack on social equality when differences in the possession of essential medicines depend on earning capacity.[301] AG Pitruzzella reminds us that the issue of unfair prices is deeply felt in the pharmaceutical sector, especially during an economic crisis.[302] Thus, there are some markets where it is not possible to wait for market self-correction, but instead the competition intervention and enforcement towards excessive prices is necessary in order to avoid consumer loss.[303]

Even though AG Pitruzzella's Opinion does not directly regard the excessive pricing of essential products during the COVID crisis, it may be useful for that issue. From the words of AG Pitruzzella, it emerged that, in the healthcare sector, it is more crucial than in others to guarantee fair prices, especially during an economic crisis.[304] This is what happened with COVID, because the pandemic caused an acute economic crisis and the prices of essential healthcare goods increased. Following the idea of AG Pitruzzella, during an economic crisis like COVID, it is even more important than before to ensure the affordability of essential medicines and healthcare materials, re-establishing fair and contained prices. The policymakers have to take measures to ensure adequate supply quantity and allocation, and to adjust excessive prices which can be exploitative of the crisis situation.[305] In times of crisis markets tend to act slowly and it is not possible to rely on their normal functioning and to wait for their self-correction[306]. Non-intervention would translate in the risk of exploitation of consumers, due to uncontrolled prices. A price violation for healthcare materials can be very harmful for consumers. The role of the competition authorities is to guarantee that prices do not increase above the competitive level. The competition authorities cannot stay on the side-

pricing cases in the pharmaceutical industry: Economic considerations and practical pitfalls", Concurrences Review N° 3-2017, pp. 9-16

[301] Opinion of AG Pitruzzella in Case C-372/19 Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v Weareone.World BVBA, Wecandance NV. [2020], ECLI:EU:C:2020:598, para 26

[302] *Ibid*., para 26

[303] Opinion of AG Wahl in Case C-177/16 Autortiesību un komunicēšanās konsultāciju aģentūra /Latvijas Autoru apvienība v Konkurences padome, ECLI:EU:C:2017:286,para.4; see also OECD, Roundtable on excessive prices, 2011, p.9, where emerged that the clearest argument in favour of competition law intervention against excessive prices is the consumer harm: by addressing high prices, the competition authority can improve consumer welfare. Where self-correction is not possible, it is felt the need of competition law or regulatory intervention in order to avoid very high prices and their detrimental effects on consumer welfare.

[304] Opinion of AG Pitruzzella in Case C-372/19 Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v Weareone.World BVBA, Wecandance NV. [2020] ECLI:EU:C:2020:598, para 26

[305] F. Jenny, Opening Keynote Speech, Concurrences Quarantine Webinar Series, 21 April 2020

[306] OECD, Competition policy responses to COVID-19, Frederic Jenny contribution on economic resilience and the role of competition policy in times of crisis, 2020

lines to wait for the market to self-correct, but it is necessary to correct the prices using the remedies provided by the law.[307] Leaving to the markets the possibility to take their time in order to self-correct is not an option either, because an intervention is necessary to safeguard the fairness of the competition, the stability of the markets and the protection of consumers.[308] Therefore, in the EU there is a weak belief in the market's ability to self-regulate and the authorities must intervene to develop a more efficient outcome.[309]

2.2 INTERVENTION BY USING COMPETITION LAW: USING ARTICLE 102 TFEU AGAINST COVID RELATED EXCESSIVE PRICING

Having realised that it is correct to intervene adjusting excessive pricing, it is necessary to understand how to intervene. Let's start seeing whether competition law enforcement is a suitable option of intervention for COVID related excessive pricing cases, recognizing those practices as abuse of competition law. in order to resolve this doubt, this section describes the different methods on how to enforce Article 102 and then it focuses on the pros and cons of enforcing Article 102 against excessive pricing practices, especially during a crisis.

During the COVID crisis, one of the anticompetitive practices that was worrying the most is exploitative pricing. The peak in the demand for medical supplies created opportunities for companies to substantially increase prices. The challenges for competition authorities during this period consisted in ensuring that strategies adopted by companies to resist the huge shocks of supply and demand will not degenerate into strategies to exploit consumers.[310] The debate is about whether competition law, and specifically Article 102 of the TFEU, is the most suitable option to deal with exploitative pricing conduct in times of COVID-19. The EU Commission reminded the importance of intervening against exploitative pricing with Article 102 TFEU and EU competition law, by referring to the central goal of competition policy[311]. According to the EC, this central goal is to protect consumer welfare, and, in order to be fulfilled, it is necessary to intervene against too high or unfair prices.[312]

EU Authorities, trying to pursue a pragmatic application of competition rules in the context of the crisis, highlighted that the antitrust enforcement and the scrutiny of anticompetitive

[307] F. Jenny, Opening Keynote Speech, Concurrences Quarantine Webinar Series, 21 April 2020
[308] OECD, Competition policy responses to COVID-19- Frederic Jenny contribution on economic resilience and the role of competition policy in times of crisis, 2020
[309] M. S. GAL, "*Monopoly Pricing as an Antitrust Offence in U.S. and E.U. Competition Law: two systems about belief in monopoly?*", The Antitrust Bulletin, 2004, Volume 49, Issue 1-2, p.346
[310] OECD, "*The role of competition policy in promoting economic recovery*", 2020
[311] OECD, Roundtable on Excessive Prices, Contribution of the European Union, 2011
[312] OECD, Roundtable on Excessive Prices, Contribution of the European Union, 2011

practices remained a priority.[313] The competition authorities are well equipped to fully consider the market circumstances of the COVID crisis. This means that the enforcement can take into account market conditions that are specific to the current economic crisis. In particular, as it is necessary that essential drugs for people's health and lives are sold at a reasonable price, competition authorities may commit closer monitoring and more enforcement resources for this sector, in order to ensure that the consequences of the crisis are not too severe.[314]

In some exceptional circumstances, due to the structure of the market, the most suitable remedy against excessive pricing may be the enforcement of competition law.[315] For instance, in times of crisis like COVID, when due to the exceptional circumstances of the market, a consequence may be excessive pricing which falls within the scope of competition law, it does not seem possible to do without competition law and policy. They are not unnecessary political goods, but rather they are the fuel of the economic recovery. The enforcement actions of competition authorities contribute to ensuring well-functioning markets in the long-term[316] and to safeguarding consumer interest. Since exploitatively excessive pricing represents one the most direct violation of the consumers' interest and may concretely harm consumer welfare, which antitrust policy aims to protect, competition authorities should intervene to protect consumers. Accordingly, enforcing competition law against excessive pricing may be the most suitable remedy and may be fit for protecting the overarching objectives of competition policy, in particular consumer welfare and interest.[317] Competition authorities have at their disposal both soft powers and investigatory powers to fight excessive pricing practices during crisis situations. Public recommendations, warnings or statements by competition authorities regarding excessive prices could have a dissuasive effect on firms from charging high prices, increasing the consumers' alertness to the possibility of being

[313] L. WRIGHT, S. VASANI, "*Reading the signs: evolving antitrust policy in europe in response to the pandemic*", Antitrust, 2020, Volume 34, Issue 3, p.2

[314] M. Vestager, "Protecting Consumers from Exploitation", Chillin' Competition Conference, Brussels, 21 November 2016; see also M. D'ALBERTI, "*Concorrenza e giustizia sociale*", in Mercato Concorrenza Regole, 2020, Fascicolo 2: when deciding cases concerning major anti-competitive infringements in the pharmaceutical sector, the main objective and result of the NCAs in Europe have always been to best guarantee a fundamental non-economic right, such as the right to health.

[315] M. MOTTA, A. DE STREEL, "*Excessive Pricing in Competition Law: Never say Never?"* in The Pros and Cons of High Prices, 2007, p.20; see also Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, 2009, par.7, according to which the Commission has the duty to intervene in respect of exploitative pricing in the case that consumer protection and the smooth functioning of the internal market cannot be adequately ensured by other means.

[316] OECD, "*The role of competition policy in promoting economic recovery*", 2020, p.39

[317] See L. HOU, "*Excessive Prices within EU Competition Law*", European Competition Journal, 2011, Vol. 7, Issue 1, pp. 47-70

exploited.[318] In the EU, according to the Article 102 TFEU, excessive pricing is punished only when a dominant undertaking charges prices that are above the competitive pricing level. No new EU rules have been introduced for excessive pricing during the crisis.[319] The EU Commission decided to keep the pre-existing rules, only publishing soft-law measures like the Temporary Framework, which have a precautionary aim, warning potential exploiters by reminding vigilance and ensuring that markets continued to function effectively during the current crisis situation. Its main message is in fact to not drop the guard and to not tolerate any attempts of abusive conduct, because the crisis cannot become an excuse to exploit consumers and to violate competition law.[320] As essential COVID related products should be supplied and distributed in a sufficient quantity and at competitive prices, there is a legitimate public interest for competition authorities to enforce competition rules in cases of excessive pricing for healthcare materials during the COVID-19 crisis. The NCAs gave the highest priority to these investigations.[321]

There are various common ways to enforce Article 102 TFEU. Regulation 1/2003 empowers both the Commission and the national competition authorities (NCAs) to enforce Article 102 after receiving complaints. The Commission may investigate undertakings that are believed to have committed a breach of Article 102 and, if a breach has been committed, it can issue a decision ordering the stop of the abuse and imposing remedies such as fines. The Commission has also the power to order an undertaking to supply. According to Article 5 of Regulation No 1/2003, the NCAs have the same powers to take infringement and fining decisions.[322] For instance, in the recent cases in the pharmaceutical market, the Competition Authority of Italy

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[318] F. JENNY, "*Competition Law Enforcement and the COVID-19 Crisis: Business As (Un)usual?*", 20 May 2020

[319] I. RAKIĆ, "*Competition Law in the Age of Covid-19*", 30 April 2020, Anali Pravnog fakulteta u Beogradu, 2/2020, p.45

[320] European Commission, Temporary Framework for assessing antitrust issues related to business cooperation in response to situations of urgency stemming from the current COVID-19 outbreak (2020/C 116 I/02); another example of soft-law measure may be even the Commission's "Guidelines on the optimal and rational supply of medicines to avoid shortages during the COVID-19 outbreak", which aims to preserve the integrity of the single market with regard to the supply of essential medicines: in fact, trying to solve the supply chain's disruption for essential products would help to satisfy the huge demand for these goods with a sufficient supply, that it is likely to also provoke price decrease.

[321] I. RAKIĆ, "*Competition Law in the Age of Covid-19*", 30 April 2020, Anali Pravnog fakulteta u Beogradu, 2/2020, p.44; see also V. MELI, "*Il public interest nel diritto della concorrenza della UE*", Mercato Concorrenza Regole, Fascicolo 3, 2020, pp.453-456, reminding that the Legislation is aimed at protecting weak positions against private powers capable of exploiting them and that there is no possibility of limiting the application of the prohibition of abuse of a dominant position for reasons of public interest. In fact, differently from article 101, there are no rules governing exemptions from the application of the prohibition of article 102 and the recognition of possible justifications for the company under investigation, such as the efficiency defence, cannot be considered an applicable exception.

[322] A. JONES, B. SUFRIN, N. DUNN, "EU Competition Law: Text, Cases, and Materials", 7th edition, Oxford University Press, 2019, p.281

and UK respectively, imposed high fines on the companies concerned. The imposition of fines to the firms does not ensure that firms will comply with the decisions of NCAs and will not raise their prices again in the future. Moreover, the monitoring of the effectiveness of this remedy needs many of the NCAs' resources.[323] Another possibility that the EC has is to adopt a commitments decision making the commitments proposed by the infringer binding. Finally, as Article 102 has direct effect, any citizen or business which suffers harm as a result of a breach of this Article should be entitled to claim compensation from who caused it. This means that the victims of competition law infringements can bring an action for damages before the national court. Then, this court may make references to the CJ for preliminary rulings under Article 267.[324]

However, the different enforcement methods do not seem to be sufficiently effective and prompt against excessive pricing practices, in particular during an exceptional crisis like the COVID one. Considering the need to address market failures, adequate tools are required to intervene promptly and there is active search for ways of speeding up the enforcement of EU competition law.[325] In order to avoid irreparable harm to competition due to the crisis, it could be appropriate to use an instrument provided by EU competition law and that is already at the Commission's disposal: the interim measures. Its legal basis is in Article 8 of Regulation 1/2003[326] and in the Broadcom case[327]. Abuse of dominance cases are complex and may take many years, especially where a Commission decision is followed by appeals to the General Court and the Court of Justice. There is a danger that, by the time a case has run its course, a market may have tipped in favour of the dominant firm under investigation. One way of preventing this from happening would be for the investigation authority to impose interim measures pending the outcome of its investigation.[328] This tool allows the Commission to implement remedies quickly and is useful when competition is being seriously damaged, and

[323] P. GIOSA, "*Exploitative Pricing in the Time of Coronavirus—The Response of EU Competition Law and the Prospect of Price Regulation*", Journal of European Competition Law & Practice, 2020, Volume 11, Issue 9, p. 505

[324] A. JONES, B. SUFRIN, N. DUNN, "*EU Competition Law: Text, Cases, and Materials*", 7th edition, Oxford University Press, 2019, Chapter 6, p.282

[325] A. RUIZ FEASES, "*Sharpening the European Commission's tools: interim measures"*, European Competition Journal, 2020, Volume 16, Issue 2-3, p.404

[326] The first paragraph of this article reads as follows:"In cases of urgency due to the risk of serious and irreparable damage to competition, the Commission, acting on its own initiative may by decision, on the basis of a prima facie finding of infringement, order interim measures"; the second paragraph adds that: "A decision under paragraph 1 shall apply for a specified period of time and may be renewed in so far this is necessary and appropriate".

[327] European Commission-Press release, Antitrust: Commission imposes interim measures on Broadcom in TV and modem chipset markets Brussels, 16 October 2019

[328] R. WHISH, D. BAILEY, "*Competition Law*", tenth edition, 2021, Oxford University Press, p. 209

the Commission must intervene as soon as possible.[329] It may be a prompt solution against excessive pricing, especially in a crisis period when urgent measures are required.[330] Interim measures could be a way to intervene rapidly without waiting for the effectiveness of the final decision. This may be appropriate when the objective is to cure a sudden price increase. During a crisis, waiting for the final decision could be too late: the market structure might have completely changed, and competitors may have been driven out of the market. Therefore, interim measures are appropriate when it is urgent to avoid the risks of serious damages for competition. However, interim measures have some disadvantages. First, only a prima facie infringement detected through detailed investigations can justify their adoption[331]. Thus, it is not sure that interim measures help competition authorities to prevent exploitative abuse in a timely manner.[332] Second, interim measures must be shown to be necessary to prevent serious and irreparable harm to competition while an investigation is pending.[333] In order to allow a sooner intervention via interim measure, it would be necessary to relax the standard of irreparable damage.[334]

2.2.1 DRAWBACKS OF ENFORCING ARTICLE 102 FOR EXCESSIVE PRICING DURING COVID CRISIS

One of the criticisms against the possibility of applying Article 102 TFEU in order to solve excessive pricing cases is that, during a crisis, competition authorities should consider whether running an abuse of dominance case is necessary and effective because these cases are usually long, complex, and need considerable resources. Investigations by competition authorities on excessive pricing abuses are particularly long and fraught with risks.[335] The complexity is

[329] A. RUIZ FEASES, "*Sharpening the European Commission's tools: interim measures*", European Competition Journal, 2020, Volume 16, Issue 2-3, p.405

[330] F. COSTA-CABRAL, L. HANCHER, G. MONTI, A.R. FEASES, "*Eu Competition Law and Covid-19*", TILEC Discussion Paper 2020–007, p.11

[331] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003], OJ L 001, article 8(1)

[332] OECD, "Exploitative pricing in the time of COVID-19", 2020, p. 10; see also D. EDWARD R. LANE, L. MANCANO, "*EU law in the time of COVID-19*", European Policy Centre, 2020: the Commission could order interim remedies during Covid crisis, but it takes time because it is available only in the course of a formal investigation and it must be properly reasoned.

[333] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003], OJ L 001, article 8(1); for a countervailing consideration, see D. EDWARD R. LANE, L. MANCANO, "*EU law in the time of COVID-19*" European Policy Centre, 2020: given that an Article 102 investigation can last for years, interim measures may have far-reaching consequences for an undertaking made subject to them when the competition violation of the concerned undertaking is not proved when the investigation ends.

[334] A. RUIZ FEASES, "*Sharpening the European Commission's tools: interim measures*", European Competition Journal, 2020, Volume 16, Issue 2-3, p.420

[335] See F. JENNY, "*Introduction*" in Concurrences Review, special issue "Competition Law and Health Crisis", n. 2/2020, adding that the definition of abusive prices, which requires a demonstration of the fact that the price charged was both excessive and unfair, places a heavy burden of proof on competition authorities; on the

mainly linked to the problem of proving the dominance of the company charging excessive prices. It is not easy to demonstrate it in normal times, so it is even more challenging during the crisis, when the ability to charge exploitative prices may not correlate with dominance.[336] There are a number of market settings where prices are a lot higher, but because of the lack of dominance, the competition authorities cannot enforce Article 102.[337] This under-enforcement of antitrust rules may cause its crisis[338]. Article 102 is relatively unlikely to be a useful solution against excessive pricing COVID related cases because it is very hard to prove that someone exploiting the crisis situation by whacking up the prices of masks reselling them is dominant.[339] Excessive pricing cases under Article 102 can take years to pursue: a NCA could find itself in a couple of years still fighting the abuse of dominance case trying to prove against the court that a company was dominant during the crisis.[340] Abuse of dominance cases are complex and may take many years, especially where a Commission decision is followed by appeals to the General Court and the CJEU. The danger is that, by the time a case has run its course, the dominant firm under investigation may have already exploited the market.[341] The competition authorities may not use their competition law enforcement powers if the undertaking which imposes those prices cannot be considered to hold a dominant position on the market.[342] During the COVID crisis, this obstacle can be overcome by using the concept of temporary dominance. Those who charged excessive prices during the crisis, provided that they have got pricing power and that they might temporarily be operating in small markets, as a consequence might temporarily be dominant.[343] The distorted market conditions of the crisis might have generated temporary and circumstantial dominance, and thus it would be possible to apply Article 102 to exploitative pricing practices. The concept of temporary dominance

difficulty of enforcing article 102 for excessive pricing see also D. GERARD, A. KOMNINOS, "*Remedies in EU Competition Law: Substance, Process and Policy*", 2020, Chapter 5, pp.73-94, according to which European competition authorities and the Commission have often been very reluctant to take action against exploitative pricing put in place by dominant firms mainly because limiting the ability of a firm to raise prices it is likely to have a negative impact on firm's incentives to invest and innovate, and due to the difficulty of both identifying the right price at which products might be sold and monitoring compliance with it.

[336] C. RIEFA, "*Coronavirus as a Catalyst to Transform Consumer Policy and Enforcement*", Journal of Consumer Policy, 2020, 43, p. 457

[337] J. Vickers, "Competition Policy and the Covid-19 Crisis", Royal Economic Society Webinar, 4 June 2020

[338] D.A. CRANE, "The New Crisis in Antitrust (?)", Antitrust Law Journal, Vol.16, Issue 1, 2020, p. 253

[339] OECD Competition Division, Webinar on "Antitrust in Times of Crisis" 28 May 2020, Introductory Presentation of John Davies on excessive pricing interventions in times of crisis

[340] L. WRIGHT, S. VASANI, "*Reading the signs: evolving antitrust policy in europe in response to the pandemic*", Antitrust, 2020, Volume 34, Issue 3, p.5

[341] R. WHISH, D. BAILEY, "*Competition Law*", tenth edition, 2021, Oxford University Press, p. 209

[342] F. JENNY, "*Competition Law Enforcement and the COVID-19 Crisis: Business As (Un)usual?*" 20 May 2020

[343] OECD Competition Division, Webinar on "Antitrust in Times of Crisis" 28 May 2020, Introductory Presentation of John Davies on excessive pricing interventions in times of crisis

emerged in the Commission decision "ABG" of 1977[344] and it has been recently accepted by the Commission in its Temporary Framework[345].

2.2.2 PRICE REGULATION AS ALTERNATIVE TO COMPETITION LAW ENFORCEMENT

An alternative to running an exploitative abuse of dominance case may be price regulation. In fact, EU competition law enforcement for excessive pricing cases may be justified by the absence of price regulation and the limitation of incentive to innovate.[346] Price regulation refers to the policy of setting maximum prices by a government agency or regulatory authority. In fact, competition authorities are considered not to be able to carry out price controls because they intervene on an ad hoc basis, while price regulation is a long-term effort which requires quasi-permanent supervision.[347] This policy response may be a suitable remedy option against excessive pricing when there is no prospect that the market will correct itself in the short term, identifying a certain price level above which prices become excessive, and obliging the infringing firm not to offer its products above that price. Price controls should only be adopted on an extraordinary basis, being limited to essential products affected by the crisis and their duration should be limited in time, only as long as is strictly necessary.[348] The best examples of price controls adopted during the COVID crisis are France, which decided to set a maximum price for hand sanitizers[349], and Italy for face masks[350]. However, there are certain problems and drawbacks related to this remedy[351]. The main drawback and competition issue of price

[344] 77/327/EEC: Commission Decision of 19 April 1977 relating to a proceeding under Article 86 of the EEC Treaty (IV/28.841 - ABG/Oil companies operating in the Netherlands)

[345] European Commission, Temporary Framework for assessing antitrust issues related to business cooperation in response to situations of urgency stemming from the current COVID-19 outbreak (2020/C 116 I/02)

[346] M. BOTTA, "Sanctioning unfair pricing under Art. 102(a) TFEU: yes, we can!", European Competition Journal, 2020, Volume 17, Issue 1, p.160

[347] D. GERADIN, A. LAYNE-FARRAR, N. PETIT, "*EU Competition Law and Economics*", 2012, Oxford Competition Law, Chapter 4

[348] Price regulation has been suggested even by the UNCTAD, which recommended governments to monitor markets of essential products such as disinfectants and face masks to ensure their availability, if necessary, through temporary price caps to protect the health of consumers during the pandemic, see UNCTAD, "*Defending competition in the markets during COVID-19*", 2020

[349] Décret n° 2020-197 du 5 mars 2020 relatif aux prix de vente des gels hydro-alcooliques (Lien Legifrance, JO 06/03/2020)

[350] Presidenza del Consiglio dei Ministri - il Commissario straordinario per l'attuazione e il coordinamento delle misure di contenimento e contrasto dell'emergenza epidemiologica COVID-19, Ordinanza 26 aprile 2020 Disposizioni urgenti per la vendita al consumo di mascherine facciali. (Ordinanza n. 11). (20A02353) (GU Serie Generale n.108 del 27-04-2020)

[351] There are various practical problems of regulating price with the imposition of price cap. The first one is the difficulty of determining in practice the right price level and above what price level a price becomes excessive. Secondly, imposing a static pricing remedy is appropriate only as long as the market conditions (such as costs, number of firms, demand) do not change substantially. The price cap needs to be adjusted as long as any of these parameters change. For example, if costs rise, the initial excessive price level may become unproblematic and consequently the maximum price level needs to be increased in order to avoid negative effects. Conversely, if

regulation is that in the long run it risks reducing the incentives to increase production, consequently delaying the expansion of supply and the reduction in prices over time.[352] Moreover, obliging companies to keep low prices can develop illegal resale mechanisms, penalising consumers.[353]

2.2.3 THE CONCEPT OF TEMPORARY DOMINANCE: THE ABG COMMISSION DECISION AND THE TEMPORARY FRAMEWORK

The concept of dominance is crucial to contrast excessive pricing under EU competition law. According to Article 102 TFEU and case law, only an undertaking in a dominant position can exhibit a behaviour which corresponds to an abuse of that position. An excessive pricing practice adopted by a non-dominant undertaking is not an abuse and it is not problematic under competition law. This obstacle can be surmounted by using the concept of temporary dominance caused by a sudden crisis and a consequent shortage of products. This concept emerged in the Commission decision "ABG" of 1977[354].

The situation preceding the decision was as follows. The shortage of oil products caused an oil crisis. Despite the market shares of the company BP were only of 26%, the Commission considered that Article 102 TFEU was applicable: the Commission argued that BP had abused its dominant position during the period of shortage by reducing its supplies to ABG, which was one of its customers. With respect to the characterization of the dominant position of BP, the Commission states that the existing commercial relations between suppliers and customers were altered due to the economic restrictions caused by the oil crisis. For reasons which do not depend on the suppliers, they now have a substantial share of the market and quantities available. Thus, their customers are completely dependent on them for the supply of the products in scarcity. As the shortage of the products concerned and the oil crisis continue, the

costs fall, the initial maximum price level has to be adjusted downwards. Another problem of static pricing remedies is the possibility to circumvent them. For example, undertakings involved by the price cap may be incentivised to reduce quality. Quality can be hard to measure, and reductions in quality are a strategy that will allow the firm to not fully violate price cap remedy. To sum up, the dominant firm can easily justify adjustments, so it might be very difficult for the competition authority to prove non-compliance with the price regulation remedy.

[352] For an in-depth analysis about the drawbacks of price regulation see OECD, Roundtable on excessive pricing, 2011: price regulation can distort competition, investment and R&D, to the detriment of consumer welfare. In particular, price regulation is considered likely to i) inhibit entry by competitors, ii) distort investment and pricing incentives for efficiency and innovation. See also S. S. FUNG, S. ROBERTS, "*Covid-19 and The Role of a Competition Authority: The CMA's Response to Price Gouging Complaints*", Journal of European Competition Law & Practice, 2021, Volume 12, Issue 10, affirming that direct price regulation could disrupt supply responses.

[353] J. Vickers, "Competition Policy and the Covid-19 Crisis", Royal Economic Society Webinar, 4 June 2020

[354] 77/327/EEC: Commission Decision of 19 April 1977 relating to a proceeding under Article 86 of the EEC Treaty (IV/28.841 - ABG/Oil companies operating in the Netherlands)

suppliers are placed in a dominant position in respect of their customers.[355]. The EC suggested that, Article 102 should apply if during a temporary situation a firm is in a position to obtain monopoly profits.[356] Thus, the Commission argued that short term general disequilibrium characterized by a restriction of supply and a spike in demand can give a dominant position to a firm over its customers, irrespective of its market share before the shortage occurred, because the shortage makes switching suppliers impossible for the customers.[357] Such a situation may be considered similar to the situation during the COVID emergency. In both cases there is a shortage, in the first case the oil crisis of 1973 caused an oil shortage, while in 2020 the pandemic caused a shortage of essential healthcare products such as hand sanitizers, face masks and medicines. In both cases the equilibrium between the supply and demand for the products collapsed. This huge variance between demand and supply combines with a substantial increase in the price of the products concerned[358]. It is possible to find similarities between such situation and the situation experienced at the beginning of the COVID-19 crisis, for example with the shortage of masks[359]. By adopting the Commission's reasoning on the definition of dominance in the ABG decision, provisions on pricing abuses of dominance could be used to fight excessive pricing in cases of shortages caused by the recent crisis. Thus, the NCAs, following the reasoning adopted by the EC in the ABG decision, may try to establish transitory market power of the sellers of high-demanded goods due to the coronavirus outbreak.[360] By recognising the temporary dominant position, the Commission is certain to protect competition in times of crisis.[361]

The concept of temporary and circumstantial dominance during a period of huge shortage and crisis, introduced and outlined by the Commission in the ABG decision, has been recalled by the Commission during the COVID crisis with the antitrust Temporary Framework. The latter may imply that the concept of temporary and circumstantial dominance caused by particular situations, like a severe sudden shortage of essential goods which is in turn the consequence

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[355] *Ibid*.

[356] J. TEMPLE LANG, "Some Aspects of Abuse of Dominant Positions in European Community Antitrust Law", Fordham International Law Journal, 1979, Volume 3, Issue 1, p.16

[357] F. JENNY, "*Competition Law Enforcement and the COVID-19 Crisis: Business As (Un)usual?*", 20 May 2020, p.6

[358] 77/327/EEC: Commission Decision of 19 April 1977 relating to a proceeding under Article 86 of the EEC Treaty (IV/28.841 - ABG/Oil companies operating in the Netherlands)

[359] F. JENNY, "*Competition Law Enforcement and the COVID-19 Crisis: Business As (Un)usual?"* 20 May 2020

[360] P. GIOSA, "*Exploitative Pricing in the Time of Coronavirus—The Response of EU Competition Law and the Prospect of Price Regulation*", Journal of European Competition Law & Practice, 2020, Volume 11, Issue 9, p. 502

[361] J. TEMPLE LANG, "*Some Aspects of Abuse of Dominant Positions in European Community Antitrust Law",* Fordham International Law Journal, 1979, Volume 3, Issue 1, p.16

of an exceptional crisis, could be applicable to the COVID crisis. Speaking of which, in paragraph 20 of the Temporary Framework it is expressly stated that *"the Commission will not tolerate conduct by undertakings that opportunistically seek to exploit the crisis as a cover for abuses of their dominant position, including dominant positions conferred by the particular circumstances of this crisis".*[362] Thus, according to the Commission, the enforcement of Article 102 letter a) TFEU against excessive pricing practices during the COVID crisis is possible, and it is made easier by the possibility of recognizing temporary dominant positions caused by the particular circumstances of the crisis. The particular circumstances of the crisis to which the framework refers may be the sanitary emergency, the disruption of the supply chain and the shortage of the products concerned. This means that crises can generate positions of dominance and there is the dominance while the crisis lasts[363]. Analysis of shocks in the market, as that of essential products during a crisis, may help to identify temporary dominant positions.[364] The temporal dimension of the market, which considers the fluctuations of the conditions of demand or supply over time, is likely to prove particularly relevant.[365] The competition authorities may identify situations where the market power of a firm lasts for a very narrow amount of time.[366]

Considering the temporal quality of the market, a firm may find itself exposed to competition at one point in time but effectively free from it at another, having market power during one part but not others. In ABG the Commission defined the temporal market for oil more narrowly by limiting it to the period of crisis when price of oil increase dramatically in the early 1970s, holding that during the concerned crisis companies had a special responsibility to supply existing customers on a fair and equitable basis.[367] During the COVID crisis, the pre-existing firms, which were non-dominant, may become temporarily dominant due to the changed equilibriums of the market.[368] Recognizing temporary dominance may allow to apply Article 102 TFEU also to stockouts of essential products caused by COVID-19, for example sellers

[362] European Commission, Temporary Framework for assessing antitrust issues related to business cooperation in response to situations of urgency stemming from the current COVID-19 outbreak (2020/C 116 I/02), para. 20

[363] F. COSTA-CABRAL, "*Future-Mapping the Three Dimensions of EU Competition Law: Modernisation Now and After COVID-19*", TILEC Discussion Paper No. DP 2020-011, pp. 22-23

[364] Commission Notice on the definition of relevant market for the purposes of Community competition law [1997] OJ C 372, para 38

[365] A. JONES, B. SUFRIN, N. DUNN, "*EU Competition Law: Text, Cases, and Materials*", 2019, 7th edition, Chapter 6, pp. 277-356

[366] See R.A. POSNER, "*Economic Analysis of Law*", 2014, 9th edition, ch.4.9

[367] R. WHISH, D. BAILEY, "*Competition Law*", 2021, tenth edition, Oxford University Press, pp. 38-39

[368] See P. DIAMOND, "*Posner's Economic Analysis of Law*" The Bell Journal of Economics and Management Science, 1974, Volume 5, Issue 1, pp. 294-300; see also D. EDWARD, R. LANE, L. MANCANO, "*EU law in the time of COVID-19*", European Policy Centre, 2020, which admits that market power in a crisis can emerge, and erode, weekly, even daily, and its abuse can be transient.

of face masks being able to charge exorbitant prices[369], and may even allow to satisfy the urgent need of reviving antitrust enforcement.[370]

With the recognition of temporary dominance, those who are able to charge excessive prices during the crisis, even sellers having low market shares, may be identified as temporary dominant. In fact, crises may cause vulnerable states that reinvigorate competition law's control of economic power.[371] However, the concept of temporary dominance is not concretely tested under competition law. Even where time-limited dominance may be identified, it is likely difficult and challenging for competition authorities to detect evidence which supports such a conclusion.[372] In fact, as it will be seen in the next section, EU NCAs are fairly restricted in their ability to fight excessive pricing during periods of acute shortage, unless they have a consumer protection function. Therefore, temporary price fluctuations should be considered normal dynamics in a competitive market, which are not sanctioned under Art. 102(a).[373]

2.3 IS ARTICLE 102 THE RIGHT INSTRUMENT TO INTERVENE AGAINST EXCESSIVE PRICING DURING COVID? EXCESSIVE PRICING BETWEEN COMPETITION LAW AND CONSUMER PROTECTION: THE POSSIBILITY OF THE DUAL BASIS

Exploitative abuse is the most direct violation of the consumers' interest that antitrust policy aims to protect.[374] For consumers, excessive pricing by a dominant firm is one of the worst forms of abuse, a clear exploitation that transfers wealth from them to undertakings. Since consumers cannot easily switch to an alternative and less expensive source of supply, the

[369] F. COSTA-CABRAL, L. HANCHER, G. MONTI, A. RUIZ FEASES, "*EU Competition Law and COVID-19*", TILEC Discussion Paper DP 2020–007, p.11

[370] See J. B. BAKER, "*The Antitrust Paradigm: Restoring a Competitive Economy*", Harvard University Press, 2019

[371] F. COSTA-CABRAL, "*Future-Mapping the Three Dimensions of EU Competition Law: Modernisation Now and After COVID-19*", 21 April 2020, TILEC Discussion Paper No. DP 2020-011, pp. 22-23

[372] OECD, "*Exploitative pricing in the time of COVID-19*", 2020, p. 5; see also OECD, Roundtable on excessive pricing, 2011, whose background paper of OECD's Secretariat suggested price gouging laws rather than temporary dominance as a solution against excessive pricing, explaining that price gouging laws aim to protect vulnerable consumers from short term and wind-fall market power in relation to necessities. Price gouging laws are absent in EU but are common in US, providing for civil penalties, criminal penalties or both. They are based on a comparison of a fictitious normal price with the potentially excessive price in periods of abnormal supply disruptions.

[373] See L. HOU, "*Excessive Prices within EU Competition Law*", European Competition Journal, 2011, Vol. 7, Issue 1, pp. 47-70

[374] M. MOTTA, A. DE STREEL, "*Excessive Pricing in Competition Law: Never say Never?"* in The Pros and Cons of High Prices, 2007, p.20; see also M. IOANNIDOU, "*Consumer Involvement in Private EU Competition Law Enforcement*", Oxford University Press, 2015, according to whom the finding of exploitative abuse is based on the effects of the dominant undertaking's conduct on consumers. Combating exploitative abuse in certain cases is consistent with the wording of the Treaty and the case law, as well as with the Commission's pronouncements in favour of protecting consumer interests under the ambit of competition law. Delivering concrete results to consumers plays an important role in competition policy.

dominant firm can raise prices to enhance profits. [375] An increase in prices above the competitive level has negative effects on consumer welfare: every consumer who purchases the goods pays more for them than in a competitive market, and the poorer consumers are forced out of the market.[376] Therefore, it is very important for consumer welfare to limit the excessive pricing practices, due to the great harm that they provoke to consumers. Consumer welfare is the standard the Commission applies when assessing infringements of the rules on abuses of dominance. Competition needs to be protected in the market even because it is a means of enhancing consumer welfare and ensuring an efficient allocation of resources. [377] Competition enforcement protects consumer welfare and markets should work for consumers.[378] Article 102 TFEU protects consumers' interests by prohibiting conduct by dominant undertakings which impairs free and undistorted competition or which goes directly to the detriment of consumers.[379] However, due to the practical difficulties which characterize the enforcement of the excessive pricing prohibition, it should be applied only where it is clear that its benefits to social welfare significantly exceed its costs.[380] To ensure full protection for consumers and competition, national authorities should use not only competition law rules, but they should also be encouraged to make use of every instrument at their disposal to monitor these practices.[381] As Article 102 (a) failed to deliver a swift and efficient response to exploitative pricing during the crisis, due to difficulties in its application, competition authorities had to use other ways to deal with those issues.[382] An instrument allowing to prohibit excessive pricing, even of non-dominant companies, may be the consumer protection and the use of its rules may help to plug some gaps in competition law enforcement.[383] Sudden price surges might create issues for competition authorities and trigger their investigations in order to distinguish whether they constitute excessive pricing abuse or conduct violating

[375] P. GIOSA, "*Exploitative Pricing in the Time of Coronavirus—The Response of EU Competition Law and the Prospect of Price Regulation*", Journal of European Competition Law & Practice, 2020, Volume 11, Issue 9, p. 505

[376] J. PADILLA, D. EVANS, "*Excessive Prices: Using Economics to Define Administrable Legal Rules*", 2004

[377] N. KROES, Speech of 15 September 2005, Speech/05/512

[378] M. VESTAGER, Speech of 29 November 2018

[379] M. IOANNIDOU, "*Consumer Involvement in Private EU Competition Law Enforcement*", Oxford University Press, 2015

[380] M. S. GAL, "*The Case for Limiting Private Excessive Pricing Litigation*", Journal of Competition Law & Economics, 2019, Volume 15, Issue 2-3, pp. 298-326

[381] Beuc, "Letter to Commissioner Reynders "COVID-19 – implications for consumers and BEUC recommendations for policy responses", 3 April 2020

[382] B. BASARAN, "*A closer look on the effectiveness of the EU legal framework for excessive pricing during the COVID-19 crisis*", European Competition Journal, 2021

[383] See OECD, "*Exploitative pricing in the time of COVID-19*", 2020, p.3; see also C. RIEFA, "*Coronavirus as a Catalyst to Transform Consumer Policy and Enforcement*", Journal of Consumer Policy, 2020, 43, p. 457

consumer protection rules.[384] For this reason, the authorities should coordinate actions with consumer protection agencies, or rely on the consumer protection powers, to protect consumers during the crisis.[385] In fact, most of the EU NCAs are also entrusted with a consumer protection function and therefore have the powers to enforce both competition law and consumer protection against excessive pricing[386]. Thus, the application of consumer protection by the authorities can cleverly solve the problems caused by the complexity of using competition law for excessive pricing, driving consumer benefit by direct actions.[387] The antitrust actions are not the best option for quick delivery of consumer welfare and during the crisis they became complementary to consumer protection regimes.[388] Thus, COVID- related exploitative pricing has been investigated by many authorities working as both competition and consumer protection authorities[389]. For example, the Italian authority launched the investigations for both competition law and consumer protection against Amazon and Ebay[390], and against numerous stores for the increase in prices for detergents and disinfectants during COVID[391].

Given the circumstances, a cooperative approach between competition law and consumer protection is probably the most desirable choice, especially for borderline cases. No problems arise when an already dominant undertaking practices excessive pricing, but when dominance is not present, consumer protection is probably a better choice.[392] During the crisis there has

[384] P. M. HORNA, "*A global overview of the impact of Covid-19 on competition policies in key sectors*", in Concurrences Review, special issue "Competition Law and Health Crisis", n. 2/2020; see also OECD, Roundtable on excessive pricing, 2011, where emerged that express prohibitions on unfair prices may be contained within competition legislation, consumer protection legislation, or more general market regulation or consumer protection provisions.

[385] OECD, "*Competition policy responses to COVID-19*", 2020; see also F. JENNY, "*Introduction*", in Concurrences Review, special issue "Competition Law and Health Crisis", n. 2/2020: most competition authorities in Europe, unless they have a consumer protection function, are fairly restricted in their ability to fight excessive pricing during periods of acute shortage

[386] I. RAKIĆ, "*Competition Law in the Age of Covid-19*", 30 April 2020, Anali Pravnog fakulteta u Beogradu, 2/2020, p.45

[387] L. WRIGHT, S. VASANI, "*Reading the signs: evolving antitrust policy in Europe in response to the pandemic*", Antitrust, 2020, Volume 34, Issue 3, p.5; see also see also P. SICILIANI, C. RIEFA, H. GAMPER, "*Consumer theories of harm – An economic approach to consumer law enforcement and policy making*", Bloomsbury Publishing, 2019, p.9: consumer protection enforcement helps to develop a general duty to trade fairly, shaping markets and lessening the need for competition enforcement

[388] *Ibid*.

[389] F. FERRARI, "*The antitrust implications of COVID-19 in the European Union*", Regulating for Globalization, 27 August 2020, p.5

[390] Autorità Garante della Concorrenza e del Mercato- Press release, PS11716-PS11717 - ICA: Coronavirus, the Authority begins investigating Amazon and eBay for misleading claims and excessive price increases.

[391] Autorità Garante della Concorrenza e del Mercato- Press release, DS2620 - ICA: Coronavirus emergency, investigation launched into price increases for food and detergents, disinfectants and gloves.

[392] See F. FERRARI, "*The antitrust implications of COVID-19 in the European Union*", Regulating for Globalization, 27 August 2020

been a notable increase in the activity of protection and repression, also due to the degree of reprehensibility and disvalue connected to certain speculative conduct, but no changes in the rules emerged.[393] Consumer protection rules may be able to face unfair commercial practices that exploit the health emergency situation by distorting the consumer's assessment of the situation so as to induce him to purchase essential goods and services at higher prices. Consumer protection rules, due to their different sanctioning capacity, are less effective in terms of deterrence, but because of their flexibility they may be particularly appropriate at a time when rapid action is needed.[394] There is a certain amount of mixture in the use of the two disciplines for the purpose of price stabilisation.[395] Reliance on consumer law avoids some of the difficulties of competition law, in particular the requisite of dominance. Where competition authorities have the possibility of acting against excessive prices under both competition and consumer law, NCAs have indicated that they intend to apply antitrust law in parallel with consumer protection laws or rules concerning unfair commercial practices.[396] At the beginning of the COVID crisis, the UK CMA, for example, expressed its will to apply both competition law and consumer protection rules, in order to tackle alleged exploitative price increases, if firms fail to respond to its warnings.[397]

Using only competition law, prohibiting the abuse of dominance, does not appear as a strong tool in responding to the COVID-19 challenges. Maybe the right thing to do is to apply measures using as a basis both consumer protection, for the most urgent and prompt solutions, and the competition law, for more complex cases which require long investigations. Anyway, when a dominant position is detected, there is no doubt that the correct thing is to apply Article 102 and not consumer protection.[398]

The most important element of EU consumer protection is the Unfair Commercial Practices Directive (UCPD). The UCPD is not directly aimed at excessive prices, but rather at

[393] F. GHEZZI, L. ZOBOLI, "*L'antitrust ai tempi del Coronavirus: riflessioni sulle esperienze internazionali e sulle iniziative italiane*", Rivista delle società, 2020, n. 2/3

[394] A. PEZZOLI, "*La politica della concorrenza ai tempi del virus e la rilegittimazione dell'intervento pubblico*", Mercato Concorrenza Regole, Fascicolo 1, 2020; see also P. SICILIANI, C. RIEFA, C., H. GAMPER, "*Consumer theories of harm – An economic approach to consumer law enforcement and policy making*", Bloomsbury Publishing, 2019, p.9: in some cases, the prompt intervention under consumer law can be a remedy for issues which competition enforcement would not suffice to solve, being the latter unable to restore a fair market outcome.

[395] F. GHEZZI, L. ZOBOLI, "*L'antitrust ai tempi del Coronavirus: riflessioni sulle esperienze internazionali e sulle iniziative italiane*", Rivista delle società, 2020, n. 2/3

[396] OECD, "*Exploitative pricing in the time of COVID-19*", 2020

[397] Competition and Market Authority, Open letter to pharmaceutical and food and drink industries, 20 March 2020

[398] F. FERRARI, "*The antitrust implications of COVID-19 in the European Union*", Regulating for Globalization, 27 August 2020, p.5

misleading and aggressive practices. In fact, although the practices of imposing unfair purchase or selling prices are, under certain circumstances, prohibited by competition rules, they are not automatically considered as unfair for the UCPD. The breach of competition rules should, however, be taken into account when assessing their unfairness under the UCPD.[399] Consumer protection may be used for excessive pricing practices against which it is difficult to enforce competition law, thereby increasing deterrence, and the application of the UCPD may be a way to control unfair pricing.[400]

During the first weeks of the COVID crisis, the Consumer Protection Cooperation ("CPC") Network[401], with the support of the European Commission, issued a common position on the most common unlawful commercial practices in relation to the pandemic.[402] The CPC common position declared the pressure selling techniques used by traders in order to charge higher than normal prices to be contrary to the UCP Directive. An example of these techniques is the practice of sellers offering protective masks at a price of up to 600% higher than the normal price, due to their huge demand and the consequent scarce supply.[403] Some Articles of the UCPD can be violated by excessive pricing[404]:

- Articles 5 and 6 of the UCPD prohibit traders from misleading consumers about the price of a product;
- Articles 8 and 9 of the UCPD prohibit aggressive commercial practices which include exploiting serious situations as to impair the consumers' judgement;
- No. 7 and 18 Annex I of the UCPD prohibit giving inaccurate information to the consumers in order to trigger their purchasing decision and charge them higher than normal prices.[405]

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[399] European Commission, Staff working document guidance on the implementation/application of directive 2005/29/ec on unfair commercial practices (2016)

[400] C. RIEFA, "*Coronavirus as a Catalyst to Transform Consumer Policy and Enforcement*", Journal of Consumer Policy, 2020, 43, p. 457

[401] The CPC Network is a cooperation network for consumer protection composed by national authorities coordinated by EU Commission, whose legal basis is Regulation EU 2017/2394 of the European Parliament and of the Council of 12 December 2017 on cooperation between national authorities responsible for the enforcement of consumer protection laws and repealing Regulation (EC) No 2006/2004, with the objective of tackling together the violations of consumer protection rules with cross-border effect

[402] Common Position of CPC Authorities, Stopping scams and tackling unfair business practices on online platforms in the context of the Coronavirus outbreak in the EU

[403] *Ibid*.

[404] F. FERRARI, "*The antitrust implications of COVID-19 in the European Union*", Regulating for Globalization, 27 August 2020, p.5

[405] Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market

During an emergency like COVID, people need a fast and urgent response. Competition law qualified as unlawful only the conduct undertaken by a dominant company, while Article 102 TFEU cannot be used for the excessive pricing of a non-dominant company. Instead, the UCPD prohibits unfair commercial practices. Excessive pricing practices can be prosecuted either as abuse of dominance under Article 102 TFEU and as unfair commercial practice under the UPCD. Unfair commercial practices distort not only the freedom of consumers to carry out their economic activities, but also the principle of competition and the creation of a single market, giving rise to genuine speculation.[406] Using consumer protection would be better and faster than using competition law. Protecting consumers is a priority during the COVID crisis: thus, in order to satisfy all the necessary conditions and address all the issues, the better solution should be to not use only competition law but also consumer protection as a legal basis against excessive prices. Consumer protection offers faster remedies which are more effective for consumers. Most of the European NCAs, having competence for both competition law and consumer protection, can use both as a complementary legal basis against excessive pricing practices. Fair competition and consumer protection are both the necessary fuel of consumer welfare and economic recovery. Therefore, consumer protection should be the rule against excessive pricing, unless there is a dominant position of the player concerned: in the latter case, competition law should have absolute priority.[407]

3. EXCESSIVE PRICING IN PHARMACEUTICALS SECTOR: THE ASPEN CASE

The attention of the enforcers towards excessive pricing has increased recently. For a long time, the Commission and the NCAs did not consider excessive pricing as an enforcement priority that needed the vivid intervention of the enforcers, and they pursued this type of anticompetitive practice on a limited basis. Moreover, the intervention of enforcers to correct high prices was seen as an intrusion within the autonomous market dynamics and free-market fluctuations. Due to the fact that excessive pricing is today increasingly perceived as harmful for consumers, the more lenient approach of the past towards excessive pricing practices is today replaced by a strong and inflexible approach, according to which the imposition of excessive prices is severely sanctioned. In the last couple of years, there has been a revival of the concept of excessive pricing and a growing trend for European antitrust watchdogs to focus actively on excessive pricing cases, with a growing number of cases handled by the national competition authorities and the Commission, and of cases brought before the Court. Excessive

[406] S. SANDULLI, "*AGCM e tutela del consumatore ai tempi del Coronavirus*", Federalismi, 5 Maggio 2020
[407] F. FERRARI, "*The antitrust implications of COVID-19 in the European Union*", Regulating for Globalization, 27 August 2020, p.5

pricing practices are today considered as an enforcement priority by the Commission and the NCAs. Especially the pharmaceutical sector has been at the centre of this new activity[408]. The Aspen case has been a turning point for excessive pricing in the EU. The European Commission opened its first investigation into excessive pricing after years, following on from an investigation by the Italian competition authority fining Aspen EUR 5.2 million for the pricing of the same drugs.[409] The recent Aspen commitments decision of the EU Commission shows that even this institution is currently re-considering its traditional "non-enforcement approach" towards unfair pricing cases concerning drugs.[410] In the light of the excessive pricing issues for medical items presented by the COVID-19 pandemic, the impact of the recent excessive pricing cases in the pharmaceutical sector is not to be underestimated. Aspen, together with other recent cases such as Phenytoin in the UK, became a turning point: they show that excessive prices of medicines charged on final consumers could be subject to the antitrust scrutiny. Moreover, the single MSs and the EC realized that Article 102 is the proper tool to check excessive pricing in pharmaceuticals. In 2018, the OECD organized a Roundtable on excessive pricing in pharmaceuticals, in the light of the increasing attention towards this type of practices in this field. In its contribution paper the EU Commission recognized the possibility and the importance to intervene against this type of practices in this particular field by enforcing Article 102 TFEU.[411]

3.1 EU COMMISSION VS ASPEN

The recent proceedings against Aspen pharmaceutical company concern excessive pricing of anticancer drugs. Both Italian competition authority and the EU Commission opened investigations against the prices charged by Aspen. The Italian competition authority (AGCM) imposed a fine of more than 5 million Euros on the multinational pharmaceutical company Aspen for infringing art. 102, letter a) of the TFEU. The company was found to have fixed unfair prices with increases up to 1500% for life-saving and irreplaceable drugs, in order to gain extra profits. In its investigation, the AGCM made a temporal comparison between the prices charged during the infringement period and prices charged before it, discovering a

[408] See R. DE CONINCK, E. KOUSTOUMPARDI, "*Excessive pricing cases in the pharmaceutical industry: Economic considerations and practical pitfalls"*, Concurrences Review N° 3-2017, pp. 9-16; see also Opinion of AG Pitruzzella in Case C-372/19 Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v Weareone.World BVBA, Wecandance NV. [2020], ECLI:EU:C:2020:598, para 21

[409] See J. KILLICK, A. KOMNINOS, "*Excessive Pricing in the Pharmaceutical Market – How the CAT Shot Down the CMA's Pfizer/Flynn Case*" Journal of European Competition Law & Practice, 2018, Vol. 9, No. 8

[410] See M. BOTTA, "*Sanctioning unfair pricing under Art. 102(a) TFEU: yes, we can!*", European Competition Journal, 2020, Volume 17, Issue 1

[411] OECD, Excessive Pricing in Pharmaceutical Markets – Note by the European Union, 2018

disproportionate increase of prices between the two different points in time. The AGCM found the sudden and huge increase of the price charged by Aspen as one evidence of excessive price.[412] However, a critical view of the AGCM decision may note that, even if the price-comparison benchmark provokes this deduction of the AGCM, the latter seems to have overlooked, as a relevant factor for the purposes of analysing price unfairness, the comparative analysis between the prices imposed by the company for the same products in the geographical reference markets (from which it would have emerged that prices in Italy were lower than in other European countries) and the prices applied in other markets by the same company for the same products or with respect to the prices of competing medicines.[413]

Immediately after the decision of the Italian Authority, the European Commission launched an investigation against Aspen with regard to the same conduct in other EU countries. The Aspen decision of the AGCM was recognised as ground-breaking by the European Commission, because Italy had paved the way with its fine of 5 million Euros.[414] In its Preliminary Assessment, the Commission found no objective justifications for Aspen's prices and profits.[415] They do not reflect any commercial risk, nor innovation, nor investment, nor any material improvement for the products. This absence of legitimate reasons for Aspen's excessive profits and high prices, the disproportion of the price increases, and the nature of the products (medicines on which patients depend), led the Commission to the preliminary conclusion that there was no reasonable relation between Aspen's prices and the economic value of the products supplied. Therefore, at the end of the investigation, the Commission

[412] A480 – PRICE INCREASE OF ASPEN'S DRUGS Measure No. 26185, AGCM decision of 14 October 2016

[413] For this critical view, see P. FATTORI, M. TODINO, "*La disciplina della concorrenza in Italia*", terza edizione, 2019, Il Mulino, p. 174. In fact, in its assessment, the authority rejected arguments seeking to compare the prices in Italy with the higher prices in other EU Member States and also rejected arguments seeking to justify the high price of the product due to its high demand side value, concluding that the value of life-saving drugs could not be determined by patients' willingness to pay. However, in I. VAN BAEL AND J. BELLIS, "*Competition Law of the European Union*", sixth edition, 2021, Kluwer Law International, it is reminded that the authority also noted that Aspen had neither incurred development costs nor taken on additional distribution costs that would justify the price increases, but had instead used aggressive negotiation tactics to force the National Health System of Italy to accept the increased prices. In case CD Pharma, which is also a case regarding excessive pricing in pharmaceuticals, the competent authority, when assessing fairness, looked to the concerned undertaking's historical prices as well as those it charged in other Member States.

[414] Autorità Garante della Concorrenza e del Mercato, Press Release, "Italian Competition Authority, Pitruzzella discloses the annual report to the Parliament", 2016

[415] On this point see for instance the Opinion of AG Wahl in Case C-177/16 Autortiesību un komunicēšanās konsultāciju aģentūra /Latvijas Autoru apvienība v Konkurences padome, ECLI:EU:C:2017:286, who affirmed that unfair price above the competitive level may be objectively justified where the product in question has a higher economic value, which may include customers' demand for the product, the need to cover failed R&D, non-cost reasons. However, if the price is in excess of the benchmark, it is for the dominant firm to objectively justify it and the authority must then review those justifications.

concluded that Aspen may have abused its dominant position by imposing excessive and unfair prices within the meaning of Article 102(a) TFEU, and its profits may be excessive.[416]

Article 9 of the Regulation 1/2003 gives the Commission the possibility to take commitments decisions by accepting binding commitments from undertakings under investigation rather than proceeding to a final prohibition decision[417]. This way of concluding Commission proceedings under Article 102 is usually advantageous for both the Commission and the defendants.[418]

In July 2020, Aspen submitted a proposal of commitments to the Commission in order to meet the concerns expressed in the Preliminary Assessment. Two commitments were proposed: with the first one, Aspen committed to reduce its prices on average by around 73% for each of the products in the Member States; with the second, Aspen committed to guarantee the continuous supply of its products for at least 5 years.[419] In this way, the supply of essential products for people's health is not interrupted.

In February 2021, the Commission accepted the commitments proposal made by Aspen, making them binding with its decision. Commissioner Margrethe Vestager, in charge of competition policy, considered the Aspen's commitments as a fast and lasting solution, and as a victory for Europe, because the company would reduce the prices of its medicines but would still guarantee their supply.[420]

3.2. THE RELEVANCE OF ASPEN CASE DURING COVID CRISIS

The importance of the Aspen case, even considering the recent COVID crisis, is contained in three reasons. Firstly, the comparison of price over time. The Aspen price comparison can be used even today for deciding whether the prices of medicines and protective tools are excessive, comparing them before and after the outbreak of the COVID[421]. The comparison over time gives NCAs flexibility and easiness to analyse excessive pricing in times of COVID

[416] ASPEN, Case AT.40394, Commission Decision relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union (TFEU) and Article 54 of the EEA Agreement, 10 February 2021
[417] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, article 9
[418] A. JONES, B. SUFRIN, N. DUNN, "*EU Competition Law: Text, Cases, and Materials*", 7th edition, 2019, Chapter 6, pp.281-282
[419] ASPEN, Case AT.40394, Commission Decision relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union (TFEU) and Article 54 of the EEA Agreement, 10 February 2021
[420] European Commission-Press release, Antitrust: Commission accepts commitments by Aspen to reduce prices for six off-patent cancer medicines by 73% addressing excessive pricing concerns, 10 February 2021
[421] R. O'DONOGHUE, J. PADILLA, "*The Law and Economics of Article 102 TFEU*", Bloomsbury Publishing, third Edition, 2019, p.772

crisis.[422] For example, when using as benchmark price the price charged in the past, prices that are high due to the COVID crisis may appear more easily excessive[423]. In the Aspen case, prices have been found abusive when they increased by 1500%[424], and the evolution of pricing over time has been accepted as a valid method in order to determine whether a price is excessive under Article 102 TFEU[425]. The second reason is that it shows that excessive pricing for medicines may be severely fined. In fact, it shows the need to improve competitive conditions in certain sectors as that of healthcare materials.[426] The last reason is the commitments decision, which can be a suggestion even for today COVID crisis. In fact, the commitments decision benefits both the consumers and the companies. The advantage for companies is a compromise with the EC avoiding a severe penalty. As the commitment decisions do not establish an infringement, the undertakings avoid any damage to their reputation. They may be motivated to set lower prices in the future and offer conditions that are more convenient for consumers.[427] The commitments decision benefits also the consumers because the companies are willing to guarantee lower prices and, contemporarily, continuous supply of the needed materials. This could be even more important during an emergency as COVID, because people need essential materials but also need them to be sold at affordable prices, allowing them to have what they need without being exploited. In fact, the Aspen commitments decision stands in as a deterrent for companies that want to charge exploitative prices for healthcare products.[428] Moreover, due to the complexity of the abuse of dominance proceedings, the commitments decision may be a convenient way to circumvent the complexities inherent to infringement actions[429]: it would be a less burdensome instrument to

[422] P. GIOSA, "*Exploitative Pricing in the Time of Coronavirus—The Response of EU Competition Law and the Prospect of Price Regulation*", Journal of European Competition Law & Practice, 2020, Volume 11, Issue 9, p. 504

[423] F. BOSTOEN, C. COLPAERT, W. DEVROE, J. GRUYTERS, L. MICHAUX, L. VAN ACKER, "*Corona and EU Economic Law: Competition and Free Movement in Times of Crisis*", European Competition and Regulatory Law Review, 2020, Vol. 4, Issue 2, p. 77

[424] A480 – PRICE INCREASE OF ASPEN'S DRUGS Measure No. 26185, AGCM decision of *14 October 2016*

[425] Opinion of AG Wahl in Case C-177/16 Autortiesību un komunicēšanās konsultāciju aģentūra /Latvijas Autoru apvienība v Konkurences padome, ECLI:EU:C:2017:286, para. 19

[426] Y. BOTTEMAN, A. PATSA, "*Towards a more sustainable use of commitment decisions in Article 102 TFEU cases*", Journal of Antitrust Enforcement, 2013, Volume 1, Issue 2, p. 351

[427] P. GIOSA, "*Exploitative Pricing in the Time of Coronavirus—The Response of EU Competition Law and the Prospect of Price Regulation*", Journal of European Competition Law & Practice, 2020, Volume 11, Issue 9, p. 505

[428] European Commission-Press release, Antitrust: Commission accepts commitments by Aspen to reduce prices for six off-patent cancer medicines by 73% addressing excessive pricing concerns, 10 February 2021

[429] Y. BOTTEMAN, A. PATSA, "*Towards a more sustainable use of commitment decisions in Article 102 TFEU cases*", Journal of Antitrust Enforcement, 2013, Volume 1, Issue 2, p.351

directly address the excessive pricing in the time of coronavirus at the EU level, restoring undistorted conditions of competition in a quick and effective manner. [430]

CONCLUSIVE REMARKS

COVID created an unprecedented emergency. During the crisis period, it was important to make consumers and competitors feel protected from possible abuses of competition law and therefore the authorities reminded the effectiveness of their enforcement activity of antitrust rules.

During the COVID 19 crisis, spikes in prices occurred in Europe, especially with respect to health-related services and products such as hand sanitizers and face masks. The crisis may trigger certain abusive conducts, such as excessive pricing for products that are high in demand. Thus, the NCAs cannot let down the guard and have to do their monitoring activity with even more attention than before. The NCAS have the duty and the power to monitor the markets and detect exploitative pricing. The crisis cannot be an excuse for justifying exploitative practices. The crisis may become an opportunity for exploiting this situation, damaging consumers. Exploitative high prices may be very harmful for consumers. It is not possible to wait for them to automatically decrease as a consequence of the slow market self-correction. It is necessary to intervene, using all the instruments at disposal, to adjust the high prices of essential COVID related products. Therefore, it is necessary to intervene against exploitatively high prices, adjusting them. Especially when essential products such as medicines are concerned, it is necessary that the authorities intervene adjusting the prices, in order to make them decrease to a competitive level. Markets should not be considered self-correcting during the crisis. Letting the markets self-correct without price-adjusting interventions would have harmful consequences for both consumers and competitors. Markets act slowly, while during a crisis, instead, time is crucial and prompt solutions are needed. The continuous vigilance of competition enforcers for excessive pricing seems reasonable considering the necessity that products for the protection of health remain available at competitive prices. That is why a number of competition authorities, in the short run, put special focus on excessive pricing practices. The role and focus of competition authorities should be to eliminate excessive pricing, in order to ensure competitive prices for critical goods. The intervention approach towards excessive pricing is the preferred one. This

[430] P. GIOSA, "*Exploitative Pricing in the Time of Coronavirus—The Response of EU Competition Law and the Prospect of Price Regulation"*, Journal of European Competition Law & Practice, 2020, Volume 11, Issue 9, p. 505

approach reflects a recent trend in the EU towards a more active enforcement against excessive pricing, especially in the pharmaceutical sector. In recent years, the gain of the EC and the NCAS to enforce Article 102 against excessive pricing has been growing and this tendency has been particularly active in the field of pharmaceuticals.[431] The best example is the Aspen case, when the EU Commission and Aspen agreed on commitments regarding prices and supply. The Aspen commitments decision may be a useful example during COVID crisis, in order to contemporarily guarantee fair prices and sufficient supply of essential medical items during a pandemic. The Commission has thus continued pursuing cases of exploitation, including the investigation of cancer medicines in Aspen with implications for public health and for similar conduct for COVID-19 medicines. The Commission awards priority to exploitation, stating that it will not tolerate exploitative pricing abuses. The exploitative price increases of healthcare products are very harmful and cannot be tolerated. Crises lead to vulnerable states that reinvigorate competition law control of economic power. Thus, during the COVID crisis, the price of essential products drew most of the attention.

The focus on excessive pricing is constant and even more active for the COVID related products. The investigations are necessary in order to discover whether the excessive pricing constitutes violation of Article 102(a). The competition authorities should adapt the analysis of dominance and abusive behaviour to the crisis, by selecting the most appropriate methodology. This methodology may be the price-based benchmarks before and after the crisis. For instance, in the Aspen case, prices have been found abusive when they increased by 1500%. The comparison of prices over time during COVID may allow to discover exploitative prices, because prices of medicines, face masks and hand sanitizers increased a lot in a few weeks or even days.

During the COVID crisis, the monitoring activity of NCAs became even more important and they identified excessive pricing as an enforcement priority. With regard to this anti-competitive behaviour, competition authorities remained vigilant to prioritise COVID-19-related situations as they emerge because the inaction towards high prices of essential goods could cause substantial consumer detriments even just in the short-term. However, during the crisis, the enforcement of Article 102 resulted to be not too effective against excessive pricing, due to the length and the complexity of the investigations and the proceedings of this Article.

[431] The previous tendency was instead reluctant to enforce excessive pricing in pharmaceuticals: since the 1970s, when the UK and German authorities attempted to prosecute Hoffman-La Roche for allegedly charging excessive prices for its therapies Valium and Librium, competition authorities in the EU have generally demurred from challenging the pricing of therapies.

The main obstacle for the application of Article 102 TFEU is its own requirement of an undertaking in a dominant position, according to which only the dominant undertaking may fall under the scope of the prohibition of excessive pricing ex Article 102 and of the excessive pricing criteria to take action against unjustifiable price increases during the crisis, and whose consequence seems to be no competition concern for COVID-related excessive pricing. In order to get round this obstacle, the enforcement of this Article for excessive pricing practices of medical items could be helped by the possibility to identify the temporary dominance caused by the particular circumstances of the COVID crisis. In fact, the EC in its antitrust Temporary Framework stated that the competition authorities should be open to temporary dominance, which can lead to more frequent findings of a dominant position and can be an escamotage to enforce Article 102(a). Temporary dominance is when a firm dominates a market in a very narrow space of time. This particular situation could apply to stockouts caused by COVID-19. The competition authorities may have the possibility to enforce rules that aim to protect vulnerable consumers from wind-fall market power in relation to essential products by precluding certain types of price increases. Nonetheless, the temporary and circumstantial dominance during the crisis, even being considered by the EC in its antitrust Temporary Framework, never turned into reality. Neither the EC nor the single NCAs have enforced 102(a) through the recognition of temporary dominant positions. Due to the fact that copious excessive pricing practices were done by simple resellers, it was difficult to identify dominant positions (temporary or not). Therefore, it is possible to assert that the temporary dominance, even providing a potentially useful solution for COVID related exploitative pricing, did not help to detect more exploitative pricing abuses. The reason is that the competition authorities, in the first months of the crisis, did not consider changes to competition law that might have been necessary. They were sure that competition law is flexible enough to take into account the changed economic environment. However, the possibility to recognize temporary dominance related to the COVID crisis is not very effective if not linked to a modification of the legal basis. The EU pre-existing antitrust rules were outdated to effectively face exploitative pricing during COVID period, and it would have been desirable and beneficial to adapt them to the crisis situation.[432]

[432] It will be seen in the next chapter that this is what happened instead in South Africa where it was possible to prosecute excessive pricing violations, even temporary, in a very effective way thanks to the adoption of an ad hoc regulation which specifically prohibited the excessive pricing of goods such as face masks and hand sanitizers, for the period December 2019-March 2020.

Since no new ad hoc rules had been introduced, the power of the NCAs to intervene against excessive prices under the national and European competition law against firms holding a dominant position was not a viable instrument to deal with the price increases linked to the COVID-19 crisis. The reasons were that in most cases there was no dominance and that the intervention, due to the complex investigation, would not have been timely. On the whole, the excessive prices are charged by simple resellers and are not involved within Article 102(a). Alternatively, competition agencies can rely on powers under their competences other than competition law to address excessively high prices. When trying to deter exploitative practices flowing from the COVID-19 crisis, competition authorities should evaluate all available tools, under competition law or other rules, to address problematic practices and use the most adequate tool to address them successfully and in a timely manner. Many competition authorities have the competence to enforce consumer protection laws and they should rely on consumer protection powers to protect consumers from unfair pricing practices. Thus, competition law and consumer protection law may be complementary, and the chosen legal tool should be the one which proves to be more effective in the context of a particular case. The advantage of consumer protection is that it does not require the detailed effects analysis that competition law relies on to ensure that intervention leads to increased consumer welfare. As a consequence, enforcing these rules is less burdensome on agencies and can be achieved in a timelier manner. Consumer protection does not apply only to dominant firms and this can prove useful when addressing serious concerns about sudden pricing practices where demonstrating dominance is not relevant, given the nature of the concerns. In this way, differently from competition law, consumer protection can be used even against non-dominant sellers which charge exploitatively high prices.[433] Using it as a legal basis against excessive pricing during COVID allows to solve some of the problems of the enforcement of 102 such as the length and the complexity of its proceedings and the difficulty to identify a dominant position (even temporary) of the sellers.

The Authorities used their consumer protection powers in the healthcare and pharmaceutical sector, in order to complement their competition monitoring efforts in mitigating the effects of price increases. In view of the actions taken by the NCAs, the best solution is the complementarity between consumer protection and competition law. This complementarity allows to choose the most suitable basis for the specific exploitative pricing case. The most suitable approach for excessive pricing should be that consumer protection is the rule, unless

[433] It will be seen in the next chapter that UK and Italy are two examples of the preference of the EU NCAs for the consumer protection instead of competition law for the determent of exploitative pricing during Covid crisis.

a dominant position is recognized. If a dominant position is detected or may potentially be detected, the antitrust enforcement has the absolute priority. The two bases are complementary between them, but the primary basis should be consumer protection. The priority given to consumer protection tools for excessive pricing derives from the fact that one of the fundamental goals of competition law is to protect consumers, avoiding exploitations and harm to them. It is necessary to use the basis which is the most appropriate to fulfil this goal. The protection of consumers is so fundamental for competition law that it becomes more important than competition itself. As the real aim of competition law should be to avoid consumer harm[434], what is really important for competition law is to preserve and protect consumers. Thus, consumer welfare is a priority even for excessive pricing cases. Consumer protection and fair competition are two very important aspects of competition law. They would guarantee better conditions for consumers and they would also speed the recovery. They are two important fuels for the economic recovery after COVID.

Next chapter will deal with the policies and the actions for excessive pricing adopted by the different institutions and networks of the EU, and by the NCAs. It will consider the joint statement and the Temporary Framework published by the ECN and the EC respectively, and the different solutions adopted by some EU NCAs. Those solutions go from investigations to price caps, and from taskforces to guidance documents. There will also be a brief look at the solutions adopted outside the EU, in particular the COVID exploitative pricing policy of South Africa.

[434] N. KROES, "*Preliminary Thoughts on Policy Review of Article 82*", Speech 05/537 at the Fordham Corporate Law Institute, New York, 23 September 2005

CHAPTER III: THE ANTITRUST RESPONSES AGAINST EXPLOITATIVE PRACTICES DURING THE COVID CRISIS

During a health crisis like the COVID, the prices of certain products can rise dramatically as a result of supply shortages caused by an unexpected increase in demand and the risks of exploitation of consumers are particularly high. This chapter focuses on the antitrust law enforcement by the EU institutions and by some MSs with regard to excessive prices, analysing the solutions they adopted for Article 102 TFEU issues. The responses and solutions adopted by the EU institutions and by the NCAs to face excessive pricing will be taken into account, as most national competition authorities around Europe have stepped up their antitrust enforcement against this practice.

Differently from cooperative agreements, the approach towards exploitative practices has not been lenient. The concrete enforcement activity towards COVID related excessive pricing in EU mainly corresponds with soft-law documents aimed at warning the market players about the inflexible approach towards this type of practices, being the latter very harmful for consumers even more during an emergency period. The aim of the concerned soft-law measures is to guide the behaviours of the undertakings and prevent the spread of exploitative pricing practices during the crisis. The investigations and the market inquiries of NCAs with regard to COVID-related excessive pricing are the proof that this type of practices is not tolerated or exempted during the crisis, but instead the will of the authorities is to avoid and severely sanction them.

The ECN, the EC and the NCAs recognized the importance of ensuring fair competition and protection of consumers during the emergency and, at both the EU and national level, the main objective was to hinder exploitative pricing. EU bodies and the national competition authorities enforced the rules by warning the undertakings about their rigidity towards abusive and excessive pricing practices during the crisis and investigating any alleged violations of the law. Article 102 TFUE and the equivalent national laws prohibit the imposition of excessive prices by a dominant undertaking. In the recent years, the European Commission and many NCAs have increasingly investigated exploitative abuses under Article 102 TFEU in a number of industries.[435] The pricing abuse would seem the solution for exploitations during the

[435] See among others A. JONES, B. SUFRIN, N. DUNN, "*EU Competition Law: Text, Cases, and Materials*", 7th edition, Oxford University Press, 2019, p. 560; R. O'DONOGHUE, J. PADILLA, "*The Law and Economics of Article 102 TFEU*", Bloomsbury Publishing, third Edition, 2019, p. 736; M. BOTTA, "*Sanctioning unfair pricing under Art. 102(a) TFEU: yes, we can!*", European Competition Journal, 2020, Volume 17, Issue 1, p. 159; Opinion of AG Pitruzzella in Case C-372/19 Belgische Vereniging van Auteurs, Componisten en

emergency phase of COVID-19. However, this is a tool that, due to its peculiarities, is not the best solution against exploitative pricing. The finding of dominance and more generally the conditions of competition may be significantly affected by the exceptional nature of the situation. It is likely that the market power is transitory and not such as to constitute a lasting dominant position. The use of pricing abuse is unlikely to ensure a timely and adequate response to the current context. In order to either sanction or prevent exploitative pricing practices, the concerned NCAs resorted to alternative solutions like consumer protection or price cap, and the investigations under Article 102 TFEU did not produce concrete results.

In this chapter, the antitrust actions and solutions that the EU institutions and the competition authorities of the single MSs adopted after the COVID outbreak are under scrutiny. In that period there was a general situation of shock, and the intervention of EU institutions was necessary. When considering the actions taken at the EU level during the COVID emergency, the two main references are the joint statement of the European Competition Network and the Temporary Framework of the EU Commission, two prompt antitrust responses to COVID crisis. The ECN antitrust statement was the first relevant antitrust guidance adopted at EU level during the COVID crisis. Immediately after the ECN joint statement, the Commission published its Temporary Framework for antitrust issues. In this framework, the EC covers both Articles 101 and 102 issues. The EC reiterates its strong enforcement activity, which is not interrupted by the pandemic, especially against exploitative pricing abuses, recognizing even the abuses of temporary dominant positions as unlawful. Speaking of which, the Commission in its Framework affirms that the exploitative pricing abuses of dominant positions must not be tolerated, even if those positions are temporary and caused by the particular circumstances of the crisis. The EC recognized that the crisis altered many markets, and this alteration may have created windfall dominant positions, even of companies with low market shares. The possibility to recognize temporary dominance may allow to solve the main problem of Article 102, that is the impossibility to prohibit an excessive pricing practice of a non-dominant company.

Moreover, in addition to considering the solutions of the EU institutions this chapter focuses on the enforcement activity to face the problem of exploitative pricing for COVID related products followed by some NCAs. Competition authorities can play a fundamental role in assisting governments in the recovery phase, contributing to a faster and more sustained

Uitgevers CVBA (SABAM) v Weareone.World BVBA, Wecandance NV. [2020] ECLI:EU:C: 2020:598, para 22

economic recovery.[436] The MSs concerned are Italy, France, United Kingdom and Greece, and the choice is motivated by the fact that the solutions adopted by them are the most emblematic, meaningful and effective to hinder exploitative excessive pricing practices during the crisis. The Italian NCA launched numerous investigations against excessive pricing. Having the dual competence for both competition law and consumer protection, it even used the dual basis against excessive pricing. Similar was done by the NCAs of Greece and UK, which launched investigations and even created a taskforce against excessive pricing. In France the government adopted the policy of price regulation for hand sanitizers and gels, setting the maximum selling price of these products.

Apart from the activity of these MSs, there is a country outside the EU, South Africa, whose competition action against exploitative pricing for the COVID related products could be very useful for the EU. During the COVID crisis, this country contrasted exploitative pricing by temporarily replacing the pre-existing rules with extraordinary rules specifically to the crisis situation. The approach adopted by this country for competition law during the crisis can be useful even for EU institutions or single EU member states.

1. THE RESPONSES AT THE EU LEVEL TO EXPLOITATIVE PRICING

In order to effectively solve the combination of the shortages of essential products and the high prices charged for them, it was necessary to find some solutions at European level. In fact, nobody could have been prepared against this exceptional situation, so it was necessary for institutions at European level to adopt common policies to solve this extraordinary scenario regarding competition law. In a health crisis, shortages or even fear of shortages can trigger panic buying, which in turn could result in stimulating dominant undertakings to exploit consumers, which is prohibited under Article 102 TFEU. Businesses might use this pandemic to exploit consumers by increasing the prices of specific products which are in high demand, medical supplies and drugs being particularly vulnerable. As Nobel Prize Paul Krugman wrote, *"if disasters are followed by a free-for-all, with very high prices for essentials, the stakes of inequality become much higher. Those who can't afford high prices face extreme privation, even death."*[437]

To tackle this issue, The European Competition Network (ECN) in its policy statement restated that it is crucially important to ensure that the products considered essential to protect the health of consumers (such as face masks and hand sanitisers) in the Coronavirus crisis

[436] OECD, "*The Role of Competition Policy in Promoting Economic Recovery*", 2020
[437] C. RO, "*Can price hikes by businesses ever be justified?",* BBC, 28 April 2020

remain available at competitive prices.[438] Even though the approach of ECN towards Article 102 violations was strong, it is not possible to say the same about 101 TFEU violations. The statement has a soft approach towards cooperation agreements stating that, due to the current circumstances of the crisis, the ECN would not actively intervene against agreements between competitors which are necessary, temporary and aim to avoid a shortage of supply.[439] Thus, the NCAs "turned a blind eye" only where the latter conditions were present.

In addition, the European Commission (EC) adopted the Temporary Framework.[440] The approaches of the Temporary Framework towards violations of Articles 101 and 102 TFEU were similar to those of ECN in its statement. Thus, on the one hand the Framework stated that during the COVID-19 crisis there are forms of cooperation between competitors that may be allowed and considered lawful under EU law if their aim is to increase production or ensure a fair distribution of essential products. On the other hand, the European Commission ensured to remain vigilant in its detection of undertakings taking advantage of the current situation to breach EU antitrust law by abusing their dominant position. In fact, in the Framework, the Commission clarified its decision to not tolerate conduct by undertakings that opportunistically sought to exploit the crisis as a cover for abuse of their dominant position. The mere existence of an emergency does not give the undertakings full discretionary power for engaging with each other or abuse their dominant positions in order to overcome COVID-19 challenges.[441] Therefore, both the EU Temporary Framework and the ECN policy statement were limited in scope because the European Commission and the NCAs can only relax their enforcement criteria for cooperation aimed at ensuring the supply and fair distribution of essential scarce products and services during the COVID-19 outbreak. The undertaking must not exceed what is necessary and temporary to achieve the objective of addressing the shortage of supply and there was a reluctant approach at EU level towards a fully lenient application of competition law rules during the crisis. During the COVID crisis, a disproportionate relaxation of antitrust rules could become dangerous and the flexibility of competition rules in relation to cooperative agreements must not mean temporary and general deregulation: the leniency granted to beneficial agreements was not granted for abusive conducts, but instead the latter

[438] European Competition Network, Antitrust: Joint statement by the European Competition Network (ECN) on application of competition law during the Corona crisis, 23 March 2020
[439] Ibid
[440] European Commission, Temporary Framework for assessing antitrust issues related to business cooperation in response to situations of urgency stemming from the current COVID-19 outbreak, OJ 2020/C 116 I/02
[441] OECD, "*Competition policy responses to COVID-19*", 2020

became the object of an inflexible approach, even stronger and more careful than during normal times.

The soft law documents published by the European Commission and the ECN concerning principles governing antitrust enforcement during the COVID-19 outbreak crisis, were endorsed by the various NCAs and inspired the various communications, statements and guidelines of NCAs on how they apply competition law during the COVID-19 pandemic.

1.1 THE JOINT STATEMENT OF THE EUROPEAN COMPETITION NETWORK

The European competition network, a network through which the European Commission and the national competition authorities of all member states cooperate[442], understands that the COVID crisis suddenly upset people's lives. However, the crisis does not delete the EU competition rules: even during a pandemic, the competition law policy and objectives must be still alive. As competition law guarantees allocative and productive efficiency, and lower and fair prices to consumers, especially during a crisis, the national authorities should guarantee the enforcement of competition law in order to avoid that some companies exploit the crisis by purchasing excessive pricing to the detriment of the consumers.[443] The application of competition law during a crisis is even more important and crucial than during a static period, since there is the possibility that some economic operators try to take advantage from the crisis through exploitative practices that infringe competition law.[444] In its antitrust joint statement of March 2020, which was supposed to be a guidance on how to face the immediate impact of the COVID emergency, clarifying the position about the competition policy to be adopted in order to have an efficient reaction against the crisis, the ECN concentrated on two main issues for competition law: the cooperation between companies and the increase in prices. [445] With regards to the first issue, as it has been described in Chapter 1, the ECN recognizes that cooperative agreements created during the crisis with the aim to provide to consumers a fast and fair supply of essential medical tools, do not constitute a violation of Article 101 and are justified by the EC or by the national competition authorities. Instead, the approach of the ECN towards the increases in prices, especially the prices of products that were necessary and essential to cure and protect people from the COVID pandemic, is different. The ECN clarified that the global sanitary and economic crisis cannot be an excuse to violate competition rules

[442] Commission Notice on cooperation within the Network of Competition Authorities [2004] OJ C 101, para. 1
[443] J. FINGLETON, "*The case for competition policy in difficult economic times*", ICN Steering Group, 2009; see also See R. WHISH, D. BAILEY, "Competition Law", tenth edition, 2021, Oxford University Press, p. 17
[444] ICN, Steering Group Statement: Competition during and after the COVID-19 Pandemic, 8 April 2020
[445] European Competition Network, Antitrust: Joint statement by the European Competition Network (ECN) on application of competition law during the Corona crisis, 23 March 2020

and to unfairly increase prices of necessary products. For this reason, the ECN approach against the violations of Article 102 is different from the one against the violations of Article 101. The ECN declares that it would not tolerate abusive pricing practices and that the prices of protective tools (masks, gels) should remain competitive.[446] The ECN contrasts the abusive behaviour of companies which try to exploit the crisis in order to gain unfair and excessive profits harming consumers. The ECN does not tolerate situations in which citizens have to choose between protecting their health by paying excessive amounts or saving money but putting their lives at risk. The ECN expressly stated that the crisis would have as a consequence no relaxation of the European competition rules against excessive pricing practices, so the European Commission and the national competition authorities would fight those practices, even more than before. As a matter of fact, during a crisis the consumers are very vulnerable and their buyer power is quasi-absent, so the exchanges of essential tools can become blackmail towards consumers. The competent authorities should do everything to avoid this situation, to protect consumers and to guarantee the fairness of the purchase of masks, hand gels, medicines, respirators and so on. Moreover, to prevent the prices of those products from increasing, the ECN allowed manufacturers to set maximum prices, in order to avoid unjustified increases at the distribution level.[447]

Apparently, no particular problems seem to derive form the joint statement because, with regard to art 102 issues, the competition authorities have an instrument, abusive excessive pricing, so they can check on excessive pricing to the extent that they are linked to dominant firms.[448] It is short-sighted and excessively optimistic to rely too much on the effectiveness of this short statement, due to its limited and uncertain content. The statement's approach on prices is very strong: the ECN will immediately take action against excessive prices. But the statement remains silent on the fact that prices are influenced by quantities: prices balance the market, therefore if supply and demand are not balanced, then the prices can change drastically. When demand exceeds supplies, prices will rise, and this is not anti-competitive. If that rise in prices is blocked, to balance the market, shortages occur. These holes in the statement create a big uncertainty on what is covered, and it turns out to be ineffective. It can

[446] See D. EDWARD, R. LANE, L. MANCANO, "*EU law in the time of COVID-19*" European Policy Centre, 2020: differently from article 101 TFEU, the application of article 102 to prohibit exploitative pricing by a powerful firm is not compromised by COVID-19 because the competition authorities are not willing to allow powerful firms to adopt conduct which might fall within Article 102 during the pandemic. The reason is the protection of consumers' health, providing them essential protective products at competitive prices.
[447] European Competition Network, Antitrust: Joint statement by the European Competition Network (ECN) on application of competition law during the Corona crisis, 23 March 2020
[448] See F. Jenny, Opening Keynote Speech, Concurrences Quarantine Webinar Series, 21 April 2020

be used by NCAS and undertakings as a starting point, but it cannot be considered a satisfactory guidance about exploitative practices at EU level. [449] The Temporary Framework of the EU Commission tried to fill the holes of the ECN, becoming the reference point at EU level for the undertakings with regards to antitrust issues, in particular for cooperative agreements and pricing practices.

1.2 THE TEMPORARY FRAMEWORK OF THE EUROPEAN COMMISSION

The EC is responsible of the EU competition policy and shall ensure the application of Articles 101 and 102 TFEU, shall investigate any infringements in cooperation with the authorities of the Member States and shall bring to an end those that are incompatible with the internal market.[450] The Commission can adopt non-legislative measures, instruments of soft law which provide important information and clarification on the Commission's practice and can trigger legitimate expectations. Using this possibility, the Commission published the Temporary Framework for antitrust, in order to make the market players aware about its investigative priorities in this field during the COVID emergency, considering antitrust issues related to both Article 101 and 102 TFEU.[451] The European Commission enjoys wide discretion in assessing whether to launch an investigation, as it can determine its own priorities in the exercise of its powers on the basis of the interest of the Union. During the pandemic, through the Temporary Framework, while not considering specific beneficial agreements between competitors as one of its investigative priorities, the Commission identified exploitative pricing practices (especially those related to essential goods) as investigative priority. As the sanitary emergency caused a steep rise in demand for the products related to the health sector[452], it was necessary to allow companies to provide a sufficient supply to satisfy the huge demand of the consumers. For this reason, as already written in Chapter I, the Temporary Framework gave businesses the chance to engage in cooperative agreements, without violating Article 101 TFEU, to the extent that they meet some compulsory conditions. [453] However, even

[449] See J. Philippe's contribution, Concurrences Quarantine Webinar Series, 21 April 2020

[450] See Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003], OJ L 001; D. DOMENICUCCI, "*Commento all'articolo 105 TFUE*", Codice dell' Unione Europea Operativo, 2012

[451] European Commission, Temporary Framework for assessing antitrust issues related to business cooperation in response to situations of urgency stemming from the current COVID-19 outbreak. OJ 2020/C 116 I/02

[452] K. BODNÁR, J. LE ROUX, P. LOPEZ-GARCIA, B. SZÖRFI, "*The impact of COVID-19 on potential output in the euro area*", European Central Bank Economic Bulletin, Issue 7/2020.

[453] The conditions are listed in European Commission, Temporary Framework for assessing antitrust issues related to business cooperation in response to situations of urgency stemming from the current COVID-19 outbreak, para. 15: first, these arrangements must be designed and objectively necessary to increase output in the most efficient way to avoid a shortage of supply of essential products or services for COVID-19 patients. Second,

though cooperation between businesses is allowed in specific cases, the COVID crisis should not be a possibility to violate antitrust rules. Therefore, the Commission promised its action to be very effective during the crisis, because guaranteeing protection under competition law to businesses and consumers is even more significant than before and the monitoring activity of the European Commission remains even higher than in normal times, in order to avoid the risk of virus-profiteering.[454] Speaking of which, in paragraph 20 of the framework the Commission focuses on the possible breaches of Article 102 TFEU that could happen during the COVID crisis, in particular exploitative pricing.[455] In this paragraph the Commission assures the continuity of its active supervision of relevant market developments to detect abuses of dominant position by undertakings which take advantage of the current crisis. Notably, the Commission would not tolerate businesses' conducts that opportunistically seek to exploit the crisis abusing their dominant position through such malpractice as charging prices above normal competitive levels for products which are necessary for people to protect themselves from the virus (face masks, hand-gels, and so on).[456] The Commission specifies that the abusive conducts will be obstructed even if the dominance which is abused is "conferred by the particular circumstances of this crisis"[457]. This type of dominance is a temporary and circumstantial dominance which can be created by the imbalances caused by the COVID crisis which could have modified the structure of some markets[458]. As already seen in Chapter 2, the Commission admitted the existence of a temporary and circumstantial dominant position even before the Temporary Framework. In fact, the ABG decision recognized that a restriction of supply and a spike in demand, caused by the outbreak of the oil crisis of 1973, gave a dominant position to a firm over its customers, irrespective of its market share before the shortage

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they must remain in force only as long there is a risk of shortage during the COVID-19 outbreak. Lastly, the agreements must not exceed what is strictly necessary to achieve the objective of avoiding the shortage of supply.

[454] Friends of Europe, "In Conversation with Margrethe Vestager on COVID-19, its impact on the Single Market, bailouts and citizens", 27 March 2020

[455] European Commission, Temporary Framework for assessing antitrust issues related to business cooperation in response to situations of urgency stemming from the current COVID-19 outbreak, OJ 2020/C 116 I/02, para. 20

[456] *Ibid*.

[457] *Ibid*.

[458] See in this sense S. S. FUNG, S. ROBERTS, "*Covid-19 and The Role of a Competition Authority: The CMA's Response to Price Gouging Complaints*", Journal of European Competition Law & Practice, 2021, Volume 12, Issue 10, which suggests that some retailers may hain windfall market power from the reduction of competition intensity between retailers during the pandemic, when demand for essential goods suddenly far outstrips supply. The incentives of retailers with the essential products in stock are to induce high prices by restricting supply, clearly harming consumers. Retailers could exploit consumers' fear of shortage of essential goods, which could even inflate consumers' willingness to pay for these products, imposing higher prices than normal times. This situation may provoke a chain reaction involving a stock-piling behaviour of consumers which exacerbates the scarcity problem and causes a more distribution for these essential products. The consequences are the reduction of consumer choice and the contemporary increase of retailers' market power during the particular period.

occurred.[459] By adopting the Commission's reasoning on the definition of dominance in the ABG decision, provisions on pricing abuses of dominance could be widely used to fight exploitations in cases of shortages[460].

In this framework the Commission recognizes the unexpected effects that this pandemic has created and analyses its implications for the economy and for antitrust. Due to the emergency, the Commission recognized the necessity to identify specific priorities on which concentrate its enforcement activity in order to best use its resources. Thanks to this measure, the undertakings know which practices trigger the attention of the Commission. With regard to Article 102, the Commission informs the undertakings that exploitative pricing behaviours are likely to trigger the attention of the Commission even more than during normal times. The part of the framework regarding Article 102 enforcement focuses mainly on excessive pricing. Even being quite short, it is meaningful. In fact, paragraph 20 expressly recognised the possibility to prohibit exploitative abusive pricing practices, even when the dominance is temporary and conferred by the particular circumstances of the crisis[461]. By introducing this possibility, even conduct that normally would have been considered lawful, may be prosecuted, guaranteeing a broader protection to consumers against excessive pricing. Following this line of thinking, market power in a crisis may emerge, and erode, weekly, even daily, and its abuse can be transient. However, competition law enforcement operates in terms of months and years and this is why the NCAs had difficulties in practice to identify temporary dominant positions during the crisis and related abuses. As it will emerge in the next section, the NCAs of the MSs did not resort to temporary dominance during the COVID crisis and they were not able to sanction exploitative pricing abuses of dominant positions (temporary or not). Even if this possibility was expressly provided by the framework, it was not considered very useful by the NCAs to launch investigations on this basis and to pursue excessive pricing more effectively. In most of cases, the NCAs have resorted to moral suasions like requests for information to undertakings in order to increase deterrence, or they have preferred to pursue exploitative pricing practices using to consumer protection as investigative legal basis.

[459] See 77/327/EEC: Commission Decision of 19 April 1977 relating to a proceeding under Article 86 of the EEC Treaty (IV/28.841 - ABG/Oil companies operating in the Netherlands): this decision represents the EU precedent for dominance assessment based on short-term market power because the European Commission relied on the concept of transitory market power to establish dominance in relation to the supply of crude oil during the oil crisis in 1973.

[460] F. JENNY, "*Competition Law Enforcement and the COVID-19 Crisis: Business As (Un)usual?"*, 20 May 2020

[461] European Commission, Temporary Framework for assessing antitrust issues related to business cooperation in response to situations of urgency stemming from the current COVID-19 outbreak. OJ 2020/C 116 I/02, para. 20

Anyway, the Framework is still a very useful instrument to regulate the main antitrust issues during COVID crisis. This framework is a useful guidance which businesses look to in order to know the dos and don'ts during the crisis, because, by making reference to it, the businesses can be aware of whether and when they can cooperate, and of the repression by the European Commission of abusive pricing practices. With the framework the EC, even more than before, guarantees its control over competition law issues, especially during this period when both buyers and suppliers are in difficult situations. However, the framework is a non-legislative act, which do not modify the legislative structure introducing new ad hoc rules for the crisis, but it is a guidance for the undertakings' behaviour during the crisis. Therefore, the main objective of the framework is to informs the undertakings about which practices are likely to draw the investigative attention of the Commission. Undertakings are supposed to adapt their behaviour to the guidelines that the Commission outlined with the framework, and thus the Commission can legitimately expect that the undertakings respect the warnings with regard to exploitative pricing practices during the crisis, as they are considered harmful for consumers and deserving the enforcement of the Commission.

2. DOMESTIC SOLUTIONS OF THE MSs TO EXPLOITATIVE PRICING PRACTICES DURING COVID CRISIS

Antitrust authorities in the major jurisdictions have at least partly agreed on measures to respond to the effects of the pandemic on the supply and demand for essential products and services, allowing various forms of business cooperation of a temporary nature, but maintaining a firm grip on cartels and abuses of dominant position.[462] Together with the guidelines and the statements adopted at the EU level by institutions and networks, even the single MSs adopted their enforcement and regulatory solutions. The aim of those solutions was to contrast the competition law issues caused by the crisis, namely the excessive rises of prices of necessary tools to be up against the pandemic, such as hand-sanitizers, face masks, medicines, respirators, etc.[463] The difficulties of applying competition law provisions on

[462] F. GHEZZI, L. ZOBOLI, "*L'antitrust ai tempi del Coronavirus: riflessioni sulle esperienze internazionali e sulle iniziative italiane*", Rivista delle società, 2020, n. 2/3

[463] See for example S. O'KEEFFE "*Competition in a time of Corona: Primum non nocere*" in Concurrences Review, special issue "Competition Law and Health Crisis", n. 2/2020; MLex, "*Roche's Covid-19 testing formula draws Dutch antitrust scrutiny*", 27 March 2020; ACM Press Release, "ACM has confidence in commitments made by Roche to help solve problems with test materials", 3 April 2020: in March 2020, the multinational healthcare company Roche was the subject of attention in the Netherlands, amid claims that there could be a shortage of a solution needed in the testing process. As Roche holds a high market share for testing machines in the Netherlands, there were fears that a bottleneck could arise if the company would not share the exact instructions for the manufacture of this solution. Then, Roche agreed to share the formula with the Dutch government, emphasising that there was no shortage of the solution in question and showing its willingness to facilitate government in ensuring no shortages would ensue in a situation of increasing demand

abuses of dominance have not deterred several competition authorities throughout Europe from opening investigations into excessive pricing practices.[464] National competition authorities are observers of markets, they assess firm conduct and maintain public trust by analysing market outcomes and preventing the most severe abuses. The ultimate aim of competition policy is in the satisfaction of consumer welfare and of consumers' pricing needs.[465] Thus the NCAs actions' aim was to protect consumers, whose vulnerability is even higher during COVID crisis. The single MSs adopted similar but also different solutions to give their immediate response to the competition law questions raised by the pandemic and the consequential economic crisis. The solutions are similar because they are based on the idea of EU competition law, but they are also different because the various national legal regimes implicate solutions compatible with the respective regime. A global trend seems to be emerging among competition authorities in the European Union in order to regulate against excessive pricing, in line with the increased focus of the Commission on exploitative abuses and excessive pricing, notably in the pharmaceutical sector.[466]

This dissertation concentrates on the situation of four different MSs: Italy, France, UK and Greece. These countries are all important for similar but also different reasons. Italy was the first European country to be seriously damaged by the pandemic and has been, from an economic point of view, one of the most damaged countries in the OECD area.[467] For this reason, Italy decided to investigate every alleged exploitative price for essential COVID-related products. France was the only EU country to impose price ceilings for the resale of hand-gels, in order to avoid an excessive price increase of these products[468]. In UK, the Competition and Market Authority (CMA) set a task force in order to detect unfair business practices during the outbreak and ensure compliance in the markets affected by the public health emergency[469].

Where competition authorities have the possibility of acting against excessive prices under both competition and consumer law, NCAs have indicated that they intend to apply antitrust

[464] A. DE MONCUIT, "*How might the Covid-19 crisis change the dynamics of competition law?"* in Concurrences Review, special issue "Competition Law and Health Crisis", n. 2/2020
[465] EAGCP, An economic approach to Article 82, Report for the European Commission (DG Competition), 2005, p.2
[466] European Commission, Press Release, Statement by Executive Vice-President Vestager on the Commission decision to accept commitments by Aspen to reduce prices for six off-patent cancer medicines by 73% addressing excessive pricing concerns, 10 February 2021
[467] OECD, Economic Outlook, Volume 2020, Issue 1
[468] Décret n° 2020-197 du 5 mars 2020 relatif aux prix de vente des gels hydro-alcooliques (Lien Legifrance, JO 06/03/2020)
[469] Competition and Market Authority, "CMA launches COVID-19 taskforce", Press release, 20 March 2020

law in parallel with consumer protection laws or rules concerning unfair commercial practices.[470] The UK CMA, for example, has indicated that it makes recourse to both its competition and consumer powers to tackle exploitative price increases.[471]

2.1 ITALY: THE INVESTIGATIONS OF THE AGCM ABOUT COVID RELATED EXPLOITATIVE PRACTICES

Italy has been the first Western country and one of the most affected European countries impacted by COVID-19. From the beginning, the Italian Government took immediate actions to fight the pandemic. It was the first one to declare the national lockdown and consequently it was the first one also to adopt solutions for the competition law issues raised by the crisis[472]. The first provision adopted by the Italian competition Authority ("AGCM") was in February: the AGCM sent a request for information to the online sales platforms about the marketing of hand sanitizers and disposable respiratory protection masks, in order to know the measures that they have implemented to avoid unjustified and disproportionate price increases.[473] This request for information came after numerous complaints by consumers and associations concerning unjustified and significant increases in the prices of these products recorded after the surge of the crisis. The AGCM is the guarantor of the competitive prices for products considered essential for health protection during emergency: in paragraph 21 of the Communication of the AGCM regarding COVID-19 and the implications for competition policy, the Authority stressed that it is ready to take action against companies that seek to exploit the current situation opportunistically through abuses of a dominant position.[474] In fact, the AGCM undertook numerous investigations.

When the crisis started, there was a situation of panic because no one could know what was happening and how to fight this emergency. In this panic scenario, many economic operators tried to take advantage of people's fears, charging excessive prices for essential products and gaining unjust profits.[475] In Italy, during that period, the AGCM opened many investigations

[470] OECD, "Exploitative pricing in the time of COVID-19", 2020
[471] Competition and Market Authority, "An open letter to pharmaceutical and food and drink industries", 20 March 2020
[472] R. GIARDA, J. LIOTTA, "*TMT-Related Measures during the COVID-19 Pandemic in Italy*", European Competition and Regulatory Law Review, 2020, Vol. 4, Issue 3, p.185
[473] Autorità Garante della Concorrenza e del Mercato, Press release- ICA: Coronavirus, the Authority intervenes in the sale of sanitizing products and masks; in fact, as noted by S. Sandulli in "AGCM e tutela del consumatore ai tempi del Coronavirus", the increase in prices and the depletion of products affected not only pharmacies and parapharmacies ("physical shops") but also (and even more) e-commerce platforms.
[474] Communication from the Autorità Garante della Concorrenza e del Mercato on cooperation agreements and the COVID-19 emergency, para. 21
[475] As noted by S. SANDULLI "*AGCM e tutela del consumatore ai tempi del Coronavirus*", Federalismi, 5 Maggio 2020, even if spiralling prices resulted, first of all and apparently, from an exponential increase in

regarding suspected practices of excessive pricing on face masks, hand-sanitizers and medicines. For instance, when the COVID emergency started, there was a website promoting a medicine against HIV as an effective medicine against COVID and selling it for more than 600 euros. AGCM opened an investigation and ordered as an interim measure the shutdown of the website due to the misleading advertisement and due to the excessive high price charged to consumers for a medicine.[476] Similarly, the Authority sanctioned the undertaking Ketozona for selling at a higher price the Vitamin C supplement as having untrue preventive effects in relation to the coronavirus. [477]

In March, the Authority launched two separate investigations against the Amazon platform and eBay platform concerning the marketing of hand disinfectant products, protective masks and other health and hygiene products, during the health emergency caused by COVID-19. The two proceedings concern the unjustified and significant increase in the prices recorded for the sale of these products in the first weeks of crisis. [478] In order to evaluate the excessiveness of the prices, the AGCM used as yardstick of comparison the temporal price trend, comparing the selling prices of the products linked with the spread of the pandemic after and before the outbreak of the emergency.[479] As for face masks and sanitary products, AGCM asked Amazon and eBay to indicate the five moments during the period December 2019-March 2020 where more sales were registered and their relative average price. In December 2020 both investigations were closed because the AGCM accepted the commitments proposed by the two platforms aimed at reducing the prices and protecting consumers. The Italian AGCM solved this case by using consumer protection as a legal basis: the authority referred to the Articles of the Italian Consumer Code.[480] The AGCM has opened investigations against other online platforms. For instance, the proceedings initiated against "Wish.com" and "Vova.com" investigated the high level of prices recorded for filtering face masks and for test kits for home

demand following the outbreak of the Covid-19 emergency, in the absence of adequate supply, and to which was added the difficult availability of such devices, these reasons may combine with the behaviour of the operators in the sector, which made it necessary for the AGCM to intervene by launching several fact-finding investigations and adopting precautionary measures. Thus, the Authority investigated about a profile of unfairness, consisting in the sale of products at a higher price compared to the period before the spread of the Coronavirus.

[476] Autorità Garante della Concorrenza e del Mercato, Press release, PS11723 - ICA: Coronavirus, marketing of an antiviral drug sold for more than 600 euros suspended and the shutdown of the https://farmacocoronavirus.it website ordered

[477] Autorità Garante della Concorrenza e del Mercato, Provvedimento n. 28480, PS11730 - Ketozona/Farmaco Coronavirus, in Bollettino 1/2021

[478] Autorità Garante della Concorrenza e del Mercato, Press release, PS11716-PS11717 - ICA: Coronavirus, the Authority begins investigating Amazon and eBay for misleading claims and excessive price increases.

[479] Autorita' Garante della Concorrenza e del Mercato, Provvedimento n. 28442, PS11716 - Amazon-vendita on line prodotti emergenza sanitaria, Bollettino n. 49 del 14 dicembre 2020

[480] *Ibid*.

diagnosis of Coronavirus.[481] During this period, the AGCM has closely monitored price increases of goods and services essential to cope with the emergency and there have been numerous proceedings initiated for unfair commercial practices that have facilitated price increases of products distributed mainly through large digital platforms.[482] However, it is important to remember that all the mentioned digital platforms have greatly enhanced consumer welfare.[483]

In May 2020, the AGCM opened a preliminary investigation against several operators in the large-scale retail trade, with the intention of acquiring data on the trend in retail prices and wholesale purchase prices of basic foodstuffs, detergents and hand sanitizers, in order to identify any phenomena of exploitation of the health emergency underlying the increase in these prices.[484] The Authority considered that it could not rule out the possibility that these higher prices were also due to speculative phenomena, since they could not immediately be attributed to structural reasons, such as the greater weight of purchases in neighbourhood shops, less competition between sales outlets due to restrictions on consumer mobility, supply tensions caused by the sharp increase in demand for certain goods during the lockdown and the restrictions on production and transport induced by the measures to contain the epidemic.[485]

As part of its institutional activity of monitoring the price trends of the goods and services most affected by the COVID-19 emergency, after one year from the outbreak of the COVID emergency, the AGCM continues its action to protect consumers in the sector of products related to the health emergency for COVID-19. Thus, AGCM has not ceased its investigation

[481] See Autorità Garante della Concorrenza e del Mercato, Press release, PS11734 - Antitrust: proceedings initiated against the www.wish.com platform; Autorità Garante della Concorrenza e del Mercato, Press release, PS11752 - ICA: Antitrust acts to prevent online unfair practices: proceedings against vova.com, for the sale of COVID-19 prevention and diagnostic products

[482] A. PEZZOLI, "*La politica della concorrenza ai tempi del virus e la rilegittimazione dell'intervento pubblico",* Mercato Concorrenza Regole, Fascicolo 1, aprile 2020

[483] M. WALKER, "*Competition policy and digital platforms: six uncontroversial propositions*", European Competition Journal, 2020, Volume 16, Issue 1, p.1; on this point see also D. DELLER, T. DOAN, F. MARIUZZO, S. ENNIS, A. FLETCHER, P. ORMOSI, "*Competition and Innovation in Digital Markets*", BEIS Research Paper Number: 2021/040, according to which digital platforms, during the recent years, have reduced search costs and improved switching in a variety of consumer markets, intensifying competition and increasing consumer welfare.

[484] Autorità Garante della Concorrenza e del Mercato, DS2620 - ICA: Coronavirus emergency, investigation launched into price increases for food and detergents, disinfectants and gloves

[485] The AGCM sent a request for information to several operators in the large-scale retail trade on the weekly evolution of retail average prices, supplier purchase prices and wholesale average prices, receiving the responses of 50 retail chains, providing data on more than 2,500 points of sale. However, the AGCM closed then most of the investigations on the chains concerned, detecting no violations: see for instance, "Provvedimento AGCM n. 29693 (PS11871 - Cedi Sigma Campania/Aumento prezzi - Covid-19)", when the AGCM denied the violation of the retailer because the alleged excessive price increases were caused by changes in wholesale purchase costs and could not represent exploitative conducts of retailers.

activity against excessive pricing practices in exploitation of the sanitary emergency and the most recent example is the investigation launched against the companies U-Earth Biotech Ltd. and Pure Air Zone Italy S.r.l., for the promotional and sales activities of the "U-Masks"[486]. According to the Authority, such activities unduly exploit the current health emergency situation to induce the consumer to buy the advertised product at high prices. For this reason, in October 2021 the Authority, considering the seriousness and duration of the violations and also the high number of consumers involved, imposed a total sanction to the companies of €450,000 for the unfair commercial practice.[487]

On some occasions, the Authority decided to quickly contrast excessive pricing by the instrument of moral suasion, contacting complainants in order to resolve possible abusive behaviour in the pre-investigation phase, with a view to rapidly interrupting an infringement still in progress. In order to discourage exploitative price-increasing conduct in the face of the pandemic emergency, the Authority launched pre-investigation by requesting information as a sort of moral suasion. This strategy proved effective in particular when the Authority requested information from the laboratories of Lazio about the price level of COVID tests: after the request, prices have been decreased from 140-150 euros to 25-50 euros.[488]

The Italian Competition Law Act is the Lex 1990/287. This law applies to agreements, abuses of dominant position and mergers.[489] According to Article 1(2) of the Act, the AGCM applies in parallel Articles 2-3 of the Act and Articles 101-102 TFUE to agreements and abuses of dominant position.[490] The competences of the Italian competition authority cover both competition and consumer protection. In fact, the Authority is subject to both the Competition Law Act (Lex 1990, n. 287) and the Consumer Code (legislative decree 2005 n. 206). For this reason, the powers of the authority are larger: in particular, their sanctioning and compensation powers are larger and more effective. AGCM, and the other European NCAs which have the dual competence, can rely on the consumer protection tool at their disposal for specific cases, using all the possibilities offered by the national legislation in order to quickly and effectively intervene. The enforcement of excessive pricing cases is a proof of that: excessive pricing

[486] Autorità Garante della Concorrenza e del Mercato, Press release, PS11950 - ICA: proceedings initiated against the promotion and sale of U-Mask masks
[487] Autorità Garante della Concorrenza e del Mercato, Press release, PS11950 - Sanzioni pari a 450mila euro per la vendita delle mascherine U-Mask
[488] A. PEZZOLI, "*La politica della concorrenza ai tempi del virus e la rilegittimazione dell'intervento pubblico*", Mercato Concorrenza Regole, 1, 2020
[489] Legge 10 ottobre 1990, n. 287 - Norme per la tutela della concorrenza e del mercato (GU n.240 del 13-10-1990), art. 1(1)
[490] *Ibid*, art 1(2)

practices can be considered under competition law when they constitute practices of a dominant company abusing its dominance. On the other hand, when it is not possible to enforce competition law because it is difficult to prove the dominance and then the abuse of this dominance, the consumer protection policy can be helpful. Thus, excessive pricing practices, when there is neither dominance nor an abuse of it, can be qualified as unfair commercial practices, as consumer protection rules do not need a dominant position and they can contrast unfair commercial practices which exploit the emergency situation by altering the consumers' choice and forcing them to buy essential goods at heightened prices. The flexibility of the consumer protection tool allows to intervene quickly, so as to avoid short-term damage becoming an obstacle to medium-term recovery possibilities.[491] However, the consumer protection rules could be considered as the improper means for facing excessive pricing practices during an exceptional crisis like COVID. Even having a different and larger sanctioning capacity than the antitrust tools, the consumer protection sanctions have a lower deterrent effect than the antitrust ones, due to the higher value of the latter. For this reason, the very first draft of the "Cura Italia" Decree provided for an amendment to the Italian Consumer Code in order to expressly sanction speculative conduct linked to the application of unjustified prices in the sale of essential goods in relation to the coronavirus emergency. Article 26-bis would have introduced a specific hypothesis of commercial practices taking advantage of situations of social alarm, according to which a commercial practice is considered unfair if it concerns products relating to health, the supply of essential goods and consumer safety, and takes advantage of situations of social alarm by increasing the selling price by more than three times the average price. [492] Even if this amendment was not inserted into the final version of the Decree, the fact that the Italian Government felt it necessary to amend the Consumer Code in order to include in the scope of unfair commercial practices those practices which take advantage of situations of social alarm by unjustifiably and exorbitantly increasing the prices of essential goods shows that there is a regulatory loophole. Even the AGCM measures taken

[491] A. PEZZOLI, "*La politica della concorrenza ai tempi del virus e la rilegittimazione dell'intervento pubblico*", in Mercato Concorrenza Regole, 1, 2020

[492] T. FEBBRAJO, "*Emergenza pandemica e pratiche commerciali scorrette a danno dei consumatori*" in "*Il diritto nella pandemia";* see also S. SANDULLI, "*L'impatto dell'emergenza Covid-19 sulla lotta alle claims scorrette in una prospettiva anche europea*" in "*L'italia ai tempi del Covid*" (Tomo I), which affirms that the activity of AGCM has been part of the debate on emergency legislation and the vulnerability of consumers and the economic shock that has shaken the country are a crucial challenge for this Authority. In order to cope with the proliferation of unfair commercial practices that negatively affect the protection of consumers and the entire economic fabric, it is evident the role of the Authorities to which the Covid-19 emergency has forced questions on the economic consequences that will reverberate in terms of a fall in both demand and supply. If, in fact, the market is subject to a constant transformation, given the need to comply with new instances of protection, it seems inevitable that, in order to ensure a freedom of choice for the consumer and a non-distorted competition, even the AGCM must adapt to this new functioning of the market.

against excessive price increases do not specify under which discipline they are intervening. However, the problem should not arise because the legal system is able, thanks to the existing legislation, to sanction this conduct: in this regard, the consumer code can already punish excessive price increases as unfair practices.[493]

Antonio Catricalà, the former president of AGCM, expressed a very positive opinion on the AGCM immediate response to COVID emergency. He believed that AGCM acted fast and strongly, protecting the consumers against the jackals of the web: the authority successfully used interim measures against those who wanted to exploit the fears of people due to the pandemic. He also appreciated the authority's choice of monitoring online sales aimed at detecting and avoiding unfair commercial practices.[494] After analysing the antitrust action taken at national level to respond to the crisis, on the one hand it is possible to deduce that the AGCM has a flexible course of action, in accordance with the EU approach, towards the cooperative agreements between undertakings whose aim is to address, or at least mitigate, the most dramatic consequences of the crisis; on the other hand, the Authority is showing inflexibility and promptness when protecting consumers from actions whose aim is to exploit the crisis with abusive practices that go to the detriment of consumers.[495] The Authority demonstrated its adversity towards exploitative practices, especially in times of crisis, guaranteeing two fundamental principles of the economy: fair prices and the correct allocation of goods.[496] The measures adopted by the AGCM confirmed the importance of the fairness of commercial practices, which are even more necessary during the crisis, when there is the high risk for consumers to be exploited and misled. The actions taken by the AGCM, especially for e-commerce, are the symbol of the strong repression of exploitative commercial practices. The AGCM, through the legal toolboxes at its own disposal, is responsible to safeguard the competitive market mechanisms and the free choice of consumers, which during the crisis risk to be heavily damaged. The objective of the authority's action is to contrast the conducts which exploit the tragedy of the pandemic with a speculation aimed at convincing consumers to make a purchase. The exceptionality of the historical moment makes the consumers more vulnerable, especially from an emotional point of view, and their decision-making capacity

[493] See for instance, article 20 of the Consumer Code, which qualifies as unfair a commercial practice likely to materially distort the consumer's behaviour with regard to a product, and article 21 par. 3 of the same Code which contemplates a specific hypothesis of unfair commercial practice, that is related to products which are likely to harm health and safety of consumers

[494] A. GRIFONE, "*Antitrust, la pandemia riscrive le regole della concorrenza*", Italia Oggi, 2020, N. 121, p. 4

[495] E. CRUELLAS SADA, G. DALLA VALENTINA, A. RINALDI, "*COVID-19 e Antitrust: Le iniziative dell'Autorità Garante della Concorrenza e del Mercato*", 2020, Camera di Commercio di Spagna in Italia

[496] V. IAIA, "*Gli sfruttamenti commerciali delle crisi: dagli editti di Diocleziano ai presidi dell'AGCM ai tempi del Covid-19*", Ius in Itinere, 14 Dicembre 2020

was altered by the health alert. Misleading commercial practice relating to essential healthcare products may endanger the health and safety of consumers, contrary to the right to health under Article 32 of the Italian Constitution: the protection of consumer health in such an exceptional moment is crucial.[497]

In light of the AGCM policies during the crisis, in the future the activity of monitoring and repression of the AGCM towards unfair commercial practices may be even stronger.[498] An exceptional situation as the COVID-19 emergency has clearly demonstrated the need to take into account a different social and economic environment and, therefore, external factors, provoking a careful look at the system of protection in force and questioning the possibility of introducing a new core of measures aimed strengthening enforcement.[499]

2.2 FRANCE: PRICE CAPS FOR ESSENTIAL PRODUCTS

The French approach towards COVID related excessive pricing was identified especially in the price control and the establishment of maximum selling prices. In the first days of the crisis, the French competition authority opened investigations over possible abusive prices [500] and then France's Government decided to set the maximum price of hydro-alcoholic sanitisers: a litre of sanitiser cost EUR 15[501]. The French Government inferred the possibility to control prices from its Competition Act, Le Code de Commerce, whose Article L. 410-2 allows the government together with the competition authority to control prices in a temporary way and during a crisis.[502] After capping retail and wholesale prices of hydroalcoholic gels for sanitising hands, the French government also imposed the maximum price for disposable face masks and opened an investigation over the pricing of reusable face masks. With its decree the French government fixed the price for consumers of a single disposable face mask at 0.95 cents, ensuring its duty to safeguard this maximum price.[503] The possibility to regulate prices in sensitive sectors such as healthcare materials and medicines is in the recent French

[497] S. SANDULLI, "*AGCM e tutela del consumatore ai tempi del Coronavirus*", Federalismi, 5 Maggio 2020
[498] V. IAIA, "*Gli sfruttamenti commerciali delle crisi: dagli editti di Diocleziano ai presidi dell'AGCM ai tempi del Covid-19*", Ius in Itinere, 14/12/2020
[499] S. SANDULLI, "*L'impatto dell'emergenza Covid-19 sulla lotta alle claims scorrette in una prospettiva anche europea*" in "*L'Italia ai tempi del Covid*", Tomo I
[500] "Coronavirus: l'Autorité de la concurrence surveille les éventuels prix abusifs", Le Figaro (16 March 2020)
[501] Décret n° 2020-197 du 5 mars 2020 relatif aux prix de vente des gels hydro-alcooliques (Lien Legifrance, JO 06/03/2020)
[502] Code de commerce, art. L410-2
[503] Encadrement des prix des masques de type chirurgical et enquêtes sur les masques grand public 01/05/2020

competition policy. In 2017, the French competition authority looked into price regulation mechanisms in the pharmaceutical sector.[504]

The control of prices is a way to avoid abuses and to safeguard the consumers' confidence. Moreover, in markets where there is a risk of massive entry because of expected very high profit, it may be efficient to regulate price ex ante, limiting the incentive to enter.[505] France decided to use the power of controlling prices and imposing maximum prices to safeguard and control the prices of products, such as face masks and hand sanitizers, which are necessary against COVID[506]. France had the duty to guarantee that those goods were sold at an affordable price, thus by setting a price cap France's aim was to avoid that some businesses and retailers charged exploitative prices for the essential goods that are specifically important for the consumers' health.[507] The exploitative pricing can arguably justify price regulation, in order to protect the consumers making the products affordable to everyone in time of crisis. However, the practice of setting maximum prices (especially in sensitive sectors) has been generally criticised for being in contrast with competition policy.[508]

Price controls are a very intrusive way of intervention, and they strongly limit the freedom of economic initiative.[509] They may undermine the idea of open and undistorted competition within the EU internal market.[510] In general, economists believe that price caps are ineffective, and even counterproductive, in emergencies. The main reason is that they contradict the principle of the free formation of prices, which is considered essential to the efficient allocation of products and resources[511]. Thus, price controls might encourage people to compete ferociously for goods which are cheap, worsening shortages and favouring the black

[504] Autorité de la concurrence, Décision n° 17-SOA-01 du 20 novembre 2017 relative à une saisine d'office pour avis portant sur les secteurs du médicament et de la biologie médicale
[505] M. MOTTA, A. DE STREEL, "*Excessive Pricing in Competition Law: Never say Never?" in "The Pros and Cons of High Prices*", 2007, p. 20
[506] See also Autorité de la concurrence, Décision n° 20-D-11 relative à des pratiques mises en œuvre dans le secteur du traitement de la dégénérescence maculaire liée à l'âge (DMLA), 9 September 2020: the French Authority decided to fine three pharmaceutical companies for abusive practices
[507] P. GIOSA, "*Exploitative Pricing in the Time of Coronavirus—The Response of EU Competition Law and the Prospect of Price Regulation*", Journal of European Competition Law & Practice, 2020, Volume 11, Issue 9, p.506
[508] M. MOTTA, "*Competition Policy- Theory and Practice*", Cambridge University Press, 2004, p. 69
[509] See for instance Case C-58/08 Vodafone Ltd and Others v Secretary of State for Business, Enterprise and Regulatory Reform, Opinion of Mr Advocate General Poiares Maduro (1 October 2009), para 38, ECLI identifier: ECLI:EU:C:2009:596
[510] P. GIOSA, *"Exploitative Pricing in the Time of Coronavirus—The Response of EU Competition Law and the Prospect of Price Regulation*", Journal of European Competition Law & Practice, Volume 11, Issue 9, November 2020, p.499
[511] N. DUNNE, "*Price Regulation in the Social Market Economy*" (2017), LSE Legal Studies Working Paper No. 3/2017, pp. 3-4

market, with even higher prices.[512] The freezing of the price of medicines and establishing a ceiling on the price of essential items, could bear potential negative effects on the economy due to shortages.[513] When France decided to lower the prices of essential prices, it did not follow market rules and free competition, it regulated prices in order to respond to social needs of collective good and consumer welfare, which were considered superior to free competition and markets self-adjustment. The objective behind imposing price controls on essential medicines is to ensure that the masses have access to these essential goods without prejudice, but rather price ceilings facilitate collusion and anti-competitive practices, making prices of essentials become significantly higher, thereby preventing the people from being able to access them.[514] However, price caps can promote public health if governments are willing to provide substantial support. South Korea, for instance, has reduced the market price of face masks and has even limited the number each person can buy.[515] Thus, when governments avoid rationing and stimulate quicker production of products, the price cap can be a useful and effective solution.

2.3 THE PREVENTIONS AND REMEDIES FOR EXCESSIVE PRICING IN UK: THE OPEN LETTER, THE TASK FORCE AND THE INVESTIGATIONS

As already stated in Chapter 1, despite Brexit and the exit of UK from EU on 31st January 2020, by virtue of the transition period in the Withdrawal Agreement, EU Law continued to apply in and in relation to the UK until the 31st December 2020[516]. Therefore, during the first period of the COVID crisis, the UK was still subject to EU competition rules in parallel with its national competition rules and the CMA was one of the most active European NCAs during the first months of the emergency in investigating, preventing, and fighting potential price raises for essential products. In fact, as there was a high potential risk that COVID-19 pandemic would have been used as an opportunity to jack up the price of goods, since mid-March 2020, the CMA was contacted thousands of times about Coronavirus-related issues, launching investigations for unjustifiable price rises.[517]

[512] C. RO, "*Can price hikes by businesses ever be justified*?" BBC, 28 April 2020
[513] P. M. HORNA, "*A global overview of the impact of Covid-19 on competition policies in key sectors*" Concurrences N°2-2020, Competition law and health crisis
[514] R. REDDY LOKESH, "*The Anti-Competitive Effect of Price Controls: Study of the Indian Pharmaceutical Industry",* World Competition, 2020, Volume 43, Issue 2, pp. 283-300
[515] C. RO, "*Can price hikes by businesses ever be justified?*" BBC, 28 April 2020
[516] Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (2019/C 384 I/01)
[517] Competition and Market Authority, "Protecting consumers during the coronavirus (COVID-19) pandemic: update on the work of the CMA", 15 March 2021

In March 2020, after the outbreak of the crisis, the CMA adopted two different early solutions. First, the CMA wrote an open letter addressed to the pharmaceutical and food and drink industries. In this letter the CMA reminds the extraordinariness of the times concerned and the need that all the sections of society join the forces. During this special period the services and goods provided by the pharmaceutical and food and drink industries were essential for people. The CMA informed those industries that it had received many claims about unlawful and unreasonable excessive pricing behaviours of businesses aiming to exploit the crisis and which pertain to those sectors. The CMA can, if necessary, use its competition and consumers powers to tackle those behaviours and to ensure the regular market trends even during the COVID outbreak. It is important for the CMA to safeguard the fair treatment of consumers during these troubled times. The CMA recognizes that some price increases may be an unavoidable consequence: for example, when an individual firm raises its prices as a result of passing on increased prices from wholesalers or suppliers. Due to the great importance that the three industries concerned have for the UK economy and consumers, it is necessary that they function well above all during the crisis. With this letter the CMA hoped for the collaboration of these three sectors, in order to detect the harmful practices of businesses and protect consumers.[518]

After writing the open letter, the CMA launched a COVID Taskforce monitoring market developments and prices trends.[519] Andrew Tyrie, the former Chairman of CMA, reminded that the creation of this Taskforce was a consequence of the copious reports that the CMA received from consumers complaining about unjustifiably high prices for essential goods that traders were charging.[520] In fact, this innovative approach of the Taskforce to address the issues brought to its attention is justified by the fact that normal enforcement timescales do not allow COVID-related issues to be solved promptly, even due to the limited CMA's powers in addressing exploitative pricing.[521] The scope of this taskforce was to identify harmful sales and pricing practices, to warn firms suspected of exploiting the exceptional circumstances through unjustifiable prices, to take enforcement action if needed, and advise the Government

[518] Competition and Market Authority, "An open letter to the pharmaceutical and food and drink industries", 20 March 2020; see also the CMA's Statement on sales and pricing practices during Coronavirus outbreak, which was published few days before the open letter: "*the CMA wants to ensure that traders do not exploit the current situation to take advantage of people. It will consider any evidence that companies may have broken competition or consumer protection law, for example by charging excessive prices or making misleading claims about the efficacy of protective equipment. And it will take direct enforcement action in appropriate cases. In addition, the CMA will assess whether it should advise Government to consider taking direct action to regulate prices*".
[519] Competition and Market Authority, "CMA launches COVID-19 taskforce", Press release, 20 March 2020
[520] A. TYRIE, "How should competition policy react to coronavirus?", Institute for Public Policy Research, 2020
[521] A. TYRIE, "How should competition policy react to coronavirus?", Institute for Public Policy Research, 2020, p.8

on possible emergency legislation. Andrea Coscelli, the CMA's Chief Executive, said that during the COVID crisis period retailers must behave responsibly to protect the most vulnerable citizens; if they do not, the CMA can immediately intervene thanks to the task force's supervision of the market developments. The creation of a task force may represent a good solution against excessive pricing, due to its various benefits. First, the task force carries out rapid inquiries concerning conduct in markets most closely affected by COVID-19. Moreover, it does not demand invasive structural changes and allows NCAs to adapt their enforcement agenda to the current needs of their respective societies.[522] This taskforce created by the CMA to tackle all the aspects of the crisis used all its tools to their fullest extent and its agility and effectiveness might well be a model for tackling other big challenges in the future.[523]

In June 2020, the CMA launched four investigations under Chapter II of the Competition Act 1998 (national equivalent to Article 102 TFEU) into suspected breaches of competition law by four pharmacies and convenience stores. The investigations concerned suspected charging of excessive and unfair prices for hand sanitiser products during the COVID-19 pandemic.[524] The CMA set as one of its enforcement priorities the high prices charged by retailers, comparing the prices and mark-ups of retailers with a reasonable range of retail mark-ups. The aim of the opened investigations was to obtain further information from retailers, and it also assessed the information obtained from a wider set of retailers which received the most complaints. The CMA detected that a small number of pharmacies increased prices without cost justification, but they agreed to reduce their high prices. With the reduction, they take their prices back to pre-COVID and normal levels. Other retailers reduced their prices even before the complaint report, or after few days since the complaint was reported. Those which did not immediately decrease price justified it with high wholesale costs or they were selling a new product brand. In September, the CMA decided to close the investigations as it considers that the retailers' prices do not, or are unlikely to, infringe competition law.[525] The concerned investigations show that the CMA decided to enforce its powers, with the perspective of safeguarding markets and consumers, obtaining information from businesses about their

[522] F. CABRAL, L. HANCHER, G. MONTI, A. R. FEASES, "*Eu Competition Law and Covid-19*", TILEC Discussion Paper, 2020, pp. 12-13

[523] W. HAYTER, "*Tackling the COVID-19 challenge—a perspective from the CMA*", Journal of Antitrust Enforcement, 2020, Volume 8, Issue 2, pp. 250–252

[524] Competition and Market Authority, "Hand sanitiser products: suspected excessive and unfair pricing", Press release, 19 June 2020

[525] Statement regarding the CMA's decision to close an investigation into suspected charging of excessive and unfair prices for hand sanitiser products during the coronavirus (COVID-19) pandemic, 3 September 2020

pricing strategy, so as to monitor their pricing decisions and the factors which they used to justify alleged excessive prices.[526] The CMA, in order to fulfil its duty to protect consumers, and thanks to its capacity to collect and analyse a large volume of consumer complaints and market data, it played a market observatory role, being able to identify and focus where price hikes were most prevalent, where such increases were not proportionate to market benchmarks, and where they are not justified by cost. Anyway, having seen the unprecedented nature of COVID-19, the CMA realised that the competition tools at its disposal may not be well-suited to tackling short-term price hikes. [527]

In July 2020, Andrew Tyrie, former chairman of the CMA, published a document analysing the reaction of UK competition policy to the COVID, describing above all what happened with excessive prices in the UK.[528] Tyrie presented a line of economic thinking, according to which it is possible to positively value price increases, considering them as an efficient and desirable market response that brings demand into line with supply, while the competition authorities' intervention to address it disrupts normal market functioning.[529] Following this economic way of reasoning, the high prices signal scarcity and are an incentive for suppliers to increase supply. According to Tyrie, this economic argument justifying price rise is flawed for three reasons. Firstly, the value that different consumers put on essential products is the same. When prices of essential goods rise excessively, these goods would not be allocated in a socially optimal way, because only the people with more financial means would be able to afford them. Secondly, increases in prices are likely to be transitory and so they will have little effect on the quantity supplied. The last reason is that the levels of price increase that occurred during the crisis was far greater than what would have been needed to bring about higher supply.[530] In light of the reasoning, Tyrie argued that the task force has responded robustly to reports of unjustifiable price rises and he confirmed that the CMA was right in fighting the excessive prices charged to consumers for essential products during the pandemic. He is certain that increasing prices is not the solution to adjust the relationship between demand and supply; therefore, for goods that the consumers considered essential during the sanitary emergency, the price should have remained stable and affordable.

[526] In its open letter, the CMA invited anyone who had to increase their prices as a result of wholesalers or suppliers passing on price increases to send information so that problems upstream in the supply chain could be investigated.
[527] S. S. FUNG, S. ROBERTS, "*Covid-19 and The Role of a Competition Authority: The CMA's Response to Price Gouging Complaints*", Journal of European Competition Law & Practice, 2021, Volume 12, Issue 10
[528] A. TYRIE, "*How should competition policy react to coronavirus?",* Institute for Public Policy Research, 2020
[529] *Ibid*., p.30
[530] *Ibid*., p.31

Despite its proactivity in responding to cases of excessive pricing, the CMA's current legal powers may be limited. The CMA can only intervene using competition law when a dominant firm is abusing its market power and charging excessive prices. Proving that a firm is dominant and that its prices are excessive is difficult and cases often take many years. That's why the CMA, in addition to and as an alternative to recurring to consumer protection rules, has advised and asked the government on introducing "emergency time-limited legislation", consisting in new ad hoc powers, temporarily limited to the duration of the crisis, which would give it greater powers to tackle excessive pricing.[531] Even being consumer protection rules a solution for excessive pricing, it cannot replace enforcers having access to adequate regulations and tools to take action, which would mean holding sufficient administrative powers to take action.[532] Without introducing ad hoc time-limited rules for the COVID crisis, the British legislator maybe lost an opportunity, because it would have convinced the consumers that, during the pandemic, the prices of essential products are broadly fair. As it will be seen in section 3, successes from other countries around the world could act as a template for the UK. For example, South Africa has prohibited any firm that is found to be dominant in the context of a state of disaster from charging excessive prices for essential items during the crisis. The South African government has set a simple threshold linked to a product's cost of production and the seller's margins from before the crisis. This gives firms clarity on the prices they can charge and allows the regulator to quickly determine if a price is excessive without a lengthy investigation.

2.4 GREECE: IN DEPTH INVESTIGATIONS ABOUT EXCESSIVE PRICING

The recent Greek COVID related competition policy is important because Greece was one of the countries which took a strict approach towards the pricing practices for healthcare products, in order to make sure that there was no abusive excessive pricing for those products. After the COVID outbreak these products were necessary to save lives, protect people from the virus and reduce the risk of contagion. Thus, it was necessary for a Competition authority to guarantee the correct and fair pricing of those products.

The Hellenic Competition Commisssion ("HCC") after the spread of COVID stated that even though the country was being afflicted by the Coronavirus pandemic, the HCC continues to

[531] E. SCOTT, "*Coronavirus: Profiteering during the pandemic*", 18 May 2020, House of Lords Library; see also "*Uk's Cma Seeks New Powers to Tackle Covid-19 Profiteering*", Competition Policy International, 18 May 2020
[532] C. RIEFA, "*Coronavirus as a Catalyst to Transform Consumer Policy and Enforcement*", Journal of Consumer Policy, 2020, 43, p. 457

intervene, wherever and whenever necessary, within its powers of finding and punishing any violations of the provisions of the Greek competition Law (Law 3959/2011) and of Articles 101 and 102 TFEU. In addition, the HCC ensured that it would work in direct cooperation with the General Secretariat of Commerce and Consumer Protection.

In March 2020, following numerous consumer complaints regarding significant price increases and shortages of healthcare products, in particular surgical masks, hand sanitizers and disposable gloves, observed at a number of retail outlets, the HCC decided to investigate whether the conditions required for launching an ex officio investigation and taking enforcement measures within its powers are in place with respect to increases in the retail prices of healthcare materials.[533] The investigation initiated by the HCC, followed complaints from consumers and media reports on price increases and shortages in healthcare materials. The HCC has investigated more than 3,500 companies active in the production and marketing of healthcare materials in order to decide whether the conditions required for launching an ex officio investigation to find any antitrust violations are in place.[534]

Similarly to the British CMA, the Greek HCC created a task force to address possible distortions of competition due to the COVID-19 pandemic[535]. The HCC, fully understanding the dramatic period and the significant changes in supply and demand market conditions, at the same time reiterated that the challenges faced by the business world and the prevailing general uncertainty must not lead to unlawful conduct such as excessive pricing, which can undermine consumer and public interest.[536]

A few months after the opening of the investigation in the markets of healthcare materials and other appropriate means of individual or collective protection against the spread of Coronavirus, the HCC published the interim results.[537] These results revealed that, during the period considered, the sharp rise in demand for the healthcare materials had been accompanied by an increase in the number of businesses that were marketing or selling these products, suggesting a regular market response and so curbing the rise in prices. It seems that in the median sale price a sharp increase was observed especially in the disposable surgical masks

[533] Hellenic Competition Commission, Investigation in healthcare materials, Press Release, 21 March 2020
[534] Hellenic Competition Commission, Actions taken in the context of competition rules enforcement, Press Release, 15 April 2020
[535] Hellenic Competition Commission, "COVID-19 Task Force" to fight anticompetitive practices, Press Release, 27 March 2020
[536] *Ibid*.
[537] Hellenic Competition Commission, In-depth investigation in healthcare materials during the coronavirus health crisis, Press Release, 26 June 2020

from February 2020 onwards. This circumstance may be the result of the stock shortages during the period considered. However, no systematic increase in the average gross profit margin from the sale of the healthcare product concerned during the investigation period has been confirmed. According to the available data, the increase in the retail sale price of the healthcare materials considered comes mainly from the pass-through of the increase in the wholesale price. The pass-through rate of change in the purchase price of masks to the sale price to end consumers appears to be higher in March 2020.

The HCC concluded the investigation underlining that the data collected would be used to identify any cases of abusive pricing by companies that hold either a longstanding or a temporary dominance in the markets at issue. Thus, following the indications provided by the Commission in the Temporary Framework, the HCC confirmed that even an excessive pricing practice adopted by a temporary dominant undertaking, whose temporary dominance is caused by the exceptional circumstances of the COVID crisis, can be considered abusive. After publishing the interim results of the investigation, the HCC declared that, under the present circumstances with the COVID-19 pandemic affecting the country, it would continue to intervene for possible violations of both the national competition law and Articles 101 and 102 of the TFEU, with a view to safeguarding the competitive market structure and protect consumers.[538]

3. A LOOK OUTSIDE THE EU: THE APPROACH TOWARDS EXCESSIVE PRICING IN SOUTH AFRICA DURING THE COVID CRISIS

Even outside the EU there are states that can provide useful examples of how to react to excessive prices charged on essential products during the COVID. This section focuses on the approach of a non-EU country, South Africa, which has an interesting competition policy towards excessive pricing. South African competition law is like that of the European Union and thus prohibits dominant firms from charging excessive prices.[539] The example of South Africa can be useful for this dissertation.

In March 2020, the Minister of Trade, Industry and Competition, following the declaration of national disaster due to COVID-19, issued Regulations on consumer and customer protection and national disaster management, based on the Consumer Act and the Competition Act, specifically prohibiting the excessive pricing of goods such as face masks and hand sanitizers,

[538] Hellenic Competition Commission, The interim results of HCC's investigations on health and hospital equipment during COVID-19 pandemic, Press Release

[539] W.H., BOSHOFF, "*South African competition policy on excessive pricing and its relation to price gouging during the COVID-19 disaster period*", 2021, South African Journal of Economics, Volume 89, p.113

among others, for the duration of the national disaster[540]. These regulations define an excessive price increase as a price increase that:

(i) does not correspond to increases in costs; or

(ii) results in an increased markup relative to the average markup achieved over the three-month period from December 2019 to February 2020; so, according to this second limb, profit margins must be constant between the disaster period and the three-month period (December-February) preceding the disaster period.[541]

Many firms have entered into settlement agreements with the Competition Commission for alleged COVID-19 excessive pricing. The first and the most emblematic settlement agreement has been the one with The Centrum Pharmacy. This settlement agreement, approved by the Competition Tribunal in April 2020, involved the pricing of face masks by the Centrum Pharmacy[542]. The Commission found the prices of face masks to be excessive. The Commission argued that an individual pharmacy selling facial masks could be considered a dominant firm holding market power because of changed market circumstances arising from the COVID-19 disaster. Firstly, the geographic scope of the market became narrower due to the lockdown during the COVID-19 crisis than it may have been before it, while the Commission made no reference to market shares.[543] Then, the ability of Centrum Pharmacy to raise prices of the product in question is for the Commission evidence that it held market power and was therefore dominant. Pricing and behaviour of companies supplying essential products during the COVID-19 may be an indication that they have dominance, even only temporarily. [544] Centrum Pharmacy was found to have increased the price for facial masks by approximately 150% on average for the month of March 2020.[545]

A company has been prosecuted and found guilty of excessive pricing: Babelegi. This was the first case before the Tribunal regarding excessive pricing[546]. The Commission investigated

[540] Competition Act (89/1998): Consumer and Customer Protection and National Disaster Management Regulations and Directions, 2020 (Government Gazette Notice 43116, No R. 350)
[541] *Ibid*., art. 4
[542] Competition Tribunal of South Africa, Press Release, "Tribunal approves first consent agreement relating to COVID-19 excessive pricing", 20 April 2020
[543] Defining markets more narrowly may help authorities to establish dominance and build excessive pricing cases, see R. DE CONINCK, E. KOUSTOUMPARDI, "*Excessive pricing cases in the pharmaceutical industry: Economic considerations and practical pitfalls"*, Concurrences Review N° 3-2017, p. 12
[544] P. CLELAND, "*Do you have temporary market power? The Competition Commission's first finding of excessive pricing under the COVID-19 emergency regulations*", E-Bulletin Werkmans Attorneys, 24 April 2020
[545] Competition Commission and Cilliers and Heunis Cc T/A Centrum Pharmacy, Consent Order, Competition Tribunal Republic of South Africa, Case No: CO005Apr20
[546] Competition Commission v Babelegi Workwear Overall Manufacturers & Industrial Supplies CC (Competition Tribunal Case No: CR 003Apr20)

and found that during the period from 31 January 2020 to 5 March 2020, Babelegi increased its prices of facial masks. The Commission found that Babelegi's prices for facial masks increased from December 2019 to March 2020 by at least 888%. Facial masks have been identified by the Regulations as essential goods for the prevention and de-escalation of the COVID-19 pandemic.[547] The Competition Tribunal inferred Babelegi's dominance and market power from its behaviour, emphasised by the context of a pending COVID-19 outbreak. Thus, the sharp increase of mask prices set by Babelegi is a clear proof that the company was behaving independently of its competitors.[548] This sentence has been appreciated in Europe. The chief economic advisor at CMA, Dr Mike Walker, praising the Babelegi decision by South Africa's Competition Tribunal, has affirmed that the ability to charge excessive prices during Coronavirus is evidence in itself of dominance and potential abusive conduct.[549]

The approach of the south African competition policy during the first weeks of COVID crisis is emblematic for this dissertation for two main reasons. First, the temporary dominance identified in the Centrum pharmacy case. This case confirms that a temporary dominance during and as result of the crisis can be identified and that the prices charged by the temporary dominant company can be considered abusive and, thus, prohibited by competition law provisions.[550] The concept of temporary dominance caused by the circumstances of a crisis is a useful manner to prosecute in an effective way the excessive pricing abusive conducts for healthcare materials during the sanitary emergency[551]. Looking at the European competition policy, the Commission with the old decision ABG admitted the possibility to recognize an undertaking temporarily dominant due to a crisis.[552]. The Commission reminded with its

[547] Competition Act (89/1998): Consumer and Customer Protection and National Disaster Management Regulations and Directions, 2020 (Government Gazette Notice 43116, No R. 350), Annexure B
[548] W.H. BOSHOFF, "*South African competition policy on excessive pricing and its relation to price gouging during the COVID-19 disaster period*", 2021, South African Journal of Economics, Volume 89, pp.136-137.
[549] E. CRAIG, "*Excessive pricing is evidence of dominance, UK official says*", Global competition review, 10 June 2020
[550] See S. S. FUNG AND SIMON ROBERTS, "*Covid-19 and The Role of a Competition Authority: The CMA's Response to Price Gouging Complaints*", Journal of European Competition Law & Practice, 2021, Volume 12, Issue 10, which asserts that dominance and market definition assessments are, after all, a means to the end of identifying market power and consequent consumer detriments. Even if in exploitative abuses the real proof of market power derives from firm's conduct, the exceptional approach applied by the South African Competition Commission and confirmed by the South African Competition Tribunal in their seminal cases on excessive pricing of face masks during the pandemic is in the sense that if the evidence shows that the firm can price without effective competition constraints by successfully selling products at very high prices, then it would seem unnecessary to infer dominance from a formalistic market definition exercise.
[551] F. JENNY, "*Competition Law Enforcement and the COVID-19 Crisis: Business As (Un)usual?*", 20 May 2020
[552] 77/327/EEC: Commission Decision of 19 April 1977 relating to a proceeding under Article 86 of the EEC Treaty (IV/28.841 - ABG/Oil companies operating in the Netherlands)

Temporary Framework that during the COVID crisis, the Commission prosecutes the conduct of those firms that exploit the crisis by abusing their dominant position, even if their dominant positions are conferred by the particular circumstances of this crisis. Therefore, the European NCAs should prosecute the abuse of a temporary and circumstantial dominance, as happened in South Africa.

The second reason is that South Africa adopted ad hoc regulations aimed at sanctioning specifically excessive pricing practices carried out by undertakings on essential products during the crisis period, strengthening both the pre-existing Competition Act and Consumer Act, and adapting them to the crisis situation.[553] Thanks to this modification of the legal basis, South Africa was able to effectively detect and hinder exploitative pricing practices during the COVID crisis. The definition of an excessive price under both competition law and the consumer protection law was simplified to facilitate the task of enforcers during the time of the "National Disaster." A material price increase of a good or service that does not correspond to or is not equivalent to the increase in the cost of providing that good or service indicates that the price is exploitative.[554]

Thus, South Africa's COVID related excessive pricing cases are useful because they show us how to effectively obstruct pricing conduct of companies which exploit the crisis by charging consumers high prices for protective tools such as face masks. This pricing practice is considered very harmful for consumers. Such cases like the Competition Commission v Babelegi in South Africa stress the need for competition policy over pricing conduct. The current COVID-19 crisis, but also recent cases on excessive pricing in pharmaceuticals in Europe (Phenytoin, Aspen), notice the increasing need to assess the pricing conduct of firms. The recent COVID-19- related cases in South Africa show the usefulness of competition legislation which recognizes that excessively high prices of products and services may cause bad market outcomes.[555]

Even if during the COVID crisis, the EC, the ECN and the NCAs ensured flexibility to firms deciding to tolerate agreements among suppliers with the objective of increasing supply faster than the competitive process would have, catastrophes like COVID can increase the incentives

[553] Competition Act (89/1998): Consumer and Customer Protection and National Disaster Management Regulations and Directions, 2020 (Government Gazette Notice 43116, No R. 350)
[554] F. JENNY, "*Market adjustments, Competition Law and the Covid-19 Pandemic*", Le Concurrentialiste, 6 July 2020
[555] H. RATSHISUSU, L. MNCUBE, "*Addressing excessive pricing concerns in time of the COVID-19 pandemic—a view from South Africa*", Journal of Antitrust Enforcement, Volume 8, Issue 2, July 2020, pp. 256–259

for firms to engage in anti-competitive behaviour and the NCAs play important roles in mitigating their effects.[556] The EC and the competition authorities warned companies against using the COVID crisis as an opportunity to violate the antitrust laws and carefully monitored potential lawbreakers.[557] Due to the great importance of keeping medical supplies and equipment available at competitive prices and due to the risk that some businesses might act in anti-competitive conducts by abusing a dominant position, competition authorities had to remain vigilant.[558] The EC with its framework tried to offer a solution for simplifying the identification of more dominant positions and, consequently, of more exploitative pricing abuses, reminding its lack of tolerance for exploitative pricing abuses of dominant position, even when the dominant positions are conferred by the particular circumstances of this crisis.[559] However, the concept of temporary dominance did not help in practice and it was not possible to identify abusive pricing conducts prohibited under Article 102(a). Instead, looking at South Africa, the possibility to sanction abuses of temporary dominant positions was given by a modification of the national Competition Act. Adapting the legal basis to the crisis situation allows to prohibit exploitative pricing practice of essential goods, even by recognizing temporary dominant positions caused by the pandemic.[560]

CONCLUSIVE REMARKS

The COVID-19 pandemic has forced the EU competition authorities to adjust their approach to enforcement, requiring swift policy actions across sectors.[561] The crisis needed prompt measures, and, due to the difficulties to effectively enforce competition law for excessive pricing, consumer protection turned out to be the best alternative. The EU law protecting consumers continues to apply and cannot be limited or suspended, neither by national measures nor by unilateral decisions of European institutions.[562] The pandemic highlighted the vulnerability of the consumer during an unexpected crisis, of which the decision makers

[556] See D. S. EVANS, "*Planning for catastrophes*", Journal of Antitrust Enforcement, Volume 8, Issue 2, July 2020, pp. 273–275
[557] *Ibid*.
[558] ICN, Steering Group Statement: Competition during and after the COVID-19 Pandemic, 8 April 2020
[559] European Commission, Temporary Framework for assessing antitrust issues related to business cooperation in response to situations of urgency stemming from the current COVID-19 outbreak. OJ 2020/C 116 I/02, para. 20
[560] See E. SCOTT, "*Coronavirus: Profiteering during the pandemic*", 18 May 2020, House of Lords Library, reminding that the lack of EU ad hoc legislation for the crisis was remarked by the UK CMA, which stated that the adoption of emergency legislation introducing extra powers for a limited time by the UK Government, would have enabled the CMA to take tougher solutions on retailers profiteering from COVID-19.
[561] See F. JENNY, "*Covid-19 and the Future of Competition Law Enforcement*", Competition Law International, 2020, Vol.16, Issue 1, pp. 7-20
[562] M. GOYENS, A. REYNA, "*Public interest in EU policymaking after COVID-19: five short-term lessons from a consumer perspective*", Journal of Antitrust Enforcement, 2020, Volume 8, Issue 2, pp. 280-282

have to take special account when defining their policies for the recovery from the crisis. Therefore, it was important to protect consumers against unfair practices seeking to exploit their state of vulnerability in the form of excessive prices for essential goods.[563] The responses of competition authorities to the risk of exploitative pricing have differed, but all are guided by one common principle: the interests of consumers, because not intervening could have caused substantial consumer detriments.[564]

During the crisis period, even if the pandemic was likely to not create the best conditions for competition enforcement, it was important to make consumers and competitors feel protected from possible abuses of competition law and therefore the authorities reminded the effectiveness of their enforcement activity of antitrust rules. The cost of inaction leading to consumer harm uncorrected by market forces would have been higher than the cost of intervention, especially in relation to price increases. Since the early weeks of the crisis, the Commission has adopted the Antitrust Temporary Framework, which contains its enforcement priorities during the COVID emergency. The vigorous enforcement remains the rule, particularly during a crisis, since it is essential for recovery. [565] In fact, during the COVID-19 crisis, the NCAs cannot let down the guard and have to do their monitoring activity with even more attention than before. The crisis cannot be an excuse for justifying exploitative practices. The crisis may become an opportunity for exploiting this situation, damaging consumers. Therefore, it is necessary to intervene against exploitatively high prices, adjusting them. Especially when essential products such as medicines are concerned, it is necessary that the authorities intervene adjusting the prices, in order to make them decrease to a competitive level. Markets should not be considered self-correcting during the crisis. Letting the markets self-correct without price-adjusting interventions would have harmful consequences for both consumers and competitors. Markets act slowly, while during a crisis, instead, time is crucial

[563] *Ibid*.; see also H. FIRST, "*Robbin' Hood*", CPI Antitrust Chronicle, 2020, which infers that the objective of South Africa's antitrust enforcement to stop excessive pricing of face masks during a pandemic shows the necessity to direct enforcement resources to cases that would be more helpful for people: antirust can in fact advance justice and the antitrust enforcement should protect especially the vulnerable consumers.

[564] W. HAYTER, "*Tackling the COVID-19 challenge—a perspective from the CMA*", Journal of Antitrust Enforcement, 2020, Volume 8, Issue 2, pp. 251–252

[565] See for instance the words of Olivier Guersent, the Director-General of the European Commission's Directorate-General for Competition (L. CROFTS, "No competition enforcement let-up as Europe exits pandemic, Guersent says", 2021, Mlex): *"Covid-19 has hurled new challenges at the EU's competition watchdog and forced it to adapt both its rules and its ways of working, but the authority won't soften its approach in the medium or long term. As the emergency draws to a close, it's not only policy that can return to normal, so too can patterns of enforcement activity. EU enforcers are back, with their full suite of powers. The threats to European public life were severe: shortages of food and medical equipment, and the prospect of whole industries going under. So, the normal rules were adapted: drugmakers were allowed to share notes on their supply chains. But now, the normal application of competition law will be crucial to ensuring that Europe's economies recover fully from the crisis."*

and prompt solutions are needed. The continuous vigilance of competition enforcers for excessive pricing seems reasonable considering the necessity that products for the protection of health remain available at competitive prices. That is why a number of competition authorities, in the short run, put special focus on excessive pricing practices. The role and focus of competition authorities should be to eliminate excessive pricing, in order to ensure competitive prices for critical goods. The intervention approach towards excessive pricing is the preferred one and the Commission awards priority to exploitation, stating that it will not tolerate exploitative pricing abuses. The exploitative price increases of healthcare products are very harmful and cannot be tolerated. Crises lead to vulnerable states that reinvigorate competition law control of economic power. Thus, during the COVID crisis, the price of essential products drew most of the attention. The focus on excessive pricing is constant and even more active for the COVID related products. The investigations are necessary in order to discover whether the excessive pricing constitutes violation of Article 102(a). The competition authorities should adapt the analysis of dominance and abusive behaviour to the crisis, by selecting the most appropriate methodology. This methodology may be the price-based benchmarks before and after the crisis. For instance, in the Aspen case, prices have been found abusive when they increased by 1500%. The comparison of prices over time during COVID may allow to discover exploitative prices, because prices of medicines, face masks and hand sanitizers increased a lot in a few weeks or even days.

However, during the crisis, the enforcement of Article 102 resulted to be not too effective against excessive pricing, due to the length and the complexity of the investigations and the proceedings of this Article. Competition law enforcement turned out to be not the best instrument to deal with exploitatively high prices, existing competition policy tools have limitations while competition authorities needed timely solution to respond flexibly and quickly during a pandemic.[566] The main obstacle for the application of Article 102 TFEU is its own requirement of an undertaking in a dominant position. In order to get round this obstacle, the EC in its antitrust Temporary Framework stated that the competition authorities should be open to temporary dominance, which can lead to more frequent findings of a dominant position and can be an escamotage to enforce Article 102(a). The competition authorities may have the possibility to enforce rules that aim to protect vulnerable consumers from wind-fall market power in relation to essential products by precluding certain types of price increases. Nonetheless, the temporary and circumstantial dominance during the crisis,

[566] See S. S. FUNG, S. ROBERTS, "*Covid-19 and The Role of a Competition Authority: The CMA's Response to Price Gouging Complaints*", Journal of European Competition Law & Practice, 2021, Volume 12, Issue 10

even being considered by the EC in its antitrust Temporary Framework, never turned into reality. The reason is that the legislators, in the first months of the crisis, did not consider changes to competition law that might have been necessary, being sure that competition law is flexible enough to take into account the changed economic environment. The Temporary Framework does not correspond with a radical change of the pre-existing rules for competition in EU, but it is simply a soft-law document, a guidance which shows the investigative priorities of the Commission to the undertakings, in order to make them aware about the practices which are likely to draw the attention of the Commission's enforcement. The possibility to recognize temporary dominance related to the COVID crisis is not very effective if not linked to a modification of the legal basis. This is what happened instead in South Africa, where it was possible to prosecute excessive pricing violations, even temporary, in a very effective way. South Africa adopted an ad hoc regulation which specifically prohibited the excessive pricing of goods such as face masks and hand sanitizers, for the period December 2019-March 2020. Thus, the pre-existing rules were adapted to the crisis situation, something that did not happen in the EU. In South Africa, in order to cope with excessive pricing during the crisis, the antitrust authority has been given new powers that allow it to consider prices that lead to profits above the average as excessive, enhancing the link between market power and the ability to make extra profits. The EU pre-existing antitrust rules were outdated to effectively face exploitative pricing during COVID period. It would have been desirable and beneficial that the EU followed the example of South Africa. Since no new ad hoc rules had been introduced, the power of the EU NCAs to intervene against excessive prices under the national and European competition law against firms holding a dominant position was not a viable instrument to deal with the price increases linked to the COVID-19 crisis. The reasons were that in most cases there was no dominance and that the intervention, due to the complex investigation, would not have been timely. In fact, the authorities needed to open investigations in order to request information from the undertakings, hampering their own ability to be responsive. The NCAs in Europe were not provided of the appropriate tools to properly tackle abuse of short-term market power during the emergency and the latter should have warranted a novel approach in assessing dominance.

During the crisis, the NCAs launched investigations in order to detect exploitative pricing practices and the differences between the actions depended on whether the authority was also entrusted with a consumer protection function. The UK CMA was required to open excessive pricing investigations against firms to formally require relevant information from them and even created a taskforce against excessive pricing. The ways in which the CMA acted during

the crisis show that the role played by NCAs consists in protecting consumers and providing adequate responses to their complaints, in particular by monitoring market outcomes and assessing firm conduct. [567]

The in-depth investigations over the market of health care materials discovered no exploitative pricing abuses, as the Greek NCA expressly declared at the end of its investigations. On the whole, the excessive prices are charged by simple resellers and are not involved within Article 102(a). Alternatively, competition agencies can rely on powers under their competences other than competition law to address excessively high prices. When trying to deter exploitative practices flowing from the COVID-19 crisis, competition authorities should evaluate all available tools, under competition law or other rules, to address problematic practices and use the most adequate tool to address them successfully and in a timely manner. An atypical action has been the price control adopted by France. France proceeded to implement regulatory pricing frameworks in order to cap the wholesale and retail prices of some products in high demand due to the coronavirus pandemic. In this way the French government decided to set aside the enforcement activity of its national competition authority, directly managing the COVID situation by controlling prices. However, price control is something that could distort competition and investment, to the detriment of consumer welfare. [568] Moreover, as the EU internal market is built on open and undistorted competition, the price caps limit the freedom of economic initiative, in contradiction to the broader EU context. [569]

Many competition authorities also enforce consumer protection rules and they should rely on consumer protection powers to protect consumers from unfair pricing practices. Thanks to the complementarity between competition law and consumer protection law, the chosen legal tool should be the one which proves to be more effective in the context of a particular case. The advantage of consumer protection is that it does not require the detailed effects analysis that competition law relies on to ensure that intervention leads to increased consumer welfare. Those competition authorities with a complementary consumer protection function have a larger ability to intervene against excessive pricing. The UK and Italy are two examples of the preference of the EU NCAs for the consumer protection instead of competition law for the

[567] See S. S. FUNG, S. ROBERTS, "*Covid-19 and The Role of a Competition Authority: The CMA's Response to Price Gouging Complaints*", Journal of European Competition Law & Practice, 2021, Volume 12, Issue 10
[568] J. KILLICK, A. KOMNINOS, "*Excessive Pricing in the Pharmaceutical Market – How the CAT Shot Down the CMA's Pfizer/Flynn Case*", Journal of European Competition Law & Practice, 2018, Vol. 9, No. 8
[569] P. GIOSA, "*Exploitative Pricing in the Time of Coronavirus—The Response of EU Competition Law and the Prospect of Price Regulation*", Journal of European Competition Law & Practice, 2020, Volume 11, Issue 9, p. 506

determent of exploitative pricing during COVID crisis. The competition authorities of these two MSs are also entrusted with a consumer protection function and therefore can use their consumer protection tools alternatively to their competition enforcement tools to intervene against excessive pricing. The combination between the two functions offered them a great flexibility of action[570], and consumer law may increase deterrence being used as a residual legal basis for actions that are difficult to justify under competition law.[571] When realizing that it was not possible to enforce competition law against exploitative pricing, due to the length and complexity of its proceeding and due to the difficulty to detect dominant positions, the NCAs of Italy and UK decided to have recourse to consumer protection, as a complementary legal basis, which helped to deter excessive pricing and to offer prompt solutions for consumers. In the UK, the CMA made it clear that it intended to pursue unlawful behaviour under both competition and consumer law. In Italy, the Authority adopted a mix of strategies to address the calls to intervene, mindful that a timely response was required, in view of the risk of market distortions and harmful effects on consumers. The AGCM requested information on price spikes related to goods in the health sector. By announcing them with a press release, such information requests acted as a form of moral suasion and sometimes were sufficient to contrast the price increases. In fact, as an alternative to launching investigations and imposing high penalties for exploitative pricing practices, on the basis of either antirust or consumer protection rules, the antitrust authorities decided also to resort to preventive measures. In this sense, the NCA before launching investigations can request information to the undertakings highlighting the potential risks whether the price increases hide violations of either antitrust or consumer protection rules, showing to generally prefer a mixed strategy made of enforcement and moral suasion.[572] The Italian NCA realised that the issues raised by such price spikes could not be addressed with a competition tool, launching investigations against some companies for their price increases, configuring them as aggressive commercial practices which are prohibited by the Italian Consumer Code and by the UCPD.

The Authorities used their consumer protection powers in order to complement their competition monitoring efforts in mitigating the effects of price increases. In view of the

[570] F. JENNY, "*Market adjustments, Competition Law and the Covid-19 Pandemic*", Le Concurrentialiste, 2020
[571] F. BOSTOEN, C. COLPAERT, W. DEVROE, J. GRUYTERS, L. MICHAUX, L. VAN ACKER, "*Corona and EU Economic Law: Competition and Free Movement in Times of Crisis",* European Competition and Regulatory Law Review, 2020, Vol. 4, Issue 2, p. 79
[572] A. PEZZOLI, "*La politica della concorrenza ai tempi del virus e la rilegittimazione dell'intervento pubblico",* Mercato Concorrenza Regole, Fascicolo 1, 2020; see also F. GHEZZI, L. ZOBOLI, "*L'antitrust ai tempi del Coronavirus: riflessioni sulle esperienze internazionali e sulle iniziative italiane*", Rivista delle società, 2020, n. 2/3

actions taken by the NCAs, the best solution is the complementarity between consumer protection and competition law. This complementarity allows to choose the most suitable basis for the specific exploitative pricing case. Generally, the NCAs did a great monitoring activity and were able to respond in a quick and flexible manner to companies and consumers. Even during the 2008 crisis, European antitrust authorities showed good resilience and considerable flexibility, especially in accompanying the reorganisation processes of various sectors.[573] Therefore, the approach of the NCAs during the COVID crisis could be efficient for other issues in the future as well, providing more speedy, flexible, and practical guidance to companies and consumers.[574] The fact of having the public interest as the aim and the objective of their enforcement activity and strategy is what gives to the NCAs their legitimacy, their independence and their integrity while enforcing the law should combine with the aim to satisfy the needs of the consumers.[575]

[573] See G. OLIVIERI, A. PEZZOLI, "*L'antitrust e le sirene della crisi*", in Analisi Giuridica dell'Economia, Studi e discussioni sul diritto dell'impresa, 1/2009, pp. 115-132; see also F. JENNY, "*Introduction*", in Concurrences Review, special issue "Competition Law and Health Crisis", n. 2/2020, according to which during the covid crisis there is a massive failure of competitive markets with regard to the expected adequate supply to meet the demand at competitive prices: the markets for masks or gloves, or respirators were competitive but they failed to deliver what people needed. The reasons for these failures are different from the reasons for the failures in 2008. Competitive markets may fail to deliver and in those rare cases, the enforcement of competition principles must be adjusted.

[574] M. SNOEP, "*Competition enforcement in times of crisis—a perspective from the ACM*", Journal of Antitrust Enforcement, 2020, Volume 8, Issue 2, p. 269

[575] See among others, F. CABRAL, L. HANCHER, G. MONTI, A.R. FEASES, "*Eu Competition Law and Covid-19*", TILEC Discussion Paper, 2020; I. LIANOS "*Polycentric Competition Law*", Current Legal Problems, 2018, Volume 71, Issue 1

CONCLUSION

This dissertation analyses the effect of the COVID crisis on antitrust enforcement in EU, taking into consideration the competition law approach and the behaviour of the enforcers during that period. In relation to both Articles 101 and 102 of the TFEU, from which the EU Antitrust policy is developed, different issues have emerged during the crisis, but even the way of approaching by the antitrust enforcers towards the issues of these two Articles have been different during the COVID crisis. The demand peak and the consequent shortages of essential products during the crisis, provoked different consequences for antitrust. Firstly, it became necessary to allow undertakings to cooperate in order to facilitate the production and distribution of those products, solving the scarcity problems; however, at the same time, there could have been undertakings which exploit the allowance of cooperation in order to form cartel and anti-competitive agreements. Secondly, the shortages and the disruption of supply chains, with the difficulty to satisfy the huge demand, could become the opportunity for exploitative price increases. In relation to those emerging issues, the reactions and the approaches of antitrust enforcers have been different.

With regard to Article 101 issues, it clearly emerged the decision to relax competition rules, adopting a lenient view for agreements which would normally be prohibited by Article 101(1). In fact, the crisis and its severe consequences for the economy like shortages of medical equipment and the prospect of whole industries going under, convince the enforcers to exempt from the prohibition the agreements among competitors which satisfy beneficial conditions, excluding them from their priorities and considering them unlikely to be problematic, so, the normal rules were partially adapted during the crisis by allowing undertakings to share notes on their supply chains. The pandemic caused numerous problems and difficulties in the internal market and, due to the many concerns about the capacity shortages, the cooperation between competitors was necessary and aimed at providing urgent instruments during the pandemic such as medical equipment. Co-operation between competing firms may be in the public interest and benefit consumers by assuring an essential service or by distributing scarce but essential goods. The enforcement of antitrust by competition authorities should be pragmatic in periods of crisis and the cooperation between competitors which have broader benefits which outweigh the competition enforcement should not be prohibited. In fact, competition authorities announced their intention to not intervene when undertakings temporarily coordinate and cooperate in order to meet consumers demand for healthcare products and to ensure the supply and fair distribution of scarce products to consumers. Due

to the exceptional circumstances resulting from COVID-19, the rules on restrictive agreements were pragmatically and less strictly enforced. Moreover, competition authorities have responded with the intent to provide guidance to undertakings by communicating the criteria that followed to evaluate cooperation projects and by re-introducing the possibility to seek ad hoc feedback on such projects.

The solutions taken at both European and national level showed a preferential treatment of the enforcers toward agreements. The enforcers showed openness for agreements which aimed at provoking pro-competitive benefits directly for consumers, and those benefits have to outweigh the competitive restraints that the agreements provoke. When the consumeristic and pro-competitive requisites were satisfied, the agreements receive the approval, being considered consistent with the COVID-related practice of the enforcers. Instead, the agreements which do not satisfy the requisites and go beyond the limits established by the authorities, they would not be allowed and they would have been prohibited under Article 101(1) as a restriction of competition. The policy response to the COVID-19 crisis, consisting of targeted and time-limited allowances for coordination between suppliers, and continued vigilance with respect to firms that overstep these allowances, is likely to act as a dampener on anti-competitive collusion. The undertakings are warned that they must not exceed the limits of what is necessary to tackle the crisis in their business. They are not allowed to use the crisis for anticompetitive and non-essential collusion, such as price fixing and exchange of sensitive information. COVID crisis could not stand in as general exemption which would have granted amnesty even to arrangements among undertakings which are normally considered as strongly anti-competitive and anti-consumeristic. Thus, during COVID-19 crisis, which has affected many sectors of the economy, competition authorities are called upon to respond to the difficult task of striking the right balance between being permissive enough to allow private initiatives address market disruptions and avoid distortions of competition. Competition authorities need to ensure that agreements between competitors are necessary to help solve the crisis, proportionate to the objective they are pursuing and limited in time to impede the reduction of competition beyond the crisis period. The cooperation agreement during COVID crisis has to be aimed at limiting the harmful consequences of the crisis, generating efficiencies, while hard core restriction such as price fixing cartels, are still prohibited during the crisis. There was high alert on cartels because they may be a temptation for firms. On one hand, some firms may collude to avoid risky competition between them in sectors characterized by demand fallout and where they need to solve the issue of excess capacity. On the other hand, the cartels may be a temptation for firms which may price fix,

exploiting the augmented demand and emergency public purchasing. Cartels are prohibited even during the crisis and would not benefit from any exemption. Neither those cartels created specifically for the crisis, the so-called crisis cartels, which would have had as one of their aims the solution of undercapacity or overcapacity, were allowed during the crisis. Crisis cartels are considered equally harmful as common cartels under EU competition law and businesses are not allowed to coordinate their actions through cartels even when they are suffering demand shock and problems due to crisis. Cartels are the archetype of anti-competitive agreements, a restriction of competition per se which is not possible to save from the prohibition granting it an exemption. Even if the primary parties' intention may be to recover from the industry's crisis, a cartel agreement is prohibited due to the fact of restricting competition by object because its primary aim is the cartelists' profits and interests, exceeding the limits of what is necessary to address the shortage of essential goods. The crisis cannot represent the chance for allowing measures which are unnecessary or disproportionate for overcoming this crisis. Cartels do nothing in concrete for consumers' interests, there are no concrete guarantees about their ability to solve crisis problems like shortages of goods, or rather it is likely that they worsen that issue, even provoking price increase. Crisis cartels do not benefit from the exemption of Article 101(3) due to the absence of consumer benefit, and consumer protection would be even threatened by cartels, especially during a severe crisis like COVID. Cartels are in contrast with the competition law's goal of protecting consumer and of pursuing their welfare.

The ECN and the European Commission, since the beginning of the crisis, introduced derogations from competition rules for necessary and temporary measures aimed at solving supply shock and products shortages or at rebalancing specific markets and sectors, but they confirmed their strict vigilance on cartels. The ECN promoted the non-intervention during COVID crisis against necessary and temporary measures which are aimed at avoiding supply shortages, recognizing that, even during crisis, the European authorities have to intervene against anti-competitive agreements like cartels, because the latter are likely to reduce consumption, investment, and output at the very time public policy should reverse rather than exacerbating economic contraction. The EU Commission, with its antitrust Temporary Framework selects its enforcement priorities during the COVID emergency. The framework does not modify the pre-existing rules for competition in EU, but it is simply a soft-law document, a guidance which shows the investigative priorities of the Commission to the undertakings, in order to make them know which practices are likely to draw the attention of the Commission's enforcement. The Commission does not consider the cooperation

agreements as enforcement priorities during the COVID crisis, if the agreements were limited to solve the COVID related issues, being thus temporary, related to particular fields and proportionate to the pursued aims. In particular, the Commission allows to form cooperation necessary and aimed at solving shortages of essential products such as medical equipment in an efficient way through the improvement of supply and distribution and the increase of production for those medical items. During the crisis, it is possible to allow horizontal cooperation agreements which are usually prohibited, in order to recover from the crisis, as long as these agreements do not result in cartels, excluding the latter from the relaxation. The allowed agreements are those which provoke benefits for consumers. The Commission's monitoring during the crisis is active and does not tolerate anti-competitive agreements nor crisis cartels, considering them restriction by object which cannot be justified, and inviting undertakings to not interrupt cartels reporting during the crisis. A cartel is considered by its nature to have the potential of restricting competition, even during a crisis. A crisis cartel cannot satisfy the Article 101(3) criteria as such cartels usually involve hardcore restraints as price fixing, output restrictions and market division, which impede it to be cleared. Arrangements that lead to price fixing, output restriction or capacity reduction are extremely harmful and should be actively cracked down because they are likely to restrict or eliminate competition and to harm consumers. Relaxing the cartels prohibition during turbulent economic times, allowing to form crisis cartels, could cause more harm than benefit for competition. The impact of crisis cartels on the market could be a disaster. An opening for a huge relaxation of competition law would weaken deterrence. Giving up the cartel prohibition at the first emergency would demonstrate a lack of confidence in the competitive process, the protection of which is the real mission the authorities are tasked with. It would have sent a strong message, if the antitrust authorities had stood by competition and had explained its powers, even when faced with frightening emergency shortages of vital health protectives. Crisis cartels are not the right solution to solve shortages and they do not ensure fair allocation of essential products during the COVID crisis, but they rather usually cause reductions in output and price increases, which impede recovery and contemporarily worsen consumer harm. Crisis cartels have been demonstrated to be useless in order to reduce the negative effect of an economic crisis and they could even worsen an emergency situation, so the best solution with regards to Article 101 TFEU issues was halfway, with the enforcers trying to find a compromise: relaxation of competition law, not for cartels, but only for cooperative agreement aimed at solving shortages, unfair allocation and high prices. Making cartels benefits of exemption during COVID crisis would have caused heavy damages to competition and

consumers. Thus, during COVID crisis, cooperative agreements may be allowed, provided that they do not correspond to cartels: prosecuting illegal cartels is necessary during economic crises as during normal and prosper times. The relaxation of competition rules adopted during the crisis towards cooperative agreements, which was aimed at increase supply of essential products and consequently the wellbeing of consumers, must not be a chance for cartelizing. The competition authorities consider that during a severe recession, market forces, and not a group of undertakings through collusion, have to solve the capacity issues.

The spikes in prices which occurred in Europe during the COVID crisis, especially with respect to health-related services and products such as hand sanitizers and face masks, had consequences for antitrust. Differently from the Article 101 issues, the issues related to Article 102 were recognized as enforcement priorities during the crisis. When it comes to excessive pricing, relaxation of competition law does not cover any abuse of dominance and it would not be tolerated under competition law. This seems reasonable considering the necessity that products for the protection of health and other scarce products remain available at competitive prices and without discrimination. That is why a number of competition authorities have put special focus on excessive pricing practices in the short run. The exploitative pricing practices were an investigative priority for the enforcers, due to the high vulnerability of the consumers threatened by the high risk of price increases for essential products. It was important to make consumers and competitors feel protected from possible abuses of competition law and therefore the authorities reminded the effectiveness of their enforcement activity of antitrust rules because non-intervention would have meant consumer harm. The COVID crisis circumstances call for the intervention of the NCAs against exploitative high prices because letting the markets self-correct without price-adjusting interventions would have harmful consequences for both consumers and competitors. It is not possible to wait for market self-correction, it is necessary to intervene, using all the instruments at disposal, to adjust the high prices of essential COVID related products such as medicines, in order to facilitate their decrease to a competitive level. Waiting for the self-correction of excessive prices would make consumers suffer high prices for a long time. In time of crises, like the coronavirus outbreak, the firm entry rate into the market is affected, as firms' incentives for investment and expansion are decreased in their attempt to survive the crisis and the resulting severe economic turmoil. For all those reasons, during the crisis the NCAs adopted an interventionist approach towards excessive pricing, reflecting the recent trend for a more active enforcement of Article 102 against excessive pricing.

However, during the crisis, the enforcement of Article 102 resulted to be not too effective against excessive pricing, due to the length and the complexity of the investigations and the proceedings of this Article. The main obstacle for the application of Article 102 TFEU is its own requirement of an undertaking in a dominant position, according to which only the dominant undertaking may fall under the scope of the prohibition of excessive pricing ex Article 102. Despite all the hurdles of Article 102 (a), a solution for its application to coronavirus profiteering could have been the acknowledgement of a transitory market power. In this way, it would be possible for NCAs to establish that even small businesses, which do not have a position of dominance in the market, hold a temporary position of market strength in the relevant market. The openness to the recognition of temporary dominance caused by the circumstances of the crisis even came from the antitrust Temporary Framework of the Commission. Such dominant position was considered an escamotage to enforce Article 102(a), giving to the competition authorities the possibility to enforce rules that aim to protect vulnerable consumers from wind-fall market power. Nonetheless, the temporary and circumstantial dominance was a solution only on paper and never turned into reality.

The NCAs did not enforce 102(a) through the recognition of temporary dominant positions, which did not help to concretely detect more exploitative pricing abuses. The reason is that the competition authorities, in the first months of the crisis, did not concretely modify the pre-existing rules nor introduce ad hoc rules for the exceptional period, relying on the flexibility of the pre-existing rules to take into account the changed economic environment. The circumstantial dominance related to the COVID crisis demonstrate to be not very effective if not linked to a modification of the legal basis, while the enforcers simply introduced soft-law measures which do not concretely intervene on the pre-existing rules. Instead, it would have been desirable and beneficial to adapt the EU pre-existing antitrust rules to the crisis situation in order to effectively face exploitative pricing during COVID period. As it has been detected, a country where this happened is instead South Africa, whose NCA was able to face excessive pricing violations, even temporary, in a very effective way. South Africa adopted an ad hoc regulation which specifically prohibited the excessive pricing of products such as face masks and hand sanitizers, for the period December 2019-March 2020. Thus, the pre-existing rules were adapted to the crisis situation, something that did not happen in the EU, and the local NCA, in order to cope with excessive pricing during the crisis, has been given new powers that allow it to consider prices that lead to profits above the average as excessive, enhancing the link between market power and the ability to make extra profits. It would have been desirable and beneficial that the EU followed the example of South Africa. The NCAs in

Europe were not provided of the appropriate tools to properly tackle abuse of short-term market power during the emergency and the latter should have warranted a novel approach in assessing dominance.

Since the missed introduction of new ad hoc rules which would give to the NCAs new ad hoc powers, the intervention of NCAs against excessive prices under the national and European competition law against firms holding a dominant position was not a viable instrument to deal with the price increases linked to the COVID-19 crisis. The reasons were that in most cases there was no dominance, as the excessive prices were charged by simple resellers, and that the complex investigations did not facilitate a timely intervention. All those conditions forced the competition authorities to rely on powers under their competences other than competition law to address excessively high prices. The exceptionality of the crisis put the NCAs in the conditions to resort to any instrument that they had at their disposal to fight excessive pricing and to evaluate all available tools, under competition law or other rules, to address problematic practices and use the most adequate and prompt tool to address them successfully. The NCAs, having the consumer protection competence, can even rely on their consumer protection powers against COVID related exploitative pricing practices. Thanks to the complementarity of competition law and consumer protection, the NCA should choose the legal tool which proves to be more effective in the context of a particular case. The NCAs have to contrast exploitative practices under the most suitable legal tool on a case-by-case basis. Consumer protection proved to be a convenient tool during the COVID crisis thanks to the facility of enforcing its rules promptly. Consumer protection rules do not regard only dominant firms, so being less burdensome for NCAs and permitting to address sudden pricing practices without consideration of dominance. Consumer protection allows to include exploitative pricing practices of undertakings that due to the difficulty of being identified as dominant, would avoid the enforcement of Article 102. The difficulties of enforcing that Article may be solved using consumer protection as legal basis. As it has been seen, consumer protection has been the legal basis of the investigations of the NCAs for COVID related exploitative pricing practices. Due to the complexity and length of enforcing Article 102, the NCAs preferred the other legal basis in order to promptly mitigate the effects of price increases during the crisis, giving prompt responses for consumer welfare. In the light of the actions taken by the NCAs, the best solution is the complementarity between consumer protection and competition law, which allows to choose the most suitable basis for the specific case regarding exploitative pricing, anyway prioritizing consumer protection, unless a dominant position is identified or may potentially be detected: in the latter situation, the antitrust enforcement has the absolute priority. The two

bases are complementary between them, but the primary basis should be consumer protection. The concrete actions of the NCAs that this dissertation evaluates are illustrative of the preference of the EU NCAs for the consumer protection instead of competition law for the determent of exploitative pricing during COVID crisis. As for the risk of undertakings taking advantage of the emergency situation to apply exploitative prices, a joint approach by antitrust and consumer protection authorities is probably the most desirable option: whereas problems do not arise when an already dominant undertaking practices excessive pricing, when dominance is circumstantial consumer protection is probably a better choice. The choice to prioritize consumer protection tools as legal basis for excessive pricing derives from the fact that one of the fundamental goals of competition law is to protect consumers, avoiding exploitations and harm to them and it is thus necessary to use the most appropriate basis to fulfil this goal, which becomes even more important than competition itself. The coronavirus pandemic was a catalyst for action on the process of improvements that are needed to ensure consumer policy and enforcement.

Competition enforcement does not stop during a crisis, it is able to adapt to the necessities of an economic downturn. The competition authorities redirect enforcement resources towards strategic markets and industries considered important for the recovery process, sectors that have been strongly implicated in the response to the crisis or those that can generate positive spill-over on social welfare. The suitable way to reconstruct the supply chain during the crisis consists of allowing undertakings to cooperate between them in order to provide sufficient quantities to the consumers and contemporarily allowing consumers to buy at fair prices. However, the role of antitrust enforcement during the COVID crisis consists also of not allowing the market players to exploit the consumers by benefiting from the shock situation to either form unlawful collusions or increase prices in a disproportionate way. The antitrust enforcement had to be smart and flexible, and it had to adapt to the current situation, understanding the necessities without excessive relaxations. It is in fact necessary to ensure that the cooperation between competitors do not overcome the imposed boundaries, by giving life to anticompetitive agreements, and to ensure that exploitative pricing practices are prohibited and sanctioned, protecting the market fairness and ensuring that critical goods and services reach the market promptly, at competitive prices and without discrimination.

The COVID crisis does not interrupt the antitrust enforcement, but rather the level of attention and monitoring of the enforcers has to be even higher. Undertakings were warned that the crisis could not be an excuse to breach competition laws and that competition laws continue

to apply because, the non-intervention would have had harmful consequences in the long run, such as fewer competitors, reduced innovation, and higher prices. Therefore, the competition authorities must stay the course applying competition rules strictly to ensure well-functioning markets in the long-term, while, at the same time, retaining a degree of flexibility and taking due consideration of economic conditions in markets so that competition law enforcement does not obstruct economic recovery, but rather provide an important contribution to its speed and its sustainability. As economies cannot do without antitrust enforcement in times of crisis, it is still alive during the COVID crisis and, together with the consumer protection, has to be the fuel of the economic recovery.

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