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„EU and Azerbaijani Competition Law: A Comparative Study“

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LIST OF ABBREVIATIONS

ECSC – European Coal and Steel Community

EC Treaty – Treaty establishing the European Community

ECJ – the European Court of Justice

EU – European Union

TEU – Treaty on the European Union

TFEU – Treaty on the Functioning of the European Union

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Introduction

It is beyond any doubt that competition is one of the key elements of market economy. Competition stimulates market participants to increase and develop goods and services offered to consumers and seek for the most favorable treatment of consumers for gaining advantage over competitiors. This idea also lies behind the statement of Directorate General for Competition stressing that competition "encourages efficiency and innovation and reduces prices"[1]. However competition brings all the good only if it carried out within certain frames. In fact, competition between market players can have negative consequences for society and that is the reason why competition is being regulated by the law. In other words, by establishing competition rules the state aims to benefit from competition without suffering its negative outcomes such as, for instance, establishment of trusts.

Complexity of economic relations requires them to be governed by a number of rules from different perspectives. Each of these rules deal with a separate aspect of economy and despite their interrelation still have their own methods of regulation, problems and nature. Therefore, when speaking of economic relations, it should be stressed that a number of regulatory mechanisms are summoned for their regulations, such as civil, tax, currency and customs law. One of these regulatory mechanisms is competition law. One the other hand, it should be also noted that compared to the abovementioned fields of law competition law is rather derivative *i.e.* it has developed on the basis of other, major, fields of law. Following approach upheld in the literature[2] it may be concluded that competition law has evolved into an independent sphere of law as a reaction to intensity and complexity of competition in modern markets which accordingly required more detailed regulation. However, unlike "basic" fields of law, competition law is also classified as a complex field of law as its regulatory scope includes broad variety of relations and utilizes

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[1] Directorate General for Competition website at http://ec.europa.eu/competition/antitrust/overview_en.html (last visited: 29 July 2019)

[2] Mikhail N. Marchenko, *Theory of Law* (2d ed. 2004)

regulatory methods distinctive for several fields of law. As such, in competition law relations are simultaneously governed by dispositive methods, upholding free will of the parties, which is distinctive for civil law and by imperative methods, which would rather fit for administrative and other fields of public law[3]. Furthermore, competition regulations also interact with other fields of law such as administrative, civil and *etc*.

With that said, it could be concluded that competition law is a complex field of law governing relations in economic sphere between competitors *i.e.* actors in the market and establishment of trusts. Naturally, governing only actions of commercial entities (whether legal entities or individuals) would result in narrow scope of application of competition law and therefore compromise reaching its goals. For this purpose, scope of competition regulations also includes state authorities and consumers so that effect of competition could be assessed from all perspectives. Further to the above, the goal pursued by competition law should be also identified. As noted competition between undertakings is a precondition enabling growth and development of the market. Such growth and development is accordingly preserved by competition regulations and therefore competition law is aimed to maintain healthy market relations in order to ensure functioning of the market under fair conditions. It should be also added that the goal of competition law is achieved by establishing regulatory framework enabling supervision over trusts and incompatible actions of market actors.

Current master thesis will seek to analyze and outline provisions of the European Union Competition Law and Azerbaijani Competition Law. By conducting comparative study between these two jurisdictions the thesis will seek to identify areas for improvement of Azerbaijani legislative framework. As a background information, it should be noted that past several years have been marked with major amendments in Azerbaijani legislation. These amendments follow the aim of establishing regulatory framework for development of market relations and diversifying economy so that it no longer depends on exportation of oil and gas. During the past years a number of new laws have been adopted and existing ones were either amended or repealed. By establishing a new regulatory framework the government seeks to intensify market economy which would eventually lead to diversification of economy. Current tendency gives us a basis to conclude that this

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[3] Kirill A. Pisenko et al, *Antitrust (Competition) Law* (ConsultantPlus 2014)

competition regulations will be also subject to amendments in future. Furthermore, under Strategic Roadmaps for Development of Economy approved by Presidential Decree No. 1138 dated 6 December 2012 a separate competition code should be developed based on international best practice.[4] However, drafting new legislation does not contemplate mere replication of laws of a developed jurisdiction. Incorporation of a new rules from another jurisdiction should also entail their analysis as there is always room for improvement. With that said, this thesis will provide an overview of EU and Azerbaijani Competition Law and elaborate on differences between these two jurisdictions. For achieving this goal, the thesis will focus on certain institutes of EU Competition Law in its first chapter, then analysis such of Azerbaijani competition law will be provided. After analysis of the both the thesis will focus on comparative analysis of the EU and Azerbaijani competition law.

Chapter 1. General Overview of the EU Competition Law

First and foremost, it should be noted that complexity of EU legislation derives from the nature of the EU itself. The fact that EU cannot be perceived as an international organization accordingly influences analysis of the EU legislation, which cannot be regarded as merely norms adopted by international organization. That's to say, as a supranational organization the EU enjoys broader authority which results in establishment of more robust and thorough regulatory framework. Authority of the EU derives from conferral of competences to the EU by the Member States which contemplates certain goal behind establishment of the EU. For this reason, analysis of regulatory framework established by the EU requires analysis of the goals pursued by the EU in the first place.

Establishment of common market has been one of the main directions of activities of the EU. Although there have been other attempts to establish common market made by other organizations, such as Eurasian Customs Union, it should be highlighted that none of these has gone further than the EU. Therefore, regulations established by the EU should be reviewed from perspective of common market in the first place. This view is also supported in the literature noting that 'economic integration has been at the root since the very conception of the EU'.[5] In addition functioning of the internal market is linked to a number of provisions of EU legislation (namely, treaties) pursuant to

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[4] Strategic Roadmaps for Development of National Economy, 4.1.1.

[5] Moritz Lorenz, *An introduction to EU Competition Law*, (CUP 2013)

Article 26 of the Treaty on the Functioning of the European Union.[6] The same Article 26 of the TFEU defines internal market as an area without internal frontiers in which the fundamental freedoms of the EU (*i.e.* free movement of goods, persons, services and capital) are being upheld.[7] Based on this it may be outlined that functioning of the internal market precludes regulation of competition which may threaten this or other way fundamental freedoms declared by the EU. Indeed, it may be noted that the Treaty of European Union in Article 3 (3) requires internal market to be 'highly competitive'[8]. In the meantime, it should be added that current wording of effective primary EU legislation lacks certain clarity in terms of competitiveness in comparison to the Treaty Establishing European Community. Namely, Article 2 of the EC Treaty represented commitment of the Community to promotion of competitiveness through common market.[9] However, as noted above, this does not mean that the EU abandoned its attempts to ensure competitiveness of the internal market. Indeed, analysis of the TFEU shows that EU prioritizes competitiveness in the internal market, despite opting for different wording in comparison to the EC Treaty. In addition, the abovementioned Article 26(2) of the TFEU may solely demonstrate importance of competition for the EU.[10]

Meanwhile, functioning of market may be viewed as domestic matter since there is a number factor deriving from this or other features affecting economy of the state concerned. Consequently, only a state may be in position to assess effectiveness of its market and undertake measures for preserving competition if required. Following this approach competitions of the EU in terms of competition may be challenged. In connection with this, it should be noted the European Court of Justice has shed a light on the matter in *Metro v Commission* case. In particular, the ECJ outlined that that conditions of a single market should be similar to those of a domestic market.[11] Position of the ECJ

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[6] Treaty on the Functioning of the European Union (consolidated version) [2012], OJ C326/59

[7] Treaty on the Functioning of the European Union (consolidated version) [2012], OJ C326/59

[8] Treaty on the Functioning of the European Union (consolidated version) [2012], OJ C326/59

[9] Treaty Establishing the European Community [2012], OJ, C326/40

[10] Treaty on the Functioning of the European Union (consolidated version) [2012], OJ C326/59

[11] Case 26-76 *Metro SB-Großmärkte GmbH & Co. KG v Commission of the European Communities* [1977] ECR 1977 -01875

implies treatment of single market in the same manner as a state would have treated its domestic market. Accordingly, competences of the EU in relation to competition within single market are comparable with those of a state in relation to its domestic market which in its turn means that the EU is competent in matters relating to competition within the Community.

Summarizing the above it is safe to say that protection of competition in the internal market is one of priorities of the EU. This is evidenced both by the treaties and court practice. Speaking of court practice, it should be also noted that in ECJ case C-52/09 *Konkurrensverket v TeliaSonera Sverige AB* it was observed that internal market established by the EU 'includes a system ensuring that competition is not distorted.'[12] Additionally, competitive environment may only furnish under equal conditions for everyone participating in market. Based on this it may be concluded that regulation of internal market as the marketplace where everyone enjoys freedoms and equal opportunities and competition regulations as a safeguard for the abovementioned freedoms and opportunities are interrelated. Taking into account community-wide goals of the EU it may be concluded that national competition regulations cannot be equalized to or prevail over the EU legislation.

While observing the EU Competition Law it would be inaccurate to assume that regulatory framework of the EU Competition Law concerns only trusts or aims to ensure freedom of competition. Further to this, it may be outlined that the EU Competition Law contains two sets of provisions. The first set of provisions identifies threats to competition, tackles them and by this guards competition from disruption. The second set of provisions aims to ensure that competition in the market is conducted in a certain way or, in other words, establishes requirements for fairness of competition. With that being said, it is considered reasonable to observe scope and sources of EU Competition Law.

1.1. Scope of EU Competition Law

As noted above, protection of competition within the internal market is one of priorities of the EU. In the meantime, it is obviously policies and priorities implemented by the EU may be contrary to each other and competition policy of the EU. To illustrate the scale of objectives of the EU Article 3 should be mentioned. As such, quite understandably vast range of objectives declared therein creates

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[12] Case C-52/09 *Konkurrensverket v TeliaSonera Sverige AB* [2011] ECR I-00527

risk of conflicts and contradictions.[13] With that said, in order to reach consistency in application development of mechanisms tackling potential conflicts is required. Based on the analysis of the EU legislation it should be outlined that the following mechanisms have been developed:

- Legislative

EU brings together states having different background and stage of economic development. United in difference, these states have certain aspects that need to be considered while setting national policy and subsequently implementing it. Diversity of the Member States contemplates different priorities for their economy. With that in mind, legislation of the EU contains rules aiming to protect internal market and the Member States from such conflicts reflected both in primary and secondary legislation. For instance, conflicts may arise in the field of defense policy, agriculture *etc*. Accordingly, application of the EU Competition law is restricted for the sake of ensuring smooth implementation of national policy.[14]

- Judicial

Involvement of the ECJ may as well result in restriction of the scope of application of EU Competition Law. For example, in *Albany* case the ECJ exempted collective bargaining agreements between employers and employees from the scope of competition rules[15]. Precisely, the ECJ held that social policy has the upper hand over competition regulations.

1.2. Sources of EU Competition Law

Speaking of primary sources of EU legislation, it should be noted that provisions governing competition are contained in the TFEU. Namely, these provisions may be conditionally divided in the following groups:

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[13] Treaty on the European Union [2012], OJ C325/10

[14] Treaty on the Functioning of the European Union (consolidated version) [2012], OJ C326/64

[15] C-67/96 *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* [1999] ECR I-5751

1) Rules applying to undertakings

These rules are set by Articles 101 – 106 of the TFEU. As such, Article 101 (1) of the TFEU prohibits agreements concluded between undertakings and decisions taken by association of undertakings if such 'may affect the trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market'[16]. The Article also provides non-exhaustive criteria for identification of prohibited agreements (such as price fixing, sharing markets *etc.*). It should be also noted that pursuant to Article 101 (2) any agreement or decision violating requirements of this Article is void. However, Article 101 (3) also provides an exclusion from the abovementioned rule, stating that in specified cases prohibition laid down in Article 101 shall be inapplicable. It is particularly notable that in defining these cases the EU legislator provides for assessment based on both positive and negative outcomes. As such, under Article 101 (3) of the TFEU requirements of Article 101 (1) may be declared inapplicable provided that any agreement, decision or concerted practice 'contributes to improvement of production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit'[17]. In my opinion in the cited provision the TFEU specifies positive effect that an agreement, decision or practice may have on internal market and consumers thus lays down positive criteria. In the meantime, it is also laid down that agreements, decisions or practices do not include certain restrictions or give rise to elimination of competition in respect of substantial part of the products in question. These criteria, in their turn, should be observed as negative criteria in terms of their effect on the market. It should be also taken into account that certain undertakings tend to establish subsidiaries which allow them to extend their operations, distribute risks and operational assignments. That's to say, undertakings cannot be perceived only as sole legal entity operating in the market. With that said, arrangements between such undertakings concern 'allocation of tactical tasks'[18] and therefore, relations between parent entity and its subsidiary may not fall under the scope of Article 101. Such undertakings are regarded as single economic units and the ECJ has developed certain criteria for their determination in its case law which will be reviewed further.

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[16] Treaty on the Functioning of the European Union (consolidated version) [2012], OJ C326/88

[17] Treaty on the Functioning of the European Union (consolidated version) [2012], OJ C326/89

[18] Gabriel Moens, John Trone, *Commercial Law of the European Union* (Springer 2010)

Article 102 of the TFEU is of great importance for establishment of anti-trust regulatory framework in the EU. Precisely, it prohibits abuse of dominant position within internal market or a substantial part of it by one or more undertakings provided that such abuse affects trade between Member States. Article 102 also provides non-exhaustive list of actions constituting abuse of dominant position. These actions *inter alia* include (1) imposing unfair purchase or selling prices or other unfair trading conditions, whether directly or indirectly; (2) limiting production, markets or technical development to the prejudice of consumers, *etc.*[19] It should be noted that holding a dominant position itslef is not violation of competition rules and it cannot even be perceived this way. However, undertaking holding dominant position has certain, so to say, 'duty of care' which consequently results in additional requirements to its activities. These requirements relate not only to relations between such undertaking and its competitors but also concerns relationship between dominant undertaking and its customers, which includes, for instance, provision of goods and services of certain quality. It is also notable that the EU legislator measures dominance of an undertaking with the share of internal market. In my view such reference serves as another argument for linkage between internal market and competition law.

Meanwhile, in contrast to Article 101 of the TFEU, Article 102 focuses on other form of prohibited behavior. As such, while Article 101 prohibits certain forms of cooperation between undertakings, Article 102 prioritizes actions of one undertaking. Such approach of the EU legislators is viewed as representing widely spread practice in competition law which contemplates 'drawing a line between concerted and independent actions and views concerted action as the one bearing higher anti-trust risk.'[20]

2) Measures restricting anticompetitive State aid

In contrast to the abovementioned provisions, Articles 107 – 109 TFEU establish set of rules applying to the Member States for the sake of preventing distortions of competition. Such distortions may, for instance, occur when certain undertakings receive economic benefits from state resources. As such, under Article 107 of the TFEU 'any aid granted by a Member State or through State resources which distorts or threatens to distort competition by favoring certain undertakings or the

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[19] Treaty on the Functioning of the European Union (consolidated version) [2012], OJ C326/89

[20] Allison Jones, '*The Boundaries of an Undertaking in EU Competition Law'* [2012], 8 ECJ 301

production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market'.[21] The Article, as it is evident, sets criteria of incompatible state aid outlining that a state aid should (1) be granted by a Member State or State resources; (2) distort or threaten to distort competition by favoring certain undertakings or the production of certain goods (3) affects trade between Member States.

In the meantime, EU legislation does not only pursue aim of preserving competition in the internal market. The EU, in some sense, should also ensure development of the Member States, which contemplates development of their respective economies. Therefore, complete restriction of state aid may eventually be contrary to other goals pursed by the EU. With that in mind, Article 107 declares that a state aid is prohibited 'unless otherwise provided in the Treaties'[22]. This Article also provides categories of state aid that are compatible with internal market as well as those that may be considered compatible with internal market. For the sake of completeness, it should be noted that under Article 346 of the TFEU 'production of military equipment will not be affected by EU competition law'.[23] Apart from it, the TFEU also confers certain competences on the European Parliament and the Council to determine boundaries of application of the rules prohibiting state aid in agriculture.[24]

Coming to secondary sources of EU Competition Law, it should be noted that under Article 288 of the TFEU secondary EU legislation is comprised of regulations, directives, decisions, recommendations and opinions.[25]

Under Article 103 of the TFEU, implementation of principles set out in Articles 101 and 103 of the TFEU is carried out by adopting regulations and directives.[26] Such regulations and directives are adopted by the Council following proposal from the Commission after consultation the European

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[21] Treaty on the Functioning of the European Union (consolidated version) [2012], OJ C326/90

[22] ibid [90]

[23] Ibid [194]

[24] ibid [194]

[25] ibid [172]

[26] ibid [90]

Parliament. In light of the fact that Article 101 of the TFEU lays grounds for EU Competition Law it may be concluded that Article 103 of the TFEU provides legal basis for secondary legislation of the EU.

For the sake of completeness, it should be noted that regulations being binding and directly applicable are one of the main sources of secondary legislation. Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) may serve as an example of regulations governing competition in the EU. In addition, the Council has also adopted "block exemption regulations" governing *inter alia* vertical and horizontal agreements, as well as regulations governing particular industries. Regulations also serve for establishment and implementation of procedural rules.

In comparison to regulations, directives are rather an instrument used for goal-setting for the Member States without specific details on achievement of the set goal. With that said, it may be outlined that directives represent obligations of Member States rather than establish certain desirable behavior for individuals and undertakings. It should be noted that there are no directives adopted in the field till date.

While regulations and directives aim to establish certain expected behavior from the Member States and other subjects of EU Competition Law, decisions bear individual character and are addressed to persons specified in given decision. Based on this, it may be concluded that decisions classify as 'individual acts' and may not be deemed 'normative acts' as they, despite their binding character, do not contain rules mandatory for every subject of law and rather address to a specific subject.[27] Yet, decisions being one of the instruments utilized by the EU for enforcement of competition rules are classified as source of EU Competition Law.

Opinions and recommendations do not have legal consequences and thus they are not binding. With that said, opinions and recommendations are rather instruments allowing EU institutions to express their position on this or other matter. As ECJ put in *Grimaldi* case, 'recommendations are generally adopted by institutions of the Community when they do not have the power under the Treaty to adopt binding measures or when they consider that it is not appropriate to adopt more mandatory

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[27] Mikhail N. Marchenko, *Theory of Law* (2d ed. 2004)

rules.'[28] In my opinion, when it comes to EU Competition Law adoption of recommendations is not a matter of lack of authority but rather a matter of interpretation. It should be also added that existence of publicly available official position serves for enhancement of regulation and clarity of application

With that said, despite lack of binding force, opinions and recommendations may still indirectly effect application of EU Competition Law. For instance, in the abovementioned *Grimaldi* case, the ECJ ruled that recommendations are required to be taken into account by the national courts when it comes to interpretation of national legislation deriving from the EU legislation and adopted for the purposes of its implementation.[29]

1.3. Interrelation between EU Competition Law and national legislation of Member States

Doubtless, requirements set by the EU for competition does not exclude competences of Member States to develop their own anti-trust legislation. Therefore, distribution of competences between the EU and Member States requires observation. Running a bit further, it should be noted that this matter may not apply to comparison of EU Competition Law with such of the Republic of Azerbaijan. However, legislative approach and principles of distribution of competences and administration are still subject to comparison.

To start with, in *Walt Wilhelm v Bundeskartellamt* the ECJ clarified that the community law prevails over the national law.[30] Distribution of competences and matters relating thereto are also addressed by the Council Regulation (EC) No 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty[31]. It should be noted that Articles 81 and 82 of the Treaty are currently enacted as Articles 101 and 102 of the TFEU. With that said, for the sake of clarity and consistency, reference to Articles 81 and 82 in this section should be understood as references to Articles 101 and 102 respectively.

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[28] C-322/88 *Salvatore Grimaldi v. Fonds des maladies professionnelles* [1989] ECR I-04407

[29] *Salvatore Grimaldi* (n. 28)

[30] Case 14/86 *Walt Wilhelm v Bundeskartellamt* [1969] ECR I-00001

[31] the Council Regulation (EC) No 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003], OJ L 1/1

It should be noted that Council Regulation (EC) No 1/2003 replaces Council Regulation No 17: First Regulation implementing Articles 85 and 86 of the Treaty[32] which established centralized competition control framework by shifting the balance between national and EU authorities to the side of EU. For instance, under Article 9(1) of the Council Regulation No 17 the Commission had the sole power to declare provisions prohibiting anti-competitive practices inapplicable.[33] In contrast to this, the Council Regulation (EC) No 1/2003 made national authorities responsible for implementation of Articles 101 and 102 of the TFEU as well.[34] In the meantime, development of the Council Regulation (EC) No 1/2003 also serves as a measure aimed to distribute burden of competition proceedings between the Commission and national authorities of the Member States. Further to this, the Commission can now focus on major instances of incompatible behavior, while the national authorities of the Member States shall engage in other cases.

When it comes to distribution of authorities between the Commission and national competition authorities, including courts, it should be noted that competences of national authorities are bound by decision of the Commission further to Article 16 of the Council Regulation (EC) No 1/2003. To be more precise, should a national court or authority rule on agreements, decisions and practices laid down in Articles 81 and 82 and such matter be subject to Commission decision, then the national court 'cannot take decisions running counter to the decision adopted by the Commission'[35]. The Council Regulation (EC) No 1/2003 also provides for consistency between decisions to be made by the national authorities and such of the Commission. Precisely, the national authorities should consider decision to be taken by the Commission and attempt to eliminate possible contradiction between their decision and such of the Commission. When it comes to involvement of national courts to competition proceedings it should be outlined that they are entitled to stay their proceedings if the Commission has also initiated proceedings on given matter. [36]

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[32] EEC Council: Regulation No 17: First Regulation implementing Articles 85 and 86 of the Treaty [1962], OJ, 204-211

[33] Ibid [207]

[34] the Council Regulation (EC) No 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003], OJ L 1/3

[35] Ibid [13]

[36] Ibid [13]

With that said, in terms of competition law the national courts and authorities do have a limited role and their actions are largely preconditioned upon such of the Commission. When it comes to application of national legislation Council Regulation (EC) No. 1/2003 does preclude existence of national legislation. As such, application of national competition rules to incompatible behavior also contemplates simultaneous application of the rules envisaged by the legislation of the EU. With that said, it may be concluded that national law is rather restricted in application should the given matter fall within the scope of application of TFEU. In the meantime, application of the TFEU rules is preconditioned upon satisfaction of certain criteria such as, for instance, effect on a trade between the Member States. Consequently, absence of this effect restricts application of the EU legislation and results in application of national competition rules without regard to such of the EU. It is also worth mentioning that Article 3 of the Council Regulation (EC) No. 1/2003 provides exceptions enabling application national merger control rules. Precisely, national authorities are entitled to review cases that are not falling within the scope of EU merger control regulations.[37]

1.4. Institutional framework of EU Competition Law

EU exercises its competences through its institutions. As noted above, EU possess major competences in relation to EU Competition Law. Therefore, review of institutional framework is of great importance for understanding distribution of competences between institutions of EU.

The Commission

Under Article 105(1) of the TFEU the Commission plays the key role in ensuring application of principles laid down in the TFEU. Under the same Article the Commission is entitled to investigate suspected infringement of the rules laid down in Articles 101 and 102 of the TFEU. It is also envisaged that the Commission may launch an investigation either by itself or based on application submitted by the Member State. In investigating cases of suspected infringement, the Commission cooperates with relevant authorities of the Member States. The TFEU also sets that the Commission is authorized to undertake measures for bringing incompliant actions to an end. [38]

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[37] Ibid [8]

[38] Treaty on the Functioning of the European Union (consolidated version) [2012], OJ C326/90

Directorate General for Competition being an internal division of the Commission is the EU's competition authority entrusted with the abovementioned functions. Yet, Directorate General for Competition is not entitled to adopt a final decision on a given matter and such decisions are adopted by the Commission as a whole.[39] Therefore, adopting decisions on incompliant actions is carried out on the basis of voting of all of the Commissioners. In the meantime, application of competition policy is closely linked with an impact this or other decision may have on internal market and economy of the EU in general. For this purpose, position of Chief Competition Economist has been established. The Chief Competition Economist being a part of Directorate General for Competition carries out assessment of measures undertaken by Directorate General for Competition from economic perspective as well as gives insight on economy issues concerned with application of competition regulations.

It should be noted that the Commission possesses wide range of competences in relation to investigation of prohibited behavior. As such, officials of the Commission are authorized to enter premises of suspected undertakings, as well as other property, carry out examination of corporate records and books, take extracts from such corporate records and books and conduct interrogations with representatives of suspected undertakings.[40]

The Advisory Committee on Restrictive Practices and Dominant Positions

Another body functioning along with Directorate General for Competition is the Advisory Committee on Restrictive Practices and Dominant Positions which is comprised of the representatives of the Member States. It is worthwhile to note that despite broad competences of the Commission discussed above the Member States have the ability to take part and impact on decisions of the Commission through the Advisory Committee. Furthermore, historically the Advisory Committee was established for ensuring engagement of competition authorities of the Member States in decision-making process.[41]

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[39] Moritz Lorenz, *An introduction to EU Competition Law*, (CUP 2013)

[40] Moritz Lorenz, *An introduction to EU Competition Law*, (CUP 2013)

[41] Moritz Lorenz, *An introduction to EU Competition Law*, (CUP 2013)

As the name suggests, the Advisory Committee is a consultative body aimed acting as safeguard for the sake of effective and objective implementation of competition policies. Article 14 of the Council Regulation (EC) sets grounds for consultation with the Advisory Committee. Namely, it prescribes that certain decisions by the Commission may not be adopted without prior consultation with Advisory Committee. For instance, such decisions include decisions on termination of infringement (Article 7), interim measures *i.e.* decisions made to temporarily affect incompliant behavior of undertakings for preventing further harm to competition (Article 8), decisions on elevating commitments of undertakings to binding obligations (Article 9) *etc*. [42]

The Advisory Committee formalizes its position by issuing opinion on a given matter and pursuant to Article 14(5) of the Council Regulation (EC) 1/2003 the Commission is obligated to take opinion of the Advisory Committee into account.[43]

The Hearing Officer

The post of Hearing Officer was established in 1982 as an independent participant of competition proceedings whose aim stands for preserving the rights of undertakings brought to competition proceedings. Since then the Hearing Officer has proven its importance in competition proceedings and, as noted, plays 'vital role in ensuring that procedural rules in particular rights of the defense, are respected during a competition law procedure, and especially in the context of the Oral Hearing'.[44]

It should be noted that legislative acts governing functions of the Hearing Officer had been adopted several times and currently the Hearing Officer functions on the basis of Decision 2011/695/EU of the President of European Commission of 13 October 2011 on the function and terms of reference of the hearing officer in certain competition proceedings. Further to Recital 3 of the Terms of Reference the Hearing Officer ensures 'effective exercise of the procedural rights of the parties

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[42] the Council Regulation (EC) No 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003], OJ L1/14

[43] Ibid [14]

[44] Nikiforos Diamandouros, '*Improving EU Competition Law Procedures by Applying Principles of Good Administration: The Role of the Ombudsman'* [2010], 8 ECJ 379

concerned'.[45] The Hearing Officer is appointed by the Commission and, as laid down in Recital 7 and Article 1 of the Terms of Reference, it is also possible to appoint several Hearing Officers.[46]

Coming back to the functions of the Hearing Officer it should be highlighted, that under the Terms of Reference the Hearing Officer aims to ensure that the rights of the parties involved in competition proceedings are effectively exercised. To be more precise, competition proceedings mentioned in the Terms of Reference refer to Articles 101 and 102 of the TFEU and the Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings. In addition, the Hearing Officer is also entitled to receive complaints from undertakings involved in competition proceedings, as well as be involved in investigations conducted by the Commission for the purposes of preserving the rights of undertakings under suspect, for instance, in cases when such investigation concerns confidential documents covered by professional privileges, such as legal professional privilege.

Participation of the Hearing Officer in competition proceedings results in adoption of interim and final report. In interim report the Hearing Officer provides his or her observance on whether exercise procedural rights of the parties involved had been effective. This report is submitted to competent member of the Commission and Director-General for Competition. Following departure of draft decision on a given case to the Advisory Committee by Director-General for Competition the Hearing Officer draws up a final report which is handed in to the Commission together with the draft decision on a given case. Under Article 17 of the Terms of Reference, final report of the Hearing Officer is required to be published in the Official Journal of the European Union.[47]

The European Ombudsman

In light of the number of institutions, offices, bodies and agencies of the EU elimination of inefficency and bureaucracy in their functioning is a matter of utmost importance. As noted, correct

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[45] Decision of the President of the European Commission of 13 October 2011 on the function and terms of reference of the hearing officer in certain competition proceedings [2011], OJ, L275/29

[46] Decision of the President of the European Commission of 13 October 2011 on the function and terms of reference of the hearing officer in certain competition proceedings [2011], OJ L275/30-31

[47] Decision of the President of the European Commission of 13 October 2011 on the function and terms of reference of the hearing officer in certain competition proceedings [2011], OJ L275/36

exercise of the EU competition rules is not interest of only concerned parties, but interest of the whole EU and its citizens.[48] With that being said, Article 228 of the TFEU establishes institute of the European Ombudsman, which is elected by the European Parliament. Under Article 228 of TFEU European Ombudsman is entitled to conduct inquiries on his own initiative or on the basis of complaints received from individuals and legal entities concerning activities of the abovementioned organizations. It is specifically mentioned that powers of the European Ombudsman do not expand to ECJ due to it being a judicial institution.[49] Considering broad wording of the Article 228 of the TFEU it may be concluded that the European Ombudsman is empowered to receive complaints on the matters relating to actions of EU institutions in the field of competition. With that said, the European Ombudsman along with other bodies serves for preserving the rights of participants of competition proceedings. However, unlike other bodies, participation of the European Ombudsman in each and every competition proceeding is not prescribed. That is, the European Ombudsman is rather an *ultima ratio* than regular participant of competition proceedings.

Under the TFEU the European Ombudsman is entitled to conduct inquiries should the alleged facts be subject to legal proceedings. Should the European Ombudsman establish maladministration he or she shall refer to institution concerned for requesting its views on the matter. Finally, the European Ombudsman shall prepare a report which is submitted to the European Parliament.

It should be noted that the European Ombudsman is quite frequently engaged in competition proceedings and it is highlighted in the literature that the European Ombudsman is viewed as 'a complementary instance to that of the Hearing Officer and European Courts.'[50] In particular involvement of the European Ombudsman in such cases as *Intel* (2009)*, O2* (2008), *Airlingus/ Ryanair* (2009), *E.ON* (2010) may be highlighted.[51]

The Court of Justice of the European Union

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[48] Nikiforos Diamandouros, '*Improving EU Competition Law Procedures by Applying Principles of Good Administration: The Role of the Ombudsman'* [2010], 8 ECJ 379

[49] Treaty on the Functioning of the European Union (consolidated version) [2012], OJ C326/150

[50] Ingrid Vandenborre, Thorsten Goetz, '*EU Competition Law Procedure'* [2012], 3 ECJ 578

[51] Nikiforos Diamandouros, '*Improving EU Competition Law Procedures by Applying Principles of Good Administration: The Role of the Ombudsman'* [2010], 8 ECJ 379

The ECJ is the competent court to review decisions of the Commissions on matters concerning competition law. In addition, the ECJ is also entitled to interpret provisions of the EU Competition Law should there be a dispute regarding their interpretation. The ECJ itself is comprised from the General Court and Court of Justice. It should be noted that when it comes to competition disputes undertakings engaged may be protected by either of these courts provided that given matter falls within their competences.

As such, undertakings may appeal to the General Court against the decisions of the Commission on 'points of fact and law'[52]. Under Article 256 of the TFEU the General Court has jurisdiction to review, *inter alia*, legality of the acts of Commission. Article 256 of the TFEU further states that decisions of the General Court may be subject to appeal on points of law to the Court of Justice provided that conditions and limitations set in the Statute of the Court of Justice of the European Union are satisfied.

When it comes to competition proceedings, the most common ground to appeal for undertakings should be Article 263 of the TFEU envisaging action for annulment of decision of EU institutions, including the Commission.[53] As such, it is set that every natural or legal person is entitled to lodge an action against of the Commission. Alongside with it, there may be cases when certain dispute being heard by the courts of the Member States requires application of the EU Competition Law. For such instances, should interpretation of the EU law be required for ruling on the case, the courts of the Member States may refer to the Court of Justice for interpretation of provisions in question. This procedure of preliminary ruling is governed by Article 267 of the TFEU. When it comes to its application from perspective of competition regulation it should be noted that a national court may refer to the Court of Justice when hearing dispute between the parties and deciding whether particular matter complies with requirements of EU law.

National Competition Authorities

As it was observed above, involvement of national competition authorities is strengthened by Council Regulation (EC) 1/2003. Effectively, this means that burden of investigation of instances of

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[52] Treaty on the Functioning of the European Union (consolidated version) [2012], OJ C326/159

[53] Treaty on the Functioning of the European Union (consolidated version) [2012], OJ C326/160

incompatible behavior is carried together by national competition authorities and the Commission. Set of tools available for national competition authorities is laid down in Article 5 of the Council Regulation (EC) 1/2003. To be more precise, the national competition authorities are entitled to 'require an infringement to be brought on an end, order interim measures, accept commitments from undertakings, impose fines, periodic penalty payments or any other penalty, pursuant to national legislation of the Member State concerned.'[54]

The impact of national competition authorities to regulation of competition is notable. As provided in the statistic report of the European Competition Network the number of investigations conducted by national competition authorities exceeds such conducted by the Commission. Namely, for the past 10 years number of investigations conducted by national competition authorities exceeds such of the Commission by fair margin.[55]

National Courts

The Council Regulation (EC) 1/2003 provides that 'national courts shall have the power to apply Article 81 and 82 of the Treaty'.[56] It should be noted that entrusting national courts with such authority is viewed as a factor increasing risk of controversial interpretation of competition rules.[57] However, this risk is mitigated by the fact that the national courts do not enjoy the right of further development of competition rules but rather apply existing rules and approaches laid down in EU legislation or court practice. Additionally, positions of open for interpretation should be addressed under procedure of preliminary ruling to the ECJ.

1.5. Regulatory framework and conceptual basis of EU Competition Law: Article 101 of the TFEU

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[54] the Council Regulation (EC) No 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003], OJ L 1/9

[55] Statistics published by European Competition Network (available at https://ec.europa.eu/competition/ecn/statistics.html; last visited on 8 November 2019)

[56] the Council Regulation (EC) No 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003], OJ L 1/9

[57] Moritz Lorenz, *An introduction to EU Competition Law*, (CUP 2013)

As noted above, on level of primary legislation competition rules are set by the Articles 101-109 of the TFEU. This section seeks to provide more detailed analysis to provisions contained in the TFEU and secondary legislation of the EU.

Article 101 of the TFEU

Article 101 of the TFEU is regarded as one of three pillars of EU Competition Law alongside with Article 102 of the TFEU and EC Merger Regulation.[58] It lays ground for prohibition of agreements between undertakings or decisions by associations of undertakings and concerted parties provided that such agreements or decisions affect trade between the Member States and effectively lead to restriction or distortion of competition within the internal market or pursue this objective.[59] Article 101 further provides particular list of prohibited actions, which include sharing markets of supply, price fixing, application of dissimilar conditions to equivalent transactions, *etc*. [60] It should be noted that the list provided merely outlines the most common forms of incompatible behavior and its significance is disputed in literature and court-practice at least due to the fact that this list is not exhaustive.[61]

Concept of undertaking

Further analysis of Article 101 of the TFEU as well as EU Competition Law is not possible without determining what does an undertaking stands for. However, this concept is not defined and therefore this matter always had great importance for application of competition rules. In addition, definition of an undertaking may not depend on particular definition, if any, given by national legislation of the Member States due to EU-wise importance of the concept. This also means that it is not possible to use definition provided in legislation of one Member State and apply it all over the EU. Therefore, definition of undertaking should not stick to legal form but rather observe its activities *i.e.* whether an undertaking concerned is engaged in commercial activities, such as production, provision of

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[58] Moritz Lorenz, *An introduction to EU Competition Law*, (CUP 2013)

[59] Treaty on the Functioning of the European Union (consolidated version) [2012], OJ C326/88

[60] Ibid

[61] Walter Frenz, *Handbook of EU Competition Law* (Springer 2016)

services, sale of goods and attempt to provide definition based on such observation. However, it is noted in the literature that such approach in definition leads to conclusion that any individual or legal entity may be viewed as an undertaking.[62]

In the absence of established definition interpretation of the matter provided by judicial authorities should be observed. With that said, there has been several attempts to define undertaking. To be more precise, in *Klöckner*, a decision dating back to ECSC, it was noted that 'an undertaking is constituted by a single organization of personal, tangible and intangible factor within the context of independent legal subject intended to pursue a specific economic objective over the course of time.'[63] Further on, it was also noted that establishment of a legal entity (*i.e.* commercial legal entity) 'constitutes establishment of an undertaking.'[64]

However, later on the court practice emphasized functions executed by an undertaking and noted that an entity or individual engaged in economic activity should be classified as an undertaking 'irrespective of its legal form and the way it is financed'.[65] Accordingly, when speaking of the concept, it is not quite correct to link undertaking with a legal entity or individual entrepreneurship as the concept does not focus on legal forms of carrying economic or commercial activities and rather focuses on such activity itself. In this regard, *Enichem* may be brought as an example wherein it was stated that an undertaking is 'a complex concept involving human and physical components joined in the pursuit of a single economic activity'[66] With that said, economic unit represents combination of subjects engaged in economic activity. To summarize, it should be outlined that attempts to define an undertaking has led to establishment of two new concepts – 'economic unit' and 'economic activity'.

In the meantime, it should be also noted that concept of undertaking does not concern ownership of an undertaking ownership or its functions, whether public or private. That is, regardless of public or

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[62] Ivo van Bael, Jeal Francois Bellis, *Competition Law of the European Community* (Croner 1994)

[63] Cases 17/61 and 20/61 *Klöckner-Werke AG and Hoesch AG v High Authority of the European Coal and Steel Community* [1962] ECR I-00325

[64] Ibid

[65] C-49/07 *Motosykletistiki Omospondia Ellados NPID (MOTOE) v Elliniko* [2008] ECR I-04863

[66] T-6/89 *Enichem Anic SpA v Commission of the European Communities* [1991] ECR II-01623

private ownership of an entity EU Competition Law still applies. Furthermore, EU Competition Law applies in the same manner to the state and state authorities should they participate in commerce *i.e.* carry out economic activity, as well as to legal entities owned by the state. However, the state may as well exercise functions distinct from economic activity. Therefore, engagement of state in such capacity should be also emphasized and determined whether state acting in regulatory capacity falls under definition of undertaking. Based on functional approach outlined above it may be concluded that such engagement does not constitute economic activity and therefore does not fall under application of competition rules.

Economic Unit

Firstly, it should be noted that EU Competition Law views activities of an undertaking from perspective of their impact on competition. Therefore, when it comes to determination of criteria this factor should be borne in mind and it is one of the reasons why did the concept of undertaking lead to establishment of new concepts. With that said, it may be concluded that the concept of 'economic unit' allows EU to focus on those undertakings whose actions really have an impact on competition.[67]This leads to conclusion that competitiveness is one of characteristics of an economic unit.

Under given circumstances it may be challenging to determine whether an undertaking or undertakings concerned are acting individually or jointly and how should such relations be treated under EU Competition Law. This matter is crucial from regulatory perspective as level of independence of the parties concerned directly affects application of Article 101 of the TFEU. Therefore, for the regulatory purposes, establishment of clear and unified criteria is a matter of great importance. Nonetheless, boundaries of a single undertaking and economic unit are not clearly defined neither by EU legislation nor by available court practice. At this point it should be noted that in *Shell International Company* it is stressed that prohibition of agreements and concerted practices is aimed at economic units 'which consist of a unitary organization of personal, tangible and intangible elements which pursues a specific economic aim on a long-term basis and can contribute to the commission of an infringement'.[68] Such wording, precisely opting for the term *unitary*, leads

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[67] Okeoghene Odudu, David Bailey, '*The Single Economic Entity Doctrine in EU Competition Law'* [2014], 51 CMLR 1725

[68] T-11/89 *Shell International Chemical Company v Commission* [1992] ECR II-00757

to further conclusion that not every legal entity, individual or even entities without personality should necessary mean that given subject is an economic unit. In opposite, economic unit may be even formed by combination of different subjects giving them an opportunity to compete in the market. Therefore, alongside with competitiveness another criterion to be borne in mind is unitary or versatility of an economic unit.

Clearly, the ability of an undertaking to determine its actions and market policy should be also taken into account as otherwise real violator of competition rules would not be identified. That is, independence should be also used as criterion for determination of an undertaking. From this perspective, it may be noted that qualification of undertakings being parts of corporate groups sets some problems. Precisely, actions of undertakings being part of holdings may hardly be regarded as independent and the question is whether such undertakings may fall under application of competition rules. It should be noted that this matter is addressed by the concept of 'single economic unit' which will be observed further.

In some sense the concept of 'single economic unit' addresses structure of modern economy with numerous entities having subsidiaries all over the world. That is, interpretation of undertaking in the broadest way is crucial for preserving competition across the EU as this is by far the most widely spread corporate structure. However, it would be also unfair to apply the same approach with respect to both independent and related parties. For example, unequal relations such as those between principal and agent or between parent and subsidiary may not be construed as relations falling within the scope of Article 101 of the TFEU. In the meantime, it should be noted that status of an entity does not automatically lead to its recognition as single economic unit. As such, mere cooperation between parent and subsidiary entity does not impair independence of a subsidiary which means that conduct of such parties does not fall under concept of single economic unit.

Like other concepts, the concept of single economic unit is defined rather by court practice than legislation. In *Corrine Bodson* the ECJ held that two companies belonging to the same corporate group are considered a single economic unit in case when 'the subsidiary has no real freedom to determine its course of action on the market and if the agreements or practices are concerned merely with the internal allocation of tasks between undertakings'.[69] As it is evident from this wording, it is

[69] C-30/87 *Corinne Bodson v Pompes funèbres des régions libérées* [1988] ECR II-2479

recognized that the ability to compete does not come with establishment of legal entity it is independence of an undertaking that matters. Following this approach, it would not be fair to bring subsidiary executing tasks received from parent entity to competition proceedings while holding parent entity which in fact disrupts competition harmless. In addition, such approach would not even solve existing problem as ultimate violator of competition rules is not affected by competition proceedings. Further to this, it may be concluded that establishment and application of this concepts provides for prevention of incompatible behavior by identification of undertaking which in fact stood behind given infringement.

As noted above, the ability of directing activities is crucial for determination of whether undertaking concerned forms a single economic unit. Accordingly, in the context of relations between legal entity and another legal entity owned (controlled) by that legal entity economic independence of controlled legal entity and its freedom to carry out activities in its own way (or in other words, independence) should be emphasized. Should these tests be failed then such undertakings indeed constitute single economic unit. Meanwhile, it may be also added that parent carries out commercial activity through its subsidiary. This gives some ground to accept the fact that both of the parties act for achievement of common goal. Furthermore, as parent carries out commercial activity through subsidiary eventually the parent would receive profit from results of such activities, for instance, by distribution of net profit or dividends. Therefore, it is difficult to imagine that actions of parent and subsidiary are not aligned to each other or, even if not aligned, parent entity is incapable of taking measures to restrict such actions.

Normally, every corporate level within the group of companies includes several peer (or sibling) companies. With that said, arrangements between such peers which clearly do not have the ability to influence on each other still falls also requires observation. While *Hydrotherm* case is brought as example it should be noted that in this case impossibility of competition between parent and subsidiary legal entities was outlined. Therefore, it may be concluded that competition between 'sibling' legal entities is not addressed in this case.[70] Nonetheless, competition between legal entities with common parent does not seem impossible since they do not depend from each other in their commercial activity and may offer different conditions for consumers. However, it may be argued

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[70] Okeoghene Odudu, David Bailey, '*The Single Economic Entity Doctrine in EU Competition Law'* [2014], 51 CMLR 1732

that parent entity still has the authority to bring an end to such competition between sibling entities upon its own discretion. Based on this, it should be concluded that competition between sibling undertakings should be regarded as impossible. Given the circumstances it would be safe to assume that sibling entities indeed form a single economic unit if there are no evidences of the opposite.

In the meantime, it should be also noted that in establishment of legal entity is not required in order to qualify as a single economic. As such, in *Becu* the ECJ established that dock workers acting under instruction of their employees are 'incorporated into the undertakings concerned' and therefore form a single economic unit.[71]

Economic Activity

Clearly, it was hardly possible to define an undertaking without stressing its involvement in economic activity. By relying on commercial activity EU Competition Law seeks to exclude actions not bearing commercial character from the scope of assessment. It may be assumed that commercial activities include sale of goods, performance of works and provision of services. Meanwhile determination of economic activity also poses a question whether incompatible actions of an undertaking should necessarily pursue an aim of generation of profit. Wording of Article 101 of the TFEU does not clearly link incompatible actions of an undertaking with its aim to generate profit.[72] This means that an undertaking may not even have generation of profit as a goal but be involved in activities prohibited by EU Competition Law nonetheless. Furthermore, absence of such goal enables undertaking to have advantage over undertaking pursuing profit which eventually may result in distortion of competition.

Meanwhile, another question that needs to be answered relates to duration of an economic activity. As noted above, certain entities qualify as undertakings despite the fact that their initial functions are different. However, by engaging into economic activity such entities fall under application of competition rules. It is therefore crucial to determine period of time within which an economic activity should be carried out. However, based on the above it may be noted that duration of

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[71] Case C-22/98 *Criminal proceedings against Jean Claude Becu, Annie Verweire, Smeg NV and Adia Interim NV* [1999] ECR I-05665

[72] Treaty on the Functioning of the European Union (consolidated version) [2012], OJ C326/88

economic activity is no is not relevant factor for assessment since not all of the potential violators of competition rules engage in such activity on lasting basis.

Meanwhile, it should be also observed whether requirements applicable to certain activities undermine independency of subjects they apply to. For instance, this concerns not only legislative requirements but also codes of conduct adopted within certain associations. To be more precise, it should be determined whether existence of any particular requirements on conduct may be regarded as factor impairing economic independency, since there is a vast range of regulated industries, both from perspective of legislation and internally. The emphasis here should be placed on scope and goal of such regulation, precisely, it should be determined whether matters falling under specific professional regulation may concern independency of professionals falling under their application. In other words, if persons regulated by specific rules still have the right to carry independent economic activity they may be regarded as undertakings, as well as professional association.[73]

Based on criteria of economic activity it is also possible to distinguish consumers who pursue their private needs and undertakings whose existences stands for economic activity and generation of profit. For instance, private customers of investment companies purchase securities but their actions are aimed for meeting their personal demands whereas the same conducted on regular and commercial basis may be regarded as economic activity and accordingly trigger Article 101 of the TFEU. Yet, such approach is rather general, and, for the sake of consistency, case-by-case assessment should be conducted.

Scope of Article 101 of the TFEU

When speaking of scope of application of Article 101 of the TFEU three perspectives should be outlined. Firstly, based on the concept of undertaking application of Article 101 of the TFEU should be assessed from perspective of persons whether legal entities or individuals taking participating in the market. Accordingly, addressing this criteria or perspective analysis of the concept of undertaking outlined above is required. Secondly, geographic application should be taken into account. As noted earlier, EU Competition Law is closely linked to notion of internal market and serves for preserving undisrupted function of internal market among other objectives. This linkage

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[73] Walter Frenz, *Handbook of EU Competition Law* (Springer 2016)

to internal market allows to conclude that scope of application of Article 101 of the TFEU applies throughout the territory of the EU.[74] This raises a question on applicability of EU Competition Law on undertakings domiciled outside of the EU carrying out anti-competitive activities within the EU. Pursuant to effect-based approach upheld in Article 101 of the TFEU is should be highlighted that this matter is also addressed. Thirdly, incompatible activities should put relations protected by Article 101 of the TFEU in danger so there should be linkage between incompatible actions and threat to competition. Additionally, not every action satisfying criteria described above automatically falls under application of Article 101 of the TFEU. This leads to establishment of another criteria, namely, ability of uncompetitive actions to impair trade between the Member States and prevention, distortion or restriction of competition as objective of such activities. It should be noted that ability to affect trade between the Member States is rather vague wording and does not provide guideline for assessment. Therefore interpretation of this criterion is required.

Based on overall approach of EU legislator it may be assumed that consequences for trade between the Member States do not necessarily need to occur for triggering Article 101 of the TFEU, hence be simply possible under given circumstances. This is also supported by position of the ECJ in numerous cases, for instance *Maschinenbau Ulm*, wherein it was stated that 'it must be possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or of fact that the agreement in question may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States'.[75]

In the meantime, the wording 'trade between the Member States' cannot be interpreted narrowly and understood as goods-monetary relations, in the opposite for the purposes of competition regulations the notion of trade between the Member States should be extended to cover any commercial relations. Furthermore, involvement of the Member States in such relations is not required, especially considering peculiarities in application of the Article 101 of the TFEU on the states. However, this still leaves the question on application of Article 101 of the TFEU on anti-competitive behavior within one state open. In connection with this, it may be argued that incompatible actions taking place in one Member State still bear threat to the trade between Member State merely due to

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[74] Walter Frenz, *Handbook of EU Competition Law* (Springer 2016)

[75] C-56/65 *Société Technique Minière (L.T.M.) v Maschinenbau Ulm GmbH (M.B.U.)* [1966] ECR 00337

the fact that distortion of competition affects economy of the Member State concerned and this in its turn affects trade between that Member State and the others.

From narrow interpretation of Article 101 it may be concluded that undertakings should either conclude agreement or conduct concerted practice or collectively decide on given matter. It may be noted that listed forms of action do not distinguish much, and, for instance, concerted practice may be carried out on the basis of agreement concluded between undertakings. However, it may be argued that EU Competition Law places emphasis on violator (*i.e.* undertaking) and effect of the violation (*i.e.* impairment of trade between the Member States) not particular way of infringement. This approach is also upheld by the ECJ in *Polypropylene* case wherein it was stated that it is essential for the EU 'to draw a line between compatible and incompatible behavior regardless of type of collusion.'[76] With that said, broad interpretation allowed to cover wider range of potential harmful actions including, *inter* alia, labor bargains or requirements for an entry and operation within particular associations. This broad approach however does not lift the question on interpretation of the wordings 'concerted practice' or 'association of undertakings'. Quite expectedly, primary legislation does not provide definition of 'association of undertakings' leaving this matter for the court practice. Based on approach to definition of undertaking reviewed above it may be assumed that for the sake of consistency and comprehensive protection the approach upheld for definition of these notion should also be as broad as possible and based on overall values protected by the EU Competition Law in order to catch all instances of incompatible behavior. This accordingly means that 'association of undertakings' should be interpreted broadly and include both private associations (*i.e.* associations voluntarily established by undertakings operating in given market or markets) and public associations (*i.e.* associations whose establishment is required by legislation or serves public interests, such as for instance bar associations) From functional perspective association of undertakings may have different functions, especially considering difference in nature (public or private). However, co-ordinational and representative functions are indeed decisive because otherwise given association would lack power to threaten competition.

Notions of concreted practices and agreements between undertakings should be viewed together. Considering operational environment, it may be assumed that conclusion of agreements is by far the

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[76] C-49/92 *Commission v Anic Partecipazioni SpA* [1999] ECR I-04125

most widely spread form of incompatible behavior. In contrast to other types of violation, this form is not tied to any outcome of agreement in question for competition, which means that existence of agreement without any consequences can serve as a ground for competition proceedings. That is, evidences whether incompatible actions have been undertaken pursuant to agreement in question are not required. In contrast to this, concerted actions do not necessarily contemplate existence of agreement and therefore their treatment is rather result-focused. With that said, alignment of actions *i.e.* coordination needs to be proven.

Agreement between undertakings in the meaning of Article 101 is not linked neither to type of particular agreement nor to its classification under national law of the Member States. This allows vast range of agreements, such as the ones listed above, to fall under application of Article 101. Further to effect-based assessment in case of agreements the emphasis is placed on effect of particular agreement rather than its form. This is also evident from the fact that under applicable case law agreement is not required to be in effect or be replaced by a new agreement in order to invoke proceedings against undertakings.[77] However, this does not necessarily meant that every agreement concluded between undertakings should be viewed as potential threat to competition. Furthermore, for effective regulation only agreements having effect or potential effect on competition should be counted. This approach also allows to clarify the scope of application of Article 101(2) of the TFEU providing for nullity of incompatible agreements. As it is set in a number of jurisdictions, nullity of certain clause of agreement does not necessarily lead to nullity of the whole agreement. Further to this, when it comes to nullity envisaged by Article 101(2) of the TFEU only clauses having the potential to threaten competition should fall under application and accordingly matter on their nullity should be resolved. Speaking of subject matter of agreements, it should be also noted that Article 101 of the TFEU provides list of such agreements which is not exhaustive. This fact also gives way to effect-based assessment of particular agreements, namely from perspective of the threat such agreement may have on competition.

Meanwhile, it should be also noted that binding force of an agreement also requires observation. It is a regular practice in market to conclude term sheets or preliminary agreements not having binding force. This poses a question whether such agreements should also fall under application of Article

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[77] For example, see *SA Binon & Cie v SA Agence et messageries de la presse* [1985] ECR 02015

101 of the TFEU. Considering that these agreements may have adverse effect on competition in case of their conclusion it may be concluded that such agreements may as well fall under application of Article 101 of the TFEU.

It should be also noted that association of undertakings may also conclude an agreement with a single undertaking or another association (for instance, agreements between bar associations from different member states or agreements with associations from different industries). This case may be viewed as not falling within the scope of Article 101 of the TFEU since only decisions of associations of undertakings fall under its application based on narrow interpretation. Yet, under applicable case-law such agreements also fall under the scope of Article 101 of the TFEU.[78]

Article 101 of the TFEU also lists decisions of association of undertakings as an example of uncompetitive behavior. Besides criteria identified above, it is worthwhile to note that legislation does not provide definition of such decisions. However, the Commission clarified that decisions include 'any expressions of desire provided for in the duly approved articles of association'.[79] Such wording allows to apply competition rules on declarations, recommendations, spread sheets despite lack of their binding force. With a view to nature and functions of association of undertakings outlined above it may be concluded that decisions of such associations do need to have the power to direct activities of undertakings concerned. Consistently with approach of EU Competition Law, it should be added that neither the form nor legal structure of association is not relevant for application of competition rules, as well as the body having powers to resolve.

It is also worthwhile to note that all of the abovementioned activities are incompatible provided that they have are negatively impacting competition. However, Article 101 of the TFEU does not provide any features of competition, yet such clarity is required in order to understand what kind of relations are protected by competition rules. With that said, understanding of the scope of relations protected by Article 101 is based on the analysis of the context of EU legislation. As it was outlined above, the whole framework of EU Competition Law and competition regulations in any jurisdiction pursues an objective of maintaining functioning of the market as well as serves for benefit of consumers.

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[78] C-123/83 *Bureau national interprofessionnel du cognac v Guy Clair* [1985] ECR 00391

[79] Commission Decision 85/75/EEC of 5 December 1984 relating to a proceeding under Article 85 of the EEC Treaty [1985], OJ L 35/20

This, when extrapolated on the EU, leads to conclusion that competition regulations serve for preserving free and fair functioning of the internal market. Competition is a lasting process and market does not remain the same, which means that protection of competition does not only apply to undertakings which already operate in the market within given timeframe, but it also concerns undertakings willing to compete in future *i.e.* enter the market. Therefore, protection of competition has complex structure and Article 101 of the TFEU seeks to govern and thus protect aspect of its structure. Furthermore, competition is lasting process and it is tied to the state of market which constantly evolves. With that said, it may be concluded that competition regulations protect conditions enabling further growth and development of the market. From this perspective, it is clear that competition regulations do not only focus on competition going on at the moment but also allow competition to furnish in future provided that such competition is fair.

Speaking of interpretation of Article 101 of the TFEU it should be noted that in 2004 the Commission issued Guidelines on application of Article 81(3) of the Treaty No 2004/C 101/08 wherein it was outlined that protection of competition for the sake of 'consumer welfare and efficient allocation of resources is objective of Article 81'.[80] In the meantime, based on the practice of ECJ it should be also highlighted that interpretation of Article 101 of the TFEU is not limited to the words and phrases set in the Article. That's to say, more emphasis is placed on objectives of the TFEU rather than on wording itself. This approach is also evident from *GlaxoSmithKline Services* wherein it was stated that Article 101 of the TFEU prevents 'undertakings from reducing the welfare of the final consumers of the products.'[81]

Nullity of agreements and decisions and exemption provided in Article 101(3) of the TFEU

Catch-all provision used in Article 101(1) of the TFEU leads to nullity of agreements and decisions falling under its scope of application. As noted above, this requirement relates only to incompatible provisions of the agreement in question not the entire agreement. In addition, the parties of agreement may also insert provision stating that the agreement shall have effect even if some of its provisions shall be deemed void or invalid.

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[80] Commission Guidelines on the application of Article 81(3) of the Treaty [2004], OJ C101/97

[81] Joined Cases C-501/06 P, C-513/06 P, C-515/06 P, C-519/06 P *GlaxoSmithKline Services and Others v Commission and Others* [2009] ECR I-09291

It should be noted that national law may provide its own rules on nullity of agreements however they may not prevail over EU law so irrespective of national rules such agreements, precisely said, provisions are void. This particularly relates to requirements of national laws on declaration of nullity – a power which is usually conferred upon the courts. However, in case of incompatible agreements there is no need for declaration as this provision applies directly and without any notice. Doubtless, such agreements or decisions may have already established certain legal consequences by the time they were 'caught' by competition proceedings. This case is addressed by the ruling of the ECJ *Brasserie de Haecht* stating that nullity applies to 'all future and past effects of agreement and decision'.[82] Legal effect of this nullity applies not only in relation to the parties but to third parties as well. The TFEU does not provide further details on consequences of such agreements but Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and the European Union sets framework for those affected by incompatible actions of undertakings.

Article 101 (3) of the TFEU establishes competence of the Commission to declare requirements of Article 101 of the TFEU inapplicable provided that certain criteria are met. In the meantime, under Article 101(2) of the TFEU agreements and decisions falling under the scope of Article 101 of the TFEU are automatically void. These two rules should be viewed in conjunctions for the sake of consistent application. It means that prior to declaration of incompatibility and thus nullity of given agreement it should be assessed whether such agreement qualifies as exempted under Article 101(3) of the TFEU. This is also supported by Council Regulation (ECO 1/2003 stating that 'agreements, decisions and concerted practices which do not satisfy the conditions of Article 81 (3) of the Treaty shall be prohibited'[83] Accordingly, EU legislator provides a step-plan requiring first to assess whether incompatible behavior falls under exemption and undertake further actions after. It should be also noted that the Commission Guideline No 2004/C provides tests for assessment under Article 81 (current Article 101 of the TFEU) which consists of two parts. The first step relates to assessment of whether an agreement capable to affect the trade between the Member States 'has an anti-

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[82] , C-48/72 *SA Brasserie de Haecht v Wilkin-Janssen* [1973] ECR 00077

[83] the Council Regulation (EC) No 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003], OJ L 1/7

competitive object or actual or potential anti-competitive effects'[84]. Should requirements of the first test be satisfied then weighing of effects should be conducted. Precisely, pro-competitive and anti-competitive effects of the agreement concerned should be weighed. Application of this test further enables the Commission to declare prohibition laid down in Article 101(1) of the TFEU inapplicable. Undertakings may also conduct this test themselves or engage third parties.[85] Further to this the Commission has adopted a number of 'block exemption regulations' establishing rules and criteria for specific relations and their treatment under Article 101(3) of the TFEU. For instance, the Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted parties, states that vertical agreements shall be exempted from application of Article 101(1) of the TFEU 'to the extent such agreements contain vertical restraints'[86]. The Commission Regulation (EU) No 330/2010 further provides other criteria for exemption which include turnover of the parties concerned, market share, *etc.*

Article 102 of the TFEU – Abuse of dominant position

Pursuant to Article 102 of the TFEU 'any abuse of one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States'.[87] This wording allows to identify features of abuse of dominant position however does not entail all of the features. Wording of Article 102 of the TFEU allows to identify the following features of Article 102 of the TFEU: (i) dominant position should be held by one or more undertakings; (ii) this position must be held in the internal market or substantial part of it; (iii) dominant undertaking(s) should abuse its position; (iiii) such abuse should affect or have the ability to affect on trade between the Member States.

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[84] Commission Guidelines on application of Article 81(3) of the Treaty No 2004/C 101/08 [2004], OJ C101/98

[85] Ibid

[86] the Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted parties [2010], OJ L 102/4

[87] Treaty on the Functioning of the European Union (consolidated version) [2012], OJ C326/88

In the meantime, similarity between the wordings of Article 101 and 102 of the TFEU is apparent and this allows to assume that categories used therein should be interpreted in the same way. At the very least both of these Articles do pursue the same aim of maintaining proper functioning of the internal market. In addition, prohibition of abuse of dominant position is closely linked to consumer welfare as it may be concluded from the list of prohibited practices provided in the Article 102 of the TFEU. However, this point of view may be argued since consumer welfare is indirect result of fair competition and thus it is not the direct matter protected by the Article 102 of the TFEU.

Article 102 of the TFEU rests on a 'senior liability' of undertakings enjoying dominant position in the market. Although the term 'senior liability' does not relate to competition law at all, it may be used in the context as it assumed by the competition rules that dominant undertakings should be more responsible in their activities so that the rights of other undertakings not having dominant position would not be infringed. This, however, does not contemplate that an undertaking reaching dominant position shall no longer be able to act independently on the market. In opposite, such undertakings carry on competing in the market and even more – they try to keep their dominance, which means that their actions still pursue business aims, however with a view to requirements of legislation.

Based on the above, it should be also added that a dominant position is a precondition for incompatible behavior. However, if an undertaking legally becomes dominant and keeps its dominant position by legal means without abusing it then its actions cannot be held incompatible.

Concept of dominant position

Article 102 of the TFEU does not define dominant position neither directly nor indirectly. It should be noted that back in 1956 on the stage of discussion it was proposed to use the wording 'undertakings which are not confronted with any competition, or at least serious competition'.[88] However, it may be argued that this wording is also rather vague and does not set clear criteria for determination whether an undertaking enjoys dominant position in the market. Whether or not, eventually it was to the case law to determine what does constitute dominant position. In the meantime, the list provided in the Article 102 gives an insight on actions that a dominant

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[88] Renato Nazzini, '*Google and the (Ever-stretching) Boundaries of Article 102'* [2015] 0 ECJ 1

undertaking may be able to perform. Such actions include imposing unfair purchase prices, whether directly or indirectly, or other unfair trading conditions, limiting production, markets or technical development, *etc*. Pursuant to the ECJ dominant position exists when 'an undertaking enjoys position of economic strength which enables it to prevent effective competition from being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of the consumers'.[89] This definition contemplates that dominant position is characterized by its ability to prevent competition. However, in addition to mere prevention it is also noted that a dominant undertaking should be able to control and influence on the competition.[90] The Commission has also expressed its position on the matter by linking dominance to capability of undertaking to profitably increase prices above the competitive level without facing competitive constraints. However, this definition is argued as the ability of an undertaking to set higher prices does not necessarily contemplate its dominant position. Nonetheless, this approach is more in line with the definition of dominant position proposed in 1956.

In *Continental Can* the ECJ has crystalized features of dominant position by highlighting independent character of activities of undertaking and its ability to disregard competitors. It was also stressed that dominant position contemplates holding of certain market share and technical advantage over competitors enabling an undertaking 'to determine prices and set controls for distribution and production of products in question'.[91] Consequently dominant position is such state of activities wherein an undertaking concerned does not act based on conditions of the market – it acts upon its own discretion without taking into account realities of market. This does not only concern pricing strategy of undertaking but its each and every business decision.

The concept of dominant position is closely linked to the concept of market. Such linkage is evident from the wording of Article 102 which ties abuse of dominant position by undertaking to its actions in the internal market or substantial part thereof. Further to this, concept of dominant position requires definition of market which shall be reviewed below. In addition, the concept of dominant

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[89] C-85/76 *Hoffman-La Roche v Commission* [1979] ECR 00461

[90] Walter Frenz, *Handbook of EU Competition Law* (Springer 2016)

[91] C 6-72 *Europemballage and Continental Can v Commission* [1973] ECR 00215

position also requires assessment of actions of an undertaking in the market and outcome of such actions for the market. However, these factors are not considered to have decisive power but rather play ancillary role in the assessment, while analysis of the market and market structure should be regarded as decisive for determination of dominant position.

Analysis of market structure contemplates determination of market share. Accordingly, market share of undertaking under examination and its competitors along with possibilities to access the market are taken into account. It should be noted that these factors are viewed from perspective of relevant market which means that identification of relevant market is required in the first place. In the meantime, assessment of market share of an undertaking precludes comparison between the amount of goods and services sold or provided and total amount of such goods and services. For identification of dominant position, it is also crucial to conduct assessment in relation to real competitors of an entity. For instance, position of an undertaking involved in retail sale of automobiles may not be assessed in comparison to wholesalers. For the sake of completeness, it should be added that market share of an undertaking should not (and in fact is not) be fully relied upon. However, certain market share thresholds serve as red flags for identification of dominant position, for instance in *Hilti*[92] the ECJ noted that a market share of 70 – 80% clearly evidences on existence of dominant position. In addition, when speaking of market share it should be noted that certain undertakings enjoy regime of statutory monopoly, which means that they are the only actors in the given market. However, this status does not exempt an undertaking from application of Article 102 of the TFEU for so long as exemption under Article 106(2) of the TFEU is not used. As noted, market share is not the only criteria allowing to conclude whether an undertaking holds dominant position or not. Besides, assessment of other factors may be required for asserting dominancy of undertaking. This also means that market share is also assessed from perspective of other competitors, namely advantage in market share that an undertaking has compared to other undertakings competing with it, particularly its closest competitior. Such analysis allows to conclude that the difference between market shares demonstrates strength of larger undertaking.[93] Naturally, the gap between competing undertakings can be so little that it does not demonstrate advantage of

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[92] T-30/89 *Hilti AG v Commission* [1991] ECR II-01439

[93] Walter Frenz, *Handbook of EU Competition Law* (Springer 2016)

one undertaking over another. This however does not deny dominant position of undertaking concerned and in order to prove this further emphasis is required. For instance, in order to conclude on dominant position of undertaking analysis of factors allowing it to have upper hand over other undertakings should be examined. Such factors may include *inter alia* materials used by that undertaking, its corporate structure and decisions. Accordingly, market share does not directly evidence on existence of dominant position rather gives ground for further analysis. Furthermore, small market share of an undertaking does not exclude possibility of its dominant position but rather makes this less likely.

At this point, it should be noted that assessment of dominant position is conducted on individual basis and entails two steps. Firstly, the relevant market must be identified. For this purpose, definition of products, geographical and temporal factors should be assessed. Secondly, an undertaking concerned should be assessed taking into account its market share and market power, as well as existing barriers for entry into the market.

Existence of barriers for accessing the market supports dominant position at least because it simply decreases the number of potential competitors. It should be noted that such barriers do not necessarily relate to regulatory requirements which may decrease attractiveness of certain market for companies willing to engage. Barriers to market access may be also raised by a dominant undertaking itself, if such undertaking is so much superior that the competitors are unable to catch it up and eventually opt for competing in some other market. Accordingly, costs and overall complexity of establishing presence in the market, for instance, possibility of distribution, infrastructure available for entering and competing with already operating undertaking as well as regulatory environment combined play a role in assessment of barriers for entering into market.

Notion of relevant market under Article 102 of the TFEU

Doubtless, the notion of dominant position and its legal consequences for application of Article 102 of the TFEU would be incomplete without understanding market concerned. Given general approach and wording of the Article it may be argued that this notion simply entails internal market or substantial part of it, however such approach may not be upheld. Firstly, considering the scale of internal market such approach naturally leads to narrowing the scope of application simply because there are not so many undertakings capable of holding dominant position on such big market.

Secondly, hardly there is a general market, rather markets of different goods and services, which makes clarity in definition very important for application of Article 102 of the TFEU.

When speaking of relevant market certain goods and services offered in particular market come into mind in the first place. Following this approach, definition of relevant market is closely linked to particular goods and services and their features. This has led to development of particular aspects of goods and services such as their interchangeability. In other words, goods and services from different market players offered in particular market should be capable of substituting one another in order to form a relevant market. Therefore, if certain products or services have the ability to substitute one another and based on this they are precepted equally by the consumers it may give the ground to conclude that these goods or services form a relevant market.

As noted above, hardly any company is capable of affecting the whole internal market, rather a share thereof. Therefore, in assessment of relevant market geographical and temporal factors should be taken into account. These criteria follow establishment of relevant product market based on the factors outlined above. In determination of geographic coverage reference to internal market should be taken into account in light of ever-increasing integration of economies. However, sub-market may still be taken into account in determination of relevant market. Furthermore, in most cases identification of relevant market is merely limited to identification of sub-market, which, however, is not that simple as it sounds. Accordingly, geographical assessment contemplates breaking down various locations into small sub-markets depending on products, its distribution and availability.[94]

After all, it should be highlighted that Article 102 of the TFEU still refers to the internal market or its substantial part. This means that materiality of identified market should be taken into account or, in other words, market should have enough scale within the internal market. In *United Brands,* landmark case for the matter, the ECJ clarified that significance requirements are satisfied when a market concerned extends over several Member States[95], however size of the market does not play a role. Furthermore, substantial part of internal market may vary depending on nature of market. As such, significance of certain undertakings for the trade may be taken into account in assessment.

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[94] *Totalfina/ Elf Aquitaine* (Case M.1628) Commission Decision [2001] OJ L143/1

[95] C-27/76 *United Brands Company and United Brands Continentaal BV v Commission of the European Communities* [1978] ECR 00207

Additionally, determination of relevant market implies conducting of market study allowing to have comprehensive picture of the market by considering such factors as existing supply chains and overall consumer preferences.

Apart from features of products and geographical factor, it is also essential that the products in question are available in the market within designated period of time. For instance, certain products may be available within the entire year and therefore they may not form a relevant market with other products provided that such products are not available throughout the year. In other words, from temporal perspective it is crucial that comparable products are able to meet demands of the consumers in the same timeframe. It is also consequence of temporal factor that the undertaking may lose its dominant position should the timeframe for certain product elapse. It is therefore noted that dominant position should exist at the same time with abuse of such.

As noted, EU Competition Law seeks to protect natural development of the market. This is the case for the instances when certain new products enter the market and competitors try to catch up one another over the course of time. In such cases initial market should be taken into account. Additionally, it is also crucial to identify the timeframe within which a given undertaking held dominant position due to pioneering in certain sphere.

Concept of undertaking under Article 102 of the TFEU

Definition of undertaking refined for the purposes of Article 101 of the TFEU is applicable for the purposes of Article 102 as well. However, it is important to note that single economic unit doctrine described above does not apply to undertakings falling under the scope of Article 102 of the TFEU. The reason behind this lies in the fact that a dominant company may not necessarily distinguish its subsidiaries and other companies. This is also evident in light of the fact that a profit gained by parent company through its subsidiaries is provided in the form of dividends, which may or may not be distributed, while a dominant company directly receives its profit depending on its activities. The ECJ has expressed its position on the matter in *GT-Link* wherein it did not emphasize the fact that the parties concerned were in fact subsidiaries of a single parent.[96]

Similarly, to Article 101, undertaking in the meaning of Article 102 of the TFEU also entails public

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[96] C-242/95 *GT-Link A/S v De Danske Statsbaner* [1997] ECR I-04449

entities even if such undertaking performs functions conferred upon it by the state. In other words, market power granted to an undertaking by the state cannot be regarded as an excuse from application of Article 102 of the TFEU, unless other exceptions provided in legislation apply.[97]

It is also notable that Article 102 of the TFEU also refers to several undertakings as potential abusers of dominant position. As noted above, the concept of single economic unit does not apply to undertakings within the meaning of Article 102 of the TFEU and therefore it is required to determine precise meaning of the wording. With that said, such wording refers to dominant position held by several undertakings collectively.

Abuse of dominant position

Continental Can should be mentioned when speaking of abuse of dominant position. In this case the ECJ noted that elimination of competition by means of merger with another undertaking constitutes abuse of dominant position.[98] This view was criticized since the ECJ relied on fundamental objectives of the Treaty rather than wording of Article 86.[99] From analysis of the wording of Article 102 of the TFEU it may be concluded that in order to fall within its application an undertaking should have dominant position in the market and subsequently abuse it. Doubtless, dominant position is a threat to competition and for this reason any behavior that affects competition should be regarded as incompatible.

Article 102 of the TFEU further provides examples of abuse of dominant position which allows to assume that abuse of dominant position entails activities different from those taken in the course of ordinary competition between undertakings. In *Hoffman-La Roche* the ECJ stressed that abuse is an 'objective concept' which influences the structure of market and results in weakening of level of competition.[100] This position of the ECJ further leads to criteria enabling identification of abuse – effect on competition. Namely, in order to constitute abuse actions of an undertaking should have

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[97] Alisson Jones, Brenda Sufrin, *EU Competition Law: Text, Cases and Materials*, 263-264 (2016)

[98] C-6-72 *Europemballage and Continental Can v Commission* [1973] ECR 00215

[99] Valentine Korah, '*Interpretation and Application of Article 86 of the Treaty of Rome: Abuse of Dominant Position within the Common Market'* [1978], 53 Notre Dame Law Review 768

[100] C-85/76 *Hoffman-La Roche v Commission* [1979] ECR 00461

the capability to convert market from one state to another and thus impair ability of other undertakings to compete with abusing undertaking. For this purpose, it should be highlighted that ability of an undertaking to compete should encompass vast range of its activities so that more potential instances of incompatible behavior may be caught by Article 102. In other words, impairment of such ability does not only contemplate certain decrease in sales or other measures attributable to end functions of given undertaking, but also its ability to come up with certain offers in the market should be also included as it is hardly possible to compete without due access to supplies or *etc.*

Effect on trade between the Member States

In 2004 the Commission adopted Guidelines 2004/C 101/07 on the Effect of Trade Concept Contained in Articles 81 and 82 of the Treaty[101]. It was determined by the Commission that effect on trade under Article 102 of the TFEU entails different actions and it is not required for all of them to be present in order to establish that the trade between the Member State was affected by incompatible behavior. In contrast, presence of one action or aim is sufficient. It should be also noted that these Guidelines also determine and address concepts required for determination whether trade between the Member States was affected. These concepts emphasize trade between the Member States, potentials threats thereto and measure of such threat.

Last but not the least it should be noted that the Commission and national competition authorities, as well as the ECJ are authorized to enforce Article 102.[102] Investigation against dominant undertaking may be started by either own initiative of authorized bodies or complaints, which are usually received from competitors of the abusing undertaking.

Application of Articles 101 and 102 of the TFEU

The main distinction between Articles 101 and 102 of the TFEU is their objective. Namely, these Articles govern different forms of incompatible behavior focusing either on cooperation of

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[101] Commission Guidelines 2004/C 101/07 on the Effect of Trade Concept Contained in Articles 81 and 82 of the Treaty [2004], OJ C101/81

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

undertakings or actions of a single undertaking.[103] Speaking of nature of these Articles, *Tetra Pak I* may be mentioned as an additional argument wherein it was stated that despite common objective of these Articles they still constitute 'two independent legal instruments addressing to different situations'[104]. This is also evident from the fact that to certain extent the same concepts have different meaning and application for the purposes of these Articles, *e.g.* the concept of undertaking. However, these Articles do not exclude one another even though they may overlap in certain cases which leads to concurrency. Nevertheless, initiation of competition proceedings under one article does not exclude possibility to initiate proceedings under another. For instance, an agreement qualifying as incompatible under Article 101 of the TFEU may also be subject to proceedings under Article 102 of the TFEU. In this case the existence of dominant position of violating undertaking should be taken into account for initiation of competition proceedings.[105]

In the meantime, it may be also suggested that application of these articles does not take place simultaneously. That is, incompatible behavior may lead to establishment of dominant position and accordingly bear certain risks for competition. In this case subsequent abuse of dominant position will naturally trigger competition proceedings under Article 102 of the TFEU. However, it should be also taken into account that in case of Article 102 of the TFEU will not apply to parallel actions of several undertakings provided that such actions are carried out independently to the extent these undertakings do not satisfy criteria for holding of 'collective dominant position'.

1.6. Merger Control

It may be noted that provisions governing merger control are not reflected in primary legislation. This however, does not mean that Articles 101 and 102 of the TFEU do not apply to merger control, and indeed merger may be prohibited should it be considered incompatible under any of these articles. Nevertheless, absence of rules directly governing concentration may have negative consequences for competition regulation as Articles 101 and 102 of the TFEU may not be enough to prevent particular incompatible behavior. Accordingly, this leads to necessity of development of

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[103] Walter Frenz, *Handbook of EU Competition Law* (Springer 2016)

[104] T-51/89*Tetra Pak Rausing SA v Commission of the European Communities* [1990] ECR II-00309

[105]Walter Frenz, *Handbook of EU Competition Law* (Springer 2016)

additional set of criteria specifically covering concentrations and such development is rather unpractical when it comes to primary law.

With that said, such unclarity does not allow to carry out effective control over mergers which, naturally, bear certain threat to competition. Furthermore, as noted above EU Competition Law serves for the interests of internal market and for this reason establishment of robust merger control framework is vitally important. With that said, there has been several attempts to establish such regulatory framework, first of which dates back to 1989 when the Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings had been adopted. Subsequently, it has been repealed by the Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, which came to be known as the Merger Regulation. It should be noted that alongside with the EC Merger Regulation the Commission Regulation (EC) No 802/2004 of 7 April 2004 implementing Council Regulation No 139/2004 of 20 January 2004 on the control of concentrations between undertakings has been adopted. This Regulation in its turn is known as Implementing Regulation. In the meantime, there has been also a number of Commission Communications and Guidelines adopted for the purposes of interpretation.

Article 1 of the EC Merger Regulation sets the scope of application stating that the EC Merger Regulation shall apply to 'all concentrations with a Community dimension'[106]. Accordingly, application of the EC Merger Regulation is preconditioned upon the concept of concentration as defined by the EC Merger Regulation and Community dimension which is also provided therein.

The concept of concentration

Article 3 of the EC Merger Regulation sets that concentration arises when 'a change of control on lasting basis arises from (i) merger of two or more previously independent undertakings or parts of undertakings and (ii) the acquisition of direct or indirect control of whole or parts of one or more other undertakings by different means'.

As it is evident, by defining concentration in the above described way EC Merger Regulation seeks

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[106] the Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings [2004], OJ, L24/6

to govern not only mergers but also other forms of transfer of control over undertakings, including those functioning on different levels. This approach to definition of concentration is consistent with the title of EC Merger Regulation emphasizing control over undertakings. Meanwhile, wording of the EC Merger Regulation provides for actions of two or more independent undertakings in the concentration, even if their subsequent merger does not take place, for instance, due to establishment of joint-venture. This allows to conclude that that mere corporate procedures such as restructurings within a corporate group do not fall under application of the EC Merger Regulation since transfer of control does not take place.[107]

At this point, concept of undertakings referred to by the EC Merger Regulation should be also emphasized. Firstly, it should be noted that EC Merger Regulation does not distinct private and public undertakings applying equally to either should the criteria established be met. In the meantime, the EC Merger Regulation follows approach of upheld in definition of undertaking under Article 101 of the TFEU which accordingly means that undertakings should be independent economic units further to concept developed by the ECJ. This means that concentrating undertakings should have the ability of competing between each other. However, such approach leads to a question whether merger of undertakings operating in different markets and thus not competing with each other may fall under EC Merger Regulation. Meanwhile, it should be also noted that the Commission being competent authority under the EC Merger Regulation may provide its own definition which may be contrary to position taken by other EU institutions. As noted above, the concept of undertaking may also entail natural persons which may as well be the case for the EC Merger Regulation. As such, involvement of natural person in concentration may also trigger requirements of the EC Merger Regulation should a natural person partied to contemplated concentration have necessary control and the ability to transfer it to another undertaking.

As it may be noted Article 3 of the EC Merger Regulation refers to control as decisive factor for application. Therefore, definition of control should be emphasized in order to understand the notion of concentration in the sense of EC Merger Regulation. It should be noted that control may be defined in different ways depending on the purpose of regulation. For instance, under International Financial Reporting Standards 10 – Consolidated Financial Statements control contemplates

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[107] Walter Frenz, *Handbook of EU Competition Law* (Springer 2016)

exposure or rights to variable returns and the ability to affect those returns through power over an investee. Although such definition of control has little connection with the EU Competition Law it may serve as example of an attempt to define control in a more 'financial sense'. However, if generation of profit is regarded as the main purpose of commercial or economic activity then certain parallels may be noted.

In the context of EC Merger Regulation concentration takes place when an independent undertaking falls under lasting control of another undertaking. Article 3 of the EC Merger Regulation specifies that control arises from contracts or other means allowing to 'exert decisive influence' on an undertaking. In particular control contemplates the right ownership or the right to use assets of undertaking whether entirely or partially as well as the ability to influence on an undertaking from corporate perspective *i.e.* by exercising voting rights or making corporate resolutions. Obviously, transfer of control may have different forms and the EC Merger Regulation intends to catch all. This may include acquisition of shares or acquisition of assets. Speaking of latter, it should be noted that acquisition of assets may be regarded as concentration in case if assets in question are owned by an independent undertaking carrying out its own business activities which leads to conclusion that apart from other criteria turnover of undertaking in question should be also regarded.[108] After all, control should be construed as the ability to influence on an undertaking. Considering that there are different forms of control a question on forms of control falling under the scope of EC Merger Regulation should be observed. For this purpose, control maybe observed as the ability to undertake certain actions or prevent such. Accordingly, veto rights also fall under concept of control as they allow to prevent undertaking from certain actions. However, in such cases the ability of controlling should be assessed on case-by-case basis. It should be also noted that EC Merger Regulation does not only focus on control, it also complements control with its, so to say, temporal character. Namely, lasting nature of change of control is required to be presented as otherwise the threat to competition is impaired. Meanwhile, in Commission Consolidated Jurisdictional Notice No 2008/C 95/01 under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings it is noted that the EC Merger Regulation does not deal with transactions resulting in temporary change of control. However, even agreements concluded on definite period of time may fall under the scope

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[108] *Delta Air Lines/ PanAm* (Case IV/M.130) Commission Decision [1991] OJ L3/1

of EC Merger Regulation should extension of their term be possible. In the meantime, agreements concluded for a definite period of time may also trigger requirements of the EC Merger Regulation in case their term allows to establish lasting change of control. This, however, does not clarify the timeframe which allows to conclude that certain control is exercised on lasting basis. Pursuant to the Commission's approach timeframe should enable establishing changes in the structure of undertakings to be considered as lasting change in control.[109] EC Merger Regulation also intends to specify subjects of control under Article 3. In particular, control is acquired by persons who are holding the rights under contracts on concentration or those who have the power to exercise the rights deriving from such contracts without holding the rights under contracts on concentration.

Meanwhile, it should be also noted that the EC Merger Regulation establishes transactions which do not constitute concentration. In particular, such exemption relates to financial and credit institutions or insurance companies. The reason for this is nature of activities of the mentioned entities. Namely, operations of financial institutions or insurance companies involves operations with securities, including dealing with them for their own account or for the account of others. Their activities also include REPO transactions which contemplate holding securities. Furthermore, securities may be encumbered or transferred as a collateral in transactions concluded by these undertakings and accordingly application of competition regulations may disrupt operations of these entities. It should be also noted that such exemption also applies for securities acquired for the purpose of reselling. In relation to this it should be elaborated that credit institutions rarely engage in merger and acquisition transactions with entities not operating in capital markets (it is also regular practice to forbid establishment of subsidiaries operating in other fields apart from financial services in loan agreements where bank acts as debtor) so securities are normally held by financial institutions solely for the purposes of reselling – operation which is also exempted from requirements of EC Merger Regulation. In the meantime, EC Merger Regulation establishes certain conditions to such holding, for instance, restrictions on voting on the bases of securities held. Control acquired by an office holder in the course of liquidation, winding up and *etc*. and certain operations of financial holding companies also do not fall within the scope of EC Merger Regulation.

Community dimension

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[109] *DaimlerChrysler/ Deutsche Telecom/ JV* (Case COMP/M. 2903) Commission Decision [2003] OJ L300/62

EU Competition Law serves for proper functioning of the internal market and welfare of consumers. From this perspective it is no wonder that the EC Merger Regulation establishes thresholds which trigger requirements of the EC Merger Regulation if exceeded. In *Cementenbouw* it was clarified that involvement of the Commission is required only when concentration in question 'attains certain economic size and geographic scope'[110] Article 1 of the EC Merger Regulation establishes that a concentration shall have Community dimension should certain criteria be met. These criteria relate to worldwide turnover of undertakings involved (it should exceed 5 000 million EUR) and aggregate Community-wide turnover of involved undertakings (it should exceed 250 million EUR). However, concentration may still have Community dimension even if the above thresholds are not exceeded. For such cases the EC Merger Regulation provides a list of additional thresholds which, for instance, include lower threshold for worldwide turnover (EUR 2 500 million instead of EUR 5 000 million). It should be also noted that these sets of thresholds are accompanied by a special rule allowing to escape form Community dimension criterion if two-thirds of aggregate Community-wide turnover is achieved within one and the same Member State. In the Jurisdictional Notice it is clarified that worldwide turnover allows to understand overall scale of undertakings concerned while aggregate turnover within the Community determines whether activities of undertakings in the EU indeed have minimum intensity. Meanwhile, by applying the 'two-thirds' rule the EC Merger Regulation seeks to exclude purely domestic transactions from its scope of application. With regard to second set of thresholds the Jurisdictional Notice clarifies that their purpose is to tackle concentrations which do not have Community dimension but still may have an impact on at least three Member States.

As it is evident by assessing the scale of concentration the EC Merger Regulation seeks to establish jurisdiction of the Commission over concentration which is contemplated or already took place. This view is also supported by the Jurisdictional Notice stating that the thresholds do not intend to assess the market position of undertakings concerned nor impact that the concentration in question may have. With that said, the EC Merger Regulation establishes simple mechanism which allows undertakings to understand and thus notify on their transactions. Such approach leads to a question on the moment when the Commission's jurisdiction over concentration is established. The Jurisdictional Notice provides following dates: (i) date of conclusion of a binding legal agreement;

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[110] T-282/02 *Cementenbouw Handel & Industrie v Commission* [2006] ECR II-00319

(ii) date of public bid (iii) date of acquisition of controlling interest; (iiii) date of the first notification (either to the Commission or national authority of the Member State). Earlier date among the listed is considered as the date establishing the Commission's jurisdiction. It is also notable that the Jurisdictional Notice refers to binding legal agreement and excludes letters of intents, term sheets and other instruments used for structuring of M&A transactions.

For consistent application of the EC Merger Regulation unified approach for calculation of thresholds is required. For this purpose, Article 5 of the EC Merger Regulation along with the Jurisdictional Notice provides methods for calculation of turnover which is linked to amounts earned by the undertakings concerned in previous financial year from sale of goods and provision of services falling within undertaking's ordinary course of business and excluding certain transactions such as related-party transactions. The notion of 'undertakings concerned' also requires clarification which is provided in the Jurisdictional Notice, identifying undertakings concerned in different kinds of operations. As such, under paragraph 129 of the Jurisdictional Notice undertakings concerned are those participating in a concentration. Further the Jurisdictional Notice provides specific rules for identification of undertakings concerned in merger (each of the merging entities), acquisition of control (for acquiring side these can be one or more undertakings acquiring sole or joint control, while for acquired side these can be one or more undertakings being acquired wholly or partially). When it comes to acquisition of control by a joint-venture it should be determined whether the joint-venture itself should be considered as undertaking concerned or its parents. The Jurisdictional Notice clarifies[111] that acquisition by a fully functioning joint venture should be distinguished from the one established solely for the purposes of acquisition (the special purpose vehicle). With that said, each transaction involving joint-venture requires case-by-case assessment in order to determine the purpose of joint-venture being involved as acquiring party. For the sake of completeness, it should be added that parents of joint-venture acting special purpose vehicles shall be regarded as undertakings concerned.

Merger

From perspective of the EC Merger Regulation merger may take place both on horizontal and

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[111] The Commission Consolidated Jurisdictional Notice No 2008/C 95/01 under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings [2008], OJ C95/34

subordination basis. Accordingly, the main features that need to be present are independence of the parties and transfer of control. These criteria allow to exclude concerted practices of two undertakings which casually pursue the same goals but do not lose their independence and transfer control.

It should be noted that in practice concepts of legal merger and economic merger are developed. Firstly, speaking of legal merger, it should be noted that two or more undertakings may opt for establishing a new undertaking wherein their assets will be assembled. In such case we are evidencing amalgamation of previously existing undertakings, which have lost their legal personality due to establishment of a new one. Another mean for a merger is transfer of assets from one undertaking to another and as a result such undertaking is being absorbed by the other. Alternatively, a new undertaking may spin-off from another undertaking.

From economic perspective mergers are not linked to any legal mechanism used for implementation or shaping contemplated transactions. Therefore, it is commercial activities and their character that counts. As such, legal entities participating in economic merger do not cease to exist, but their economic independence and they no longer present a separate competitive force. Such merger is supported by certain contractual mechanisms enabling the parties to act uniformly and pursue the same goals in future. This however, does not affect legal standing of undertakings concerned as they retain their legal structure. With that said, for identification of economic merger profit and loss compensation mechanisms, allocation of risks and other economic factors should be assessed. Meanwhile, corporate governance may also serve as argument in such assessment[112].

Article 3 of the EC Merger Regulation also covers acquisition of control over undertaking, which is most common form of concentration. It should be noted that acquisition of both direct and indirect control falls under definition of concentration in accordance with the EC Merger Regulation. With that said, it should be noted that direct control contemplates acquisition of legal control over an undertaking, for instance, by purchasing shares from its previous shareholder, while indirect control results from the right of an undertaking to influence on another undertaking, by, for instance, designating personnel. In addition, the EC Merger Regulation does not contain exhaustive list of possible ways to acquire control, which means that there is still a room for interpretation and

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[112] *RTZ/CRA* (Case No IV/M.660) Commission Decision [1995] OJ C298

assessment of every case requiring notification. As an example of 'other means' purchase of stock options making shareholder dependent from actions of the holder of option. This may as well be the case for lending or pledging of securities should such securities in case if authorized party is also entitled to exercise the rights attached to securities in question. From previous example it is evident that acquisition of control takes place only if authorized party obtains the ability to exert a controlling influence on business activity of an undertaking. For this purpose, exercise of controlling influence by the authorized party is not necessary, it rather needs to have such power.[113] In the meantime, the EC Merger Regulation distinguishes 'asset deals' and 'share deals'. Accordingly, acquisition of all assets of an undertaking resulting in direct control over undertaking triggers requirements of the EC Merger Regulation. In the meantime, indirect control may be also acquired within the 'asset deal' should such deal involve the assets acquired enable acquiring undertaking to exercise decisive influence on the other undertaking. As noted above, in case of acquisition of assets involvement of an independent business having its own market presence is required. Accordingly, lease and operating agreements may also fall under definition of concentration under the EC Merger Regulation.

In comparison to 'assets deals' transfer of control in 'share deals' derives from corporate law. As such, by becoming shareholder an entity acquires vast competences which naturally involve control over the acquired entity. Accordingly, the ability to exert control should be attributed to certain amount of shares, usually majority or all of the shares. Further to this acquisition of minority shareholdings usually does not suffice for triggering requirements of the EC Merger Regulation due to lack of controlling power attributed to such shareholdings. However, there is also need for case by case assessment in share deals as circumstances of particular shareholding may be vary.

In connection with acquisition of minority shareholdings it should be also added that such transactions usually have their own purpose. Namely, acquisition of minority shareholdings represents financial interests rather than anything else.[114] In other words, transfer of control which is required for triggering the EC Merger Regulation hardly takes place in acquisition of minority

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[113] Walter Frenz, *Handbook of EU Competition Law* (Springer 2016)

[114] Fabian Badtke, Rea Diamantatou, '*Should the Acquisition of Non-controlling Minority Shareholdings be Treated as Concentrations?'* [2016], 7 ECJ 3

shareholding. However, there might be instances when acquisition of minority shareholding may be regarded as infringement of the EU Competition Law. For example, in *Philip Morris* the ECJ noted that non-controlling minority acquisitions may threaten competition, especially in cases where they constitute an instrument for commercial cooperation between competing undertakings.[115] In other words, financial interest of one competitor in performance of the other results in lowering intensity of competition between these undertakings.

Similarly to the approach taken in connection with determination of undertakings concerned in transactions concluded by joint-ventures, the Jurisdictional Notice clarifies that in transactions involving acquisition of control by one entity while there is another entity exercising control through that acquiring entity, control is in fact acquired by the latter despite the fact that it does not have formal control over particular entity.

Chapter 2: General overview of Azerbaijani Competition Law

2.1. Overview of legislative system of the Republic of Azerbaijan

Constitution of the Republic of Azerbaijan dated 12 November 1995 sets grounds for legislative system of the county. Under Article 15 of the Constitution the state establishes conditions for development of market economy, warrants freedom of entrepreneurship and combats monopolies

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[115] joined cases 142 and 156/84 *British-American Tobacco Company Ltd and R. J. Reynolds Industries Inc. v Commission of the European Communities* [1987], ECR 04487

and unfair competition. Freedom of entrepreneurship is further developed in Article 59 of the Constitution wherein it is established that everyone has the right to engage individually or collectively in entrepreneurial activity using his/her abilities and property.

Pursuant to Article 7 of the Constitution the state power is exercised by legislative power represented by Milli Majlis, the parliament, executive power on the President of the Republic of Azerbaijan and judicial power exercised by the courts. Azerbaijan applies system of checks and balances and therefore each of the bodies representing respective powers has its own means of influencing on other bodies or preventing them from certain actions, *etc.* Structure of legislative system of the Republic of Azerbaijan is established in Article 148 of the Constitution declaring that the legislative system shall be comprised of:

1) the Constitution;
2) Acts adopted by referendum;
3) Laws;
4) Decrees;
5) Resolutions of the Cabinet of Ministers of the Republic of Azerbaijan;
6) Normative acts of bodies of central executive power;

When it comes to regulatory framework of competition law, it should be added that analysis of legislation allows to supplement the above list with decisions of the Constitutional Court of the Republic of Azerbaijan, international agreements concluded by the Republic of Azerbaijan and customary law.

At this point, it should be noted that the main regulatory instruments in legislative system of the Republic of Azerbaijan are laws. Laws are adopted by Milli Majlis and they establish regulatory framework based on which other legislative acts are adopted further on. When it comes to regulatory framework of Azerbaijan Competition Law it should be noted that main laws governing competition are:

1) The Law No 526 “On antitrust activities” dated 4 March 1993

2) The Law No 590-IQ “On statutory monopolies” dated 15 December 1998

3) The Law No 1049 “On unfair competition” dated 2 June 1995.

However, it should be also noted that provisions governing competition may be also reflected in other laws and normative acts. As such, Article 1 of the Anti-trust Law states that anti-trust legislation of the Republic of Azerbaijan is comprised of the three of the abovementioned acts, the Constitution and other normative acts. In order to understand what kind of acts comprise competition regulation in Azerbaijan the notion of normative act should be further elaborated. Under the Constitutional Law No IV-KQ “On normative acts” dated 21 December 2010 normative acts are determined as ‘an official written document of a generally binding character, adopted (issued) by an authorized state body, and shall establish, amend or repeal legal norms and be envisaged for continuous application’. Therefore normative acts adopted by state authorities may be also regarded as anti-trust legislation to the extent they contain anti-trusts provisions.

Accordingly, administrative or individual acts are automatically excluded from the scope of acts comprising competition regulation. Comparing to the EU Competition Law it may be concluded that acts adopted by the Commission in connection with infringements may be qualified as individual acts in the sense of Azerbaijani law and such qualification does not allow them to be treated as acts establishing legal norms. With that said, these acts may not serve for regulatory purposes, though they still give some understanding of approach and practice of the authorized state body.

Further to the above, bodies of executive power are also entitled to adopt legislative acts within their competences. Competences of the President as head of the executive power are laid down in the Constitution, as well as competences of the Cabinet of Ministers which is higher executive body of the Republic of Azerbaijan. Apart from them there is also a number of central authorities of executive power functioning in the country. There authorities carry out their activities on the basis of regulations and charters approved by either the President or the Cabinet of Ministers.

2.2. Institutional framework of competition law in Azerbaijan

Article 3 of The Anti-trust Law, being the main legislative act concerning competition, declares that state policy on combating monopoly shall be carried out by central authorities of executive power. It should be noted that Milli Majlis, cannot directly engage an authority of executive power and it is regular practice for legislation to use vague wordings such as 'central authority of executive power' or 'relevant authority of executive power'. Therefore, following adoption of the law by the parliament the President adopts a decree on implementation of the adopted law wherein competences envisaged by the law in question are vested upon exact institution. With that said, for determination of competent state authority analysis of Presidential Decrees is also required. Running a bit further it should be also noted that the Anti-trust Law was adopted more than 20 years ago and compared to modern legislative practice this law and its implementing acts lack legislative technique in terms of details. Nevertheless, the Presidential Decree No 647 on implementation of the Law "On anti-trust activities" dated 2 December 1997 establishes that the authorized body within the meaning of Article 3 of the Anti-trust Law is the Ministry of Economy of the Republic of Azerbaijan.

The Ministry of Economy of the Republic of Azerbaijan

As noted above, Presidential Decree No 647 nominates the Ministry of Economy as the key state authority in the field of competition. It should be noted that the Ministry of Economy exercises its functions through its State Service for Antimonopoly Policy and Consumer Rights Protection functioning on the basis of Regulations approved by the Presidential Decree No 888 dated 28 April 2016 amending Presidential Decree No 203 dated 25 December 2009 on Ensuring Activities of the State Service for Antimonopoly Policy and Consumer Rights Protection under the Ministry of Economy of the Republic of Azerbaijan. Under its Regulations the State Antimonopoly Service carries out supervision over compliance with competition regulations, prevention of incompatible behaviour and taking measures against instances of incompatible behaviour. Article 16 of the Anti-trust Law also entitles the State Service for Antimonopoly Policy to inquire information from other state authorities, enterprises and authorized persons while exercising its powers. The State Service for Antimonopoly Policy is also entitled to rule on the cases conferred upon it by Anti-trust Law and the Regulations.

It should be noted that competition proceedings are not governed by the Anti-trust Law and the Regulations. For this purpose, the Cabinet of Ministers of the Republic of Azerbaijan has adopted

Decree No 120 approving Rules on Hearing the Cases on Violation of Competition Rules dated 29 May 1998. Under Competition Proceedings Rules the State Service for Antimonopoly Policy is authorized to institute competition proceedings on its own initiative or based on information submitted by state authorities, enterprises, non-commercial entities, *etc.* Upon institution of competition proceedings the Chief of the State Service for Antimonopoly Policy establishes commission which is entitled to review the case at hand and act on behalf of the State Service for Antimonopoly Policy. Based on this, it may be noted that authorities relating to investigation and submission of inquiries are mainly related to activities of the abovementioned commission rather than general authority of the State Service for Antimonopoly Policy. However, considering quite broad competences of the State Service for Antimonopoly Policy it might as well be some other way in for instance cases on protection of consumer rights. Legislation does not provide precise requirements for composition of such commissions merely noting that commission may not be comprised of less than three members.

The State Service for Antimonopoly Policy is also entitled to impose fines and financial sanctions on enterprises under procedure. It is envisaged that fines may be imposed in cases of non-adherence to instructions of the State Service for Antimonopoly Policy, failure to submit documents required under merger procedure or failure to submit requested documents in time as well as submission of incorrect information to the State Service of Antimonopoly Policy.

Under applicable legislation the State Service for Antimonopoly Policy adopts decisions on reviewed cases. Decisions are adopted by voting of the members of relevant commission. Further to adopted decision, the State Service for Antimonopoly Policy issues instructions on elimination of incompatible behavior. Pursuant to Section 4 of the Rules on Hearing the Cases on Violation of Competition Rules authorities of executive power, market subjects (their authorized representatives), citizens and individual entrepreneurs may appeal on decisions and instructions of the State Service for Antimonopoly Policy, including decisions on imposing fines either administratively or judicially.

Based on the above it may be concluded that the State Service for Antimonopoly Policy in light of its functions may be compared to the Commission, namely Directorate General for Competition. However, as it is also evident competition proceedings under Azerbaijani law do not involve such

safeguards as the Hearing Officers. Yet, it may be also noted that the possibility of appealing to decisions of the State Service for Antimonopoly Policy serves as safeguard for enterprises involved.

Administrative appeal

As noted above, the decisions of the State Service for Antimonopoly Policy may be appealed administratively. This indirectly means that the decisions adopted under competition proceedings qualify as administrative acts in the meaning of the Law No 1036-IIQ "On Administrative Proceedings". As such, Article 1 of the Law on Administrative Proceedings defines administrative acts as decision, decree or other authority order adopted by administrative authority for the purposes of resolving of the exact matter related to public law. Meanwhile, the Law on Administrative Proceedings also clarifies that administrative authority should be understood as relevant bodies of executive power, their subdivisions, municipalities and individuals or legal entities authorized to issue administrative acts. While the State Service for Antimonopoly Policy qualifies as authority of executive power under its Regulations, the discussed wording still does not clearly allow to conclude that decisions adopted by the State Service for Antimonopoly Policy do fall under definition of administrative acts since their public character may be argued, especially considering the fact that legislation does not provide definition of public law. However, it should be noted that amendments to the Rules on Hearing of the Cases on Violation of Competition Rules enabling administrative appeal on decisions of the State Service for Antimonopoly Policy have been made shortly after adoption of the Law on Administrative Proceedings which evidences that the legislator treats such decisions as administrative acts. Accordingly, decisions may be appealed by submission of administrative appeal which is defined as complaint on decisions, actions or omission of administrative authority submitted to higher administrative authority. With that said, for further analysis it is necessary to determine which of the authorities of the executive power is considered higher authority for the purposes of administrative proceedings. Based on the structure of the Ministry of Economy of the Republic of Azerbaijan approved by the Presidential Decree No 111 on Ensuring activities of the Ministry of Economy of the Republic of Azerbaijan dated 20 February 2014 it may be concluded that the Ministry of Economy qualifies as higher authority for the State Service for Antimonopoly Policy and accordingly appeals on decisions of the latter should be addressed to the said Ministry. Further to administrative appeal the Ministry of Economy may either

reject the appeal, annul administrative act wholly or partially and adopt a new administrative act or amend the existing administrative act.

Appeal Council under the President of the Republic of Azerbaijan

Presidential Decree No 761 on Establishment of the Appeal Council under the President of the Republic of Azerbaijan dated 3 February 2016 approves Regulations of the Appeal Council under the President of the Republic of Azerbaijan. The Appeal Council is established for the purposes of ensuring multi-pillar review of disputes between entrepreneurs and state authorities.[116] Jurisdiction of the Appeal Council covers disputes of entrepreneurs solely related to their commercial activity. Hearing conducted by the Appeal Council should be regarded as administrative proceedings and accordingly the Appeal Council may be referred to in case administrative appeal to higher administrative authority envisage the Law on Administrative Proceedings has been exhausted. With that said, the Appeal Council serves as additional safeguard within the framework of administrative proceedings for entrepreneurs.

Courts

As noted above, the decision of the State Service for Antimonopoly Policy may be appealed administratively or judicially. That is, an enterprise engaged in competition proceedings may as well lodge an action against decision of the State Service for Antimonopoly Policy in competent court. In order to determine jurisdiction of the court the Administrative Procedure Code of the Republic of Azerbaijan approved by the Law No. 846-IIIQ on approval of the Administrative Procedure Code of the Republic of Azerbaijan dated 30 June 2009 should be observed. In addition, it should be noted that the Administrative Procedure Code does not contain provisions governing establishment of courts. With that said, under the Law No. 310-IQ on Courts and Judges dated 10 June 1997 court system of the Republic of Azerbaijan is comprised of three pillars: (i) general courts, including administrative-economic courts (ii) appeal courts and (iii) cassation court. Based on this Article 26 of the Administrative Procedure Code establishes jurisdiction of administrative-economic courts. As such, under Article 2 of the Administrative Procedure Code administrative-economic courts have jurisdiction on disputes arising from administrative acts adopted by the state authorities. With that

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116 Presidential Decree No 761 on Establishment of the Appeal Council under the President of the Republic of Azerbaijan dated 3 February 2016, Article 1.1

said, it may be outlined that from judicial perspective administrative-economic courts are authorized to hear cases on breach of competition regulations. Decisions of administrative-economic courts are subject to appeal to administrative-economic boards of the Courts of Appeal whose decisions in their turn may be appealed to the Higher Court.

Constitutional Court of the Republic of Azerbaijan

As a general note it should be highlighted that courts in Azerbaijan do not enjoy such freedom of interpretation as, for instance, the ECJ. It means that in resolving disputes the courts are bound by letter of law and may not establish their own interpretation which shall be upheld further on. However, the Constitutional Court of the Republic of Azerbaijan is authorized by the Constitution and the Law No. 561-IIQ on Constitutional Court dated 23 December 2003 to interpret provisions of legislation.[117] Interpretation given by the Constitutional Court is binding for courts in the Republic of Azerbaijan. Meanwhile it should be also noted that till date there has not been any rulings of the Constitutional Court relating to competition regulations. Apart from it the Constitutional Court may be also appealed to in case all other judicial remedies are exhausted.[118]

2.3. Competition regulations: The Law on Antitrust Activities

The Law on Antitrust Activities was adopted few years after Azerbaijan regained its independence and shifted to market economy. That's to say, the Law on Antitrust Activities was developed during the period when market relations have not been intensive enough and therefore it is rather outdated due to lack of intensive market relations.

One of the main concepts established by the Law on Antitrust Activities is the notion of market subjects. Article 4 of the Law on Antitrust Activities defines market subjects as administrative bodies and commercial subjects participating in market relations. Administrative bodies are in their turn defined as authorities participating in exercise of executive power within Azerbaijan.[119] In contrast to this the concept of commercial subjects is not further elaborated and thus requires analysis. It should be noted that back in 1993 legislation in the Republic of Azerbaijan lacked

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[117] The Law No. 561-IIQ on Constitutional Court dated 23 December 2003, Article 32

[118] The Law No. 561-IIQ on Constitutional Court dated 23 December 2003, Article 34.4

[119] The Law No. 526 on Antitrust Activities dated 4 March 1993, Article 2

technique and therefore certain inconsistency in legislative acts is evident. In the meantime, regulatory framework for market relations had not been established which resulted in variety of different concepts and notions used in legislation. With that said, understanding of the concept of commercial subject requires analysis of legislative acts which have already lost their force. Further to this, the Law No. 847 on Enterprises dated 1 July 1994 states that an enterprise is commercial subject established in the form of a legal entity. In the meantime, the Law No. 405 on Entrepreneurial Activity dated 15 December 1992 states that both legal entities and individuals may engage in entrepreneurial activity.[120] Based on narrow interpretation it may be assumed that only legal entities fall under application of the Law on Antimonopoly Activity. However, the Competition Proceedings Rules clearly envisage that individuals, precisely, individual entrepreneurs may also be subject to competition proceedings.[121] With that said, it may be outlined that concept of commercial subject refers both to legal entities and individual entrepreneurs.

Article 8 of the Law on Antimonopoly Activities provides the list of activities of commercial subjects regarded as incompatible. As such, incompatible activities of dominant commercial subjects resulting in limitation of competition, infringing (whether factually or possibly) interests of other commercial subjects and consumers include, for instance, establishment of limited channels of sale for wholesale and retail commercial subjects *etc.*

Before proceeding to instances of incompatible behavior general rule laid down in Article 8 of the Law on Antimonopoly Activities should be analyzed. The Law on Antimonopoly Activities requires an action to be taken by commercial subject holding dominant position. Dominant position is elaborated in Article 4 of the Law on Antimonopoly Activities. Precisely, dominant position is defined as exclusive state of commercial subject establishing possibility for it to exert decisive influence on competition and create market barriers for other competitors based on advantage that entity has in economic potential. The Law on Antimonopoly Activities provides definitions of market barriers and dominant position. Namely, market barriers are defined as barriers restricting access of new competitors to the market or departure of existing ones from the market, while

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[120] The Law No. 405 on Entrepreneurial Activity dated 15 December 1992, Article 3.1

[121] Decree of the Cabinet of Ministers of the Republic of Azerbaijan No 120 approving Rules on Hearing the Cases on Violation of Competition Rules dated 29 May 1998, Section 2.13

commercial subject holding more than 35 percent of the market is considered dominant.[122] It should be also added that for particular cases other percentage may be envisaged. Further to provided definition, dominant position under Azerbaijani Competition Law is characterized by advantage in economic potential of entity further to which an entity has (i) possibility to exert decisive influence on competition (ii) ability of establishing barrier to market access. In the meantime, it is clarified that commercial subject holding 35 or more percent of the market is considered dominant. Establishment of qualitative and quantitative criteria for dominance leads to a question of their weight in assessment of dominance. In other words, it should be determined whether the assessment of dominance is carried out solely on percentage of the market held by commercial subject or are other factors also taken into account? Available legislation and practice do not provide answer to this question.

In the meantime, the Law on Antimonopoly Activities links incompatible behavior with effect of such behavior. Precisely, incompatible behavior of dominant commercial subject should either result in limitation of competition, infringement (actual or possible) of interests of other commercial subjects and consumers. List of actions considered incompatible is provided further on.[123] Such effect-based approach leads to a conclusion that actions listed in Article 8 of the Law on Antimonopoly Activities may still be regarded as compatible if they did not have abovementioned effects. Given linkage to effects it is required to further elaborate on definitions of effects contained in Article 8 of the Law on Antimonopoly Activities. As such, definition of limitation of competition is not provided in legislation. However, the Law on Antimonopoly Activities provides definition of anti-competitive measures which is defined as measures aimed to guard or isolate relevant market from competitors, such as concentrations, division of market, takeover of sale and supply channels *etc*. resulting in limitation of competition.[124] Based on this definition it may be concluded incompatible behavior of commercial subjects should eventually end up with one of these effects. However, such approach to interpretation of Article 8 of the Law on Antimonopoly Activities may

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[122] The Law No. 526 on Antitrust Activities dated 4 March 1993, Article 4

[123] The Law No. 526 on Antitrust Activities dated 4 March 1993, Article 8

[124] The Law No. 526 on Antitrust Activities dated 4 March 1993, Article 4

be argued due to similarity of anti-competitive measures and actions listed in Article 8 of the Law on Antimonopoly Activities which leads to overlapping of these articles.

Another effect envisaged by Article 8 of the Law on Antimonopoly Activities relates to infringement (whether actual or possible) of interests of other commercial subjects and consumers. This broad wording allows to interpret almost any action as incompatible, since hardly any action leaves interests of third parties unharmed. With that said, in my opinion infringement of interests of other commercial subjects should relate to their competitive interests *i.e.* weaken their positions as competitive force in the market, while interests of consumers should be construed in accordance with the Law No. 1113 on Protection of Consumer Rights dated 19 September 1995. In addition, closer look on instances of incompatible behavior listed in Article 8 of the Law on Antimonopoly Activities, allows to conclude that indeed the legislator implied negative influence on competitive interests of commercial subjects rather than their general business interests. For instance, rejection to conclude agreements on use of production units with counterparty results in decline in production of goods which accordingly weakens competitive force of counterparty.[125]

The Law on Antimonopoly Activities also prohibits cartels in Article 10. Namely, prohibition laid down in Article 10 of the Law on Antimonopoly Activities governs horizontal and vertical agreements partied by commercial subjects and administrative bodies provided that such agreements result in limitation of competition.[126] It should be clarified that the Law on Antimonopoly Activities provides definition of horizontal and vertical agreements. As such, horizontal agreements are defined as agreements concluded between commercial subjects operating on the same production chain or agreements concluded between commercial subjects operating in the same market for the purpose of restricting competition. Meanwhile, vertical agreements are defined as agreements concluded between commercial subjects operating on different levels of production chain or agreements concluded between commercial subjects and their customers or suppliers.[127]

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[125] The Law No. 526 on Antitrust Activities dated 4 March 1993, Article 8

[126] The Law No. 526 on Antitrust Activities dated 4 March 1993, Article 10

[127] The Law No. 526 on Antitrust Activities dated 4 March 1993, Article 4

As such, the Law on Antimonopoly Activities defines cartel arrangement voluntary arrangement of two or more financially and legally independent commercial subjects aimed to push aside other competitors from the market or prevent access of new competitors to the market. Cartel arrangements may be shaped as agreements on division of market based on volume of sales, customers, price-fixing or other means restricting competition. It is also notable that legislator follows effect-based approach in formulating this article as well.[128] As it is evident cartel arrangements involve two or more financially and legally independent commercial subjects. This leads to respective independence test. For determination of legal independence, the Civil Code of the Republic of Azerbaijan approved by the Law No. 779-IQ on approval of the Civil Code, its entry into force and other matters related thereto dated 28 December 1999 should be referred to. The Civil Code distinguishes dependent and derivative legal entities. As such, legal entity is considered derivative when other legal entity has the right to influence on its decisions deriving from majority shareholding or any arrangement between legal entities. This is the case for parent/subsidiary relations. In the meantime, legal entity shall be considered dependent if other legal entity holds more than 20 percent of share capital or voting shares.[129] Accordingly, in order to be considered legally independent parties to cartel arrangement should not fall under definitions of derivative (subsidiary) or dependent legal entity. This also means that cartel arrangements between legal entities being members of the same corporate group but having different shareholder fall under scope of application of the Law on Antimonopoly Activities provided that incompatible effect of such arrangements is also present. It should be also added that Azerbaijani legislation does not envisage shareholders' agreements, therefore measures for influencing on decisions of legal entity are related to shareholding. In the meantime, the Civil Code also implies existence of external management agreement allowing one legal entity to carry out functions of director of limited liability company.[130] However, this agreement is not further elaborated and rarely met in practice. Nonetheless, legal entity acting as director of another legal entity has certain ability to influence on decisions and

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[128] The Law No. 526 on Antitrust Activities dated 4 March 1993, Article 10

[129] the Civil Code of the Republic of Azerbaijan approved by the Law No. 779-IQ on approval of the Civil Code, its entry into force and other matters related thereto dated 28 December 1999, Articles 67, 68

[130] the Civil Code of the Republic of Azerbaijan approved by the Law No. 779-IQ on approval of the Civil Code, its entry into force and other matters related thereto dated 28 December 1999, Articles 91-2

therefore such relations may also fall outside of legal independence. Existence of possibility to influence on legal entity arising from pledge of securities or shares can also be viewed as impairment of legal independence.

In contrast to legal independence, neither legislation nor available practice address the concept of financial independence. Therefore, the concept of financial independence is open for interpretation and should be assessed on case-by-case basis. In connection with this it should be also added that inter-company loans or other indebtedness between companies may result in financial dependence of one entity from another. However, such dependence is achieved through legal mechanism therefore it is not clear whether existence of binding agreements resulting in indebtedness of one party impairs financial independence. Meanwhile, as it was determined above, notion of commercial subjects also entails individuals. In connection with this it should be noted that matters relating to their independence are not addressed in the legislation. It should be also added that prohibition of cartels applies both to private and public legal entities.

As noted above legislation does not contain any requirements on testing of parties' independence neither there is any official interpretation of provisions laid down in the Law on Antimonopoly Activities. The matter is not elaborated in the literature, as well. However, analysis of competition regulations in conjunction with other relevant provisions of legislation allows to conclude which approach shall be taken by the state authority. As such, it should be noted that the State Service for Antimonopoly Policy is entitled to inquire whichever document it considers necessary for the case at hand.[131] Given lack of regulation and available materials it may be also concluded that decision on financial and legal independence of counterparties may be also assessed based on the documents obtained from commercial subjects concerned.

Additionally, it should be noted that in narrow meaning incompatible actions rise from arrangement between the parties. However, it is not prescribed whether such arrangement requires conclusion of binding legal agreement or merely 'concerted practices' or commercial subjects will suffice. With that said, narrow interpretation of Article 10 of the Law on Antimonopoly Activities allows to conclude that incompatible actions should result from agreement between commercial subjects. On the other hand, it may be argued that the list of incompatible actions laid down in Article 10 of the

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[131] The Law No. 526 on Antimonopoly Activities dated 4 March 1993, Article 16

Law on Antimonopoly Activities indeed implies existence of binding legal agreement between commercial subject, however, in the meantime, paragraph prohibiting cartels uses different wording, precisely, refers to arrangement, not agreement. With that said, this matter lacks details and may be interpreted in several ways.

Prohibition of incompatible horizontal and vertical agreements does not only include prohibition of cartels described above. Article 10 of the Law on Antimonopoly Activities also provides list of other actions. Such actions include agreements between commercial subjects resulting in limitation of competition provided that these commercial subjects act as customer and supplier. In addition such relations contemplate that commercial subject acting as customer holds dominant position in the market. Taking into account definition of measures restricting competition given in the Law on Antimonopoly Activities[132] it may be concluded that legislators intends to cover abuse of dominant position committed through conclusion of incompatible agreements. However, the discussed Article does not contain the wording 'abuse of dominant position' it may be still concluded that these actions indeed fall under abuse of dominant position due to their result-driven wording.

It also notable that the scope of prohibition of incompatible horizontal or vertical agreements also extends to agreements on establishment of joint enterprise for the purposes of elimination of competition or its restriction. In connection with this rule it should be noted that Azerbaijani legislation does not provide any specific definition or regulation applicable to joint ventures. However, considering the wording of prohibition it may be still concluded that it applies to establishment of joint venture. It is not completely clear whether the prohibition covers only establishment of a new legal entity with several shareholders or for example acquisition of shares in already existing legal entity may also fall under the scope of its application. From this perspective, it is quite understandable that there are no precise requirements for agreement to be concluded between commercial subjects as this agreement may be even mere agreement on purchase of shares. Meanwhile, since the concept of commercial subject also entails individual entrepreneurs it may be concluded that agreement between two individual entrepreneurs also falls under application of this prohibition. In connection with this it should be added that individuals engaged in commercial

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[132] The Law No. 526 on Antimonopoly Activities dated 4 March 1993, Article 4

activity are required to be registered as individual entrepreneurs.[133] With that said, it may be concluded that prohibition concerns only actions of two individual entrepreneurs whereas agreement on establishment of joint enterprise concluded between individual entrepreneur and individual without entrepreneurial status should not be considered incompatible due to lack of commercial subjects in transaction. This view is also supplemented by the fact that participation in legal entity does not require any specific registration and does not count for entrepreneurial activity. In contrast to agreement between legal entities, the scope of potential agreements that may be concluded and regarded as incompatible may be identified. Firstly, establishment of legal entity requires conclusion of foundation agreement between its founders[134]. Secondly, individual entrepreneurs may opt for acquisition of shares in already existing legal entity and for this purpose they will conclude share purchase agreement.

In the meantime, it should be also added that unlike previous prohibition this prohibition clearly mentions market subjects as potential violators. Based on definition of market subjects prescribed above it may be concluded that state authorities, as well as associations of enterprises may fall under its scope should such agreement be concluded in the course of their exercise of administrative functions.[135]

Last but not the least, this prohibition emphasized the purpose of conclusion of incompatible agreement. As such, the agreement should be concluded with the purpose of elimination or restriction of competition. Having identified potential agreements that may be concluded between the parties it may be noted that verification of purpose might be difficult, even impossible, exercise for the state authorities. However, general rule laid down in Article 10 of the Law on Antimonopoly Activities links incompatible behavior with its result which provides certain, rather weak, ground for application of this prohibition.

Merger control

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[133] The Law No. 405 on Entrepreneurial Activity dated 15 December 1992, Article 10

[134] the Civil Code of the Republic of Azerbaijan approved by the Law No. 779-IQ on approval of the Civil Code, its entry into force and other matters related thereto dated 28 December 1999, Article 46

[135] The Law No. 526 on Antimonopoly Activities dated 4 March 1993, Article 4

Article 13 of the Law on Antimonopoly Activities establishes supervisory authority of the State Service for Antimonopoly Policy over establishment, reorganization and liquidation of commercial subjects. Such supervision allows to prevent potential abuse of dominant position or other incompatible outcomes. Indeed, the Law on Antimonopoly Activities also ties supervision with the aim of preventing potential abuse of dominant position or limitation of competition. Further on, the Law on Antimonopoly Activities provides precise list of cases falling under supervision.[136]

To start with, it should be noted that the Law on Antimonopoly Activities was adopted long before the Civil Code and was not harmonized with it afterwards. Accordingly, terminology used in the Law on Antimonopoly Activities is significantly different from the one used by the Civil Code. For instance, when speaking of forms of concentration, the Law on Antimonopoly Activities lists forms that are not defined in applicable legislation. Furthermore, analysis of legislative acts that had been effective prior to adoption of the Civil Code does not provide any clarity on the matter. Therefore, as a first step definitions used by the Law on Antimonopoly Activities should be aligned with those set by the Civil Code. As such, amalgamation or merger of commercial subjects resulting in establishment of commercial subject holding more than 35% of relevant market is listed as first basis for supervision. It should be noted that amalgamation results with establishment of a new legal entity while in case of merger one of counterparties continues to exist.[137] Accordingly, when the Law on Antimonopoly Activities refers to establishment of commercial subject as criteria triggering respective supervisory measures it does not necessarily mean that a new legal entity should be established in accordance with procedures envisaged in legislation. In the opposite, this criterion should be reviewed from perspective of market *i.e.* whether there have been any changes in subjects operating in the market.

Another basis for state supervision relates solely to assets of commercial subjects engaged.[138]As such, amalgamation or merger of commercial subjects with combined value of their assets exceeding the set threshold triggers state supervision. However, legislation does not provide particular details related to calculation of value of assets. As such, it is not clear whether the number indicated in

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[136] The Law No. 526 on Antimonopoly Activities dated 4 March 1993, Article 13

[137] Emin Kerimov, *Corporate Law of Azerbaijan*, (AAA 2014)

[138] The Law No. 526 on Antimonopoly Activities dated 4 March 1993, Article 13

financial statements of commercial entities engaged should be considered, or whether it is required to conduct independent valuation of assets possessed by commercial subjects at the moment preceding merger or amalgamation is required. In addition, there are no particular requirements related to audit of assets, while there is a tendency in legislation to use audited financial statements as basis for corporate actions.

Lastly, the Law on Antimonopoly Activities provides that liquidation or spin-off of state and municipal enterprises exceeding the set threshold also falls under state supervision in case it results in establishment of commercial subject holding more than 35% of relevant market. Once again there is no clarity in connection with method used for calculation of assets. It should be also added that for a long time there had been no established definition of state enterprise. However, in 2018 definition of state enterprise had been enacted to the legislation, which also allowed to identify commercial subjects falling under the scope of this requirement. Precisely, limited liability companies, joint-stock companies and public legal entities in which the state holds directly or indirectly more 51 or more percent of the shares (participating interests) is considered state enterprise.[139]In the meantime, there is no established definition of municipal enterprise. However, the Constitution provides that municipal property, along with state and private property, is one of the possible forms of property.[140]Following this approach and definition of state enterprise established in legislation it may be concluded that legal entities outlined above in which 51 or more percent of shares (participating interests) is owned by municipalities should be considered municipal enterprises. In the meantime, application of this requirement in cases of liquidation is not clear as well. To be more precise, linkage of liquidation and spin-off with establishment of dominant position in relevant market raises certain questions which are not addressed by the legislation and available practice.

Apart from the above, the Law on Antimonopoly Activities sets certain requirements on state supervision over acquisition of shares (participating interests) and assets provided that such transactions meet established criteria.[141] Prior to proceeding to specific cases, grounds triggering reporting and approval requirements set by the legislation should be observed. As such, reporting

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[139] The Law No. 358-IIQ on Budget System dated 2 July 2002, Article 1.1.30

[140] Constitution of the Republic of Azerbaijan dated 12 November 1995, Article 13

[141] The Law No. 526 on Antimonopoly Activities dated 4 March 1993, Article 13-1

and approval requirements are triggered in case if (i) balance value of commercial subjects participating in transaction exceeds the set threshold (ii) one of entities participating in transaction holds more than 35% of relevant market (iii) if commercial subject acquiring shares controls commercial subject alienating the shares. In contrast to previous thresholds linked to value of assets this time the legislator explicitly notes that balance value of assets should be taken into account. This, however, does not eliminate all concerns regarding application of this criterion. By attributing market share (and respectively dominant position) to participants of transaction legislator intends to cover abuse of dominant position as well, since dominant entities have more resources for committing, for instance, hostile takeover. Finally, the third criterion, *inter alia*, offers protection to minority shareholders and accordingly prevents major shareholders from solely exerting influence on commercial subjects which eventually may distort competition.

Accordingly, specified transactions satisfying one of the above criteria fall under state supervision. These transactions include (i) acquisition of 20 or more percent of voting shares (participating interests) comprising share (charter) capital of commercial subject by another commercial subject or union of commercials subjects, as well as commercial subjects controlling one another (ii) acquisition or transfer for use of main means of production or intangible assets, in case if balance value of objects in question comprises more than 10% of balance value of main means of production or intangible assets of alienating party (iii) acquisition of rights enabling commercial subject to determine conditions of commercial activity of another commercial subject or exercise functions of its higher governance body.

With regard to first transaction it should be outlined that voting shares referred to in the Law on Antimonopoly Activities are envisaged for joint-stock companies which accordingly means that mere acquisition of participating interests in limited liability companies may fall under state supervision should it satisfy criteria outlined above. Meanwhile, legislator excludes founders of a legal entity from the scope of this requirement, so establishment of legal entity is not considered as transaction under supervision. By establishing the second supervised transaction legislator intends to include ‘asset deals’ under supervision. It should be added that legislator uses the wording transfer for use instead of lease, thus intending to cover wider range of legal instruments that may be summoned for establishing the right of use of main means of production or intangible assets. In the

meantime, it is notable that the legislator uses wording main means of production. However, linkage between such means and book value implies that accounting treatment of such means prevails over their legal form. Therefore, in order to identify what kind of means may trigger state supervision when bought or transferred for use reference to accounting or even tax rules is required.

Finally, the third transaction that may potentially fall under supervision involves acquisition of right to determine course of commercial activity or right to exercise functions of higher governance body. At this point it should be noted that the Civil Code refers to general meeting of participants and general meeting of shareholders as higher governance body of respectively limited liability company and joint-stock company.[142]With that said, acquisition of such right in most of the cases would mean acquisition of shares of an entity, which overlaps other grounds envisaged by legislation. However, it may be argued that the right to exercise functions of higher corporate body may also arise from pledge of shares (participating interests). Accordingly, despite certain overlapping this transaction has its own features.

It is also notable that the Law on Antimonopoly Activities seeks to bring groups of companies under its scope of application. As such, the rules applicable to merger control arising from acquisition of shares or assets specify that controlled transaction may be concluded by commercial subjects having control one over another. While there is no established concept of single economic unit it may be still highlighted that to certain extent Azerbaijani legislation catches up with such of the EU.

As a general note it should be outlined that neither legislation nor available court practice do not provide any details for determination of relevant market. Considering lack of regulatory information, it may be concluded that determination of relevant market for commercial subject involved is carried out in the course of competition proceedings and is not disclosed to the public.

Last but not the least, it should be noted that there have been attempts to modernize Azerbaijani competition legislation. In particular, the Competition Code of the Republic of Azerbaijan was developed in 2011. However, the bill on approval of the Competition Code of the Republic of Azerbaijan is still pending parliament approval. Nonetheless, considering fluctuations of oil prices

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[142] the Civil Code of the Republic of Azerbaijan approved by the Law No. 779-IQ on approval of the Civil Code, its entry into force and other matters related thereto dated 28 December 1999, Article 91 and 107

the state is willing to enhance non-oil economy which accordingly requires certain safeguards for competition.

Chapter 3: Comparison of the EU and Azerbaijan Competition Law

It is beyond any doubt that development of legislation in market economy largely depends on intensity and complexity of market relations. For certain, there are other factors influencing development of legislation, such as approach of authorized bodies, but at the end of the day legislation simply catches up after market. From this perspective, it may be concluded that developed economies offer more detailed and complex regulatory framework than those which are about to develop.

On the other hand, when comparing legislation of two jurisdictions regulatory role and nature should be also taken into account. That is, despite having the same aim of preserving competition, the EU and Azerbaijan have different nature of their competences which results in establishment of more complex regulatory framework, involving different forms of cooperation and procedure. Further to this, EU Competition Law may be compared with competition law of a federal state. But when it comes to comparison of with unitary state certain aspects of the EU legislation are not even subject to comparison. With that said, comparison should be conducted from the following perspectives:

Institutional aspect

Institutional framework contemplates existence of bodies entrusted with either supervisory functions and (or) safeguard functions. As it is evident, competition control in both EU and Azerbaijan involves single authority (unlike, for instance "twin peaks" model for financial supervision) which is authorized to rule on instances of incompatible behavior. However, institutional framework of the EU has gone further than that of Azerbaijan and involves integration of different safeguards within the supervisory authority. In other words, Azerbaijani state authority entrusted with competition control functions does not offer any specific safeguards to entities involved in competition proceedings. Furthermore, lack of involvement results in more simple competition proceedings and leaves commercial entities to decide which of appeal strategies envisaged by the legislation they wish to use should their rights be infringed in the course of competition proceedings. At this point it should be added that both EU and Azerbaijani legislation provide somewhat closer range of institutional safeguards, however those of EU are engaged in more stages of competition proceedings than those of Azerbaijan.

It should be also added that transparency of practice is of vital importance for matter like competition law. From this perspective, the EU institutions involved in competition control are clearly ahead of their Azerbaijani *vis-à-vis* due to clarity and predictability of their practice for the very least. That is, institutions engaged in competition control combine their efforts to establish unified practice and approach to matters relating to competition law and this may be tracked by participants of market relations through published legal acts. Unlike the EU, Azerbaijani authority does not enjoy that much freedom for interpretation and establishment of practice and it goes without saying that it is not required to make its decisions available to the public. This results in unclarity and unpredictability of competition regulations which accordingly affects economy.

Legislative aspects

Clearly, legislative system of the EU and Azerbaijan cannot be compared due to their different nature. However, legislative approach and regulatory framework are indeed subject to comparison. As noted above, development of legislation largely depends on necessity of this or other regulation. The EU being much bigger and complex than Azerbaijan has to take different factors into

consideration while developing its legislation. Yet, both of these jurisdictions seek to protect competition by similar ways.

What makes them different is details provided either in legislative acts or court practice. In other words, development of competition legislation. Firstly, prohibition of cartels laid down both in EU and Azerbaijani legislation should be compared. Apart from rules envisaged in primary legislation of the EU there is also massive judicial material interpreting these rules. By summoning both legislative and judicial tools EU legislation achieves more thorough regulation. Accordingly, this results in establishment of a number of concepts that supplement competition regulation. For instance, Azerbaijani Competition Law does not provide concepts similar to 'single economic unit' neither does it seek to set any boundaries for entities falling under application of competition rules. This is one of the factors that allows to conclude that the EU Competition Law catches more possible forms of incompatible behavior that that of Azerbaijan. Speaking of conceptual element, it should be outlined once again that Azerbaijani Competition Law is in dire need of revision in order to be in line with requirements and challenges of modern market. Considering that judicial and institutional interpretation is rather limited under Azerbaijani legislation enacting of new concepts for the sake of catching all possible infringements is the only way for development. For instance, the Law on Antimonopoly Activities does not contain such concept as 'concerted practices' requiring binding legal agreement to be in place in order for an infringement to be brought to justice. In the meantime, EU legislation provides different tests enabling to identify instances of incompatible behavior (not only in cartel arrangements but throughout the entire regulatory framework). Azerbaijani legislation also seeks to establish tests (such as, for instance, financial and legal independence) but their application and content is not clear, especially in the absence of administrative or judicial interpretation.

It should be added that both jurisdictions uphold effect-based approach to certain extent. While EU seeks to maintain proper functioning of the internal market and thus takes more aspects into consideration, Azerbaijani legislation focuses on proper functioning of its market. Therefore, the concept of effect of incompatible behavior to trade between the Member States may be irrelevant for Azerbaijani regulation but still approach-wise it can shed some light and ensure clarity in regulation, since the Law on Antimonopoly Activities does not emphasize effect of incompatible behavior.

Furthermore, certain inconsistency in wording is also evident from analysis of original text of the Law on Antimonopoly Activities, which however can be justified since the country has just re-gained its independence. Neither does Azerbaijani legislation provide any exemptions such as 'block exemptions' envisaged by the EU legislation.

Secondly, abuse of dominant position envisaged by Article 102 of the TFEU should be compared with the rules set by the Law on Antimonopoly Activities. Unlike EU legislation, Azerbaijani legislation does not particularly emphasize abuse of dominant position. However, it still operates with the concept of dominant position therefore approach of both jurisdictions may be compared. Unlike Azerbaijani legislation, EU Competition Law establishes a set of tests aimed to determine existence of dominant position including not only market share but also geography and time. For the sake of determination, it also develops the concept of relevant market. In contrast, Azerbaijani legislation ties dominant position to market share in the relevant market without providing any specific details on determination of market share and relevant market.

Thirdly, merger control applied in both jurisdictions should be compared. As such, while EU legislation summons different tools for controlling mergers Azerbaijani legislation contains a few rules on the matter. Furthermore, from conceptual standpoint the Law on Antimonopoly Activities uses different concepts in comparison to those envisaged in the civil legislation which results in unclarity. In the meantime, scope of application of EC Merger Regulation is wider than that of the Law on Antimonopoly Activities and quite expectedly the Member States may have their own understanding and definitions of concentration or other terms used therein. However, the EC Merger Regulation provides definition of concentration and establishes appropriate tests for identification. That's to say, difference in concepts used in one legislative acts may not be automatically regarded as negative factor. Details and establishment of appropriate test is decisive factor comprising effective regulatory framework. With that said, merger control established by Azerbaijani legislation requires development of already existing concepts and addition of new concepts in order to eliminate existing unclarity and extend scope of application for achieving effective regulation.

Clearly, EC Merger Regulation observes different features of concentration and aims to establish comprehensive regulatory framework enabling to protect competition from all possible threats. Such

approach leads to development of rules which do not only focus on legal shaping of concentration but extend to cover economic side of the matter as well.

It should be also emphasized that EC Merger Regulation provides instances which do not constitute concentration, such as activities carried out by banks and *etc*. In contrast to this, the Law on Antimonopoly Activities does not provide such instances and accordingly may trigger merger control requirements. Furthermore, as noted above acquisition of right to influence on commercial activity of commercial subject or exercise of functions of higher governance body may trigger merger control requirements when shares or participating interests are pledged to the bank or in the course of activities relating to emission of shares. In the absence of exception for such activities narrow interpretation of this rule may accordingly trigger merger control requirements. However, these activities hardly bear any threat to competition and therefore their clear exclusion from the scope of merger control seems appropriate.

In addition, as noted above, in practice concepts of legal and economic mergers have been developed. While legal merger focuses on legal mechanisms available for formalization of concentration, economic merger focuses on commercial activities of undertakings involved as well as nature of such commercial activities in order to identify whether merger indeed took place. In the absence of practice, it may be highlighted that the Law on Antimonopoly Activities does not contemplate development of such approaches since it lists only legal mechanisms for formalization of merger and attributes its requirements thereto. However, it may be noted that the Law on Antimonopoly Activities deals with the concept of economic independence in rules applicable to prohibition of cartels. Yet, both concepts of independence are not further elaborated and leave quite a big room for interpretation. With that said, further development of this concept and its enaction to merger control regulations may respectively extend and thus enhance merger control regulations.

Conclusion

Doubtless, competition is one of the matters allowing economy to furnish and develop. From this perspective, protection of competition is of great importance as otherwise participants of market

relations (competitors) would be deprived from opportunities of relevant market. On the other hand, consumers are ultimate beneficiaries of goods and services offered in the relevant market. This means that interests of consumers, namely their welfare, is threatened by disruption of competition. Accordingly, protection of competition does not only enable economic development but also ensures that consumers enjoy all benefits of market. It should be noted that competition law does not solely regulate matters relating to consumer welfare. As such, legislation on protection of consumers' right and respectively quality control regulations also pursue this aim. However, these fields of law establish requirements relating to consumption and public well-being, while competition law strives to ensure consumer welfare through ensuring that market serves interests of consumers.

Meanwhile, law only reacts to relations whichever their nature is. That is, complexity of matters governed by law affects complexity and comprehensiveness of regulation. When it comes to competition law, accordingly intensity and variety of market relations, respective forms of such relations, whether abuse, merger or others, largely depends on overall development of economic relations in given jurisdiction. From this standpoint, scale of EU internal market cannot be compared with such of Azerbaijan. Moreover, Azerbaijan's economy remains largely oil-dependent and non-oil sector is still to develop. Accordingly, development of non-oil sector which has been prioritized by the government[143] will eventually result in increasing intensity of market relations. With that said, it may be concluded that diversity and intensity of economic relations is the key factor affecting comprehensiveness of regulatory framework.

Coming back to comparison of the EU and Azerbaijani Competition Law it may be outlined that differences mainly derive from economic development. This difference results in further elaboration of common concepts and establishment of different ones. Judicial and administrative interpretation is another matter affecting state of legislation. As such, interpretation of legislation allows to reveal shortcomings and ensure proper application of regulation. Azerbaijani legislation does not contain any specific rules on interpretation which results in absence of official position on this or other matter. In contrast to this, development of the EU legislation is ensured through constant involvement of the ECJ and other authorities taking part in interpretation of provisions of

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[143] For example, The Presidential Decree No 497 on Additional Measures for Development of Non-oil Sector date 19 September 2019

legislation.

With that said, based on approach to research outlined in introduction current thesis provided overview of relevant provisions of EU and Azerbaijani law, conducted their analysis and comparison for the purpose of identification of differences and factors leading to such difference.

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EU and Azerbaijani Competition Law: A Comparative Study

Abstract

Current master thesis is dedicated to analysis of competition regulations applicable in the EU with such of the Republic of Azerbaijan. It should be noted that with collapse of the Soviet Union the process of transition to market economy in the Republic of Azerbaijan has started. Naturally, this process required adoption of new regulations in order to shape and smoothen transition period. Accordingly, in 1990s new legislation of the Republic of Azerbaijan, including competition regulations, was developed. However, lack of experience and relatively un-developed market relations has affected legislation by making it less detailed and through than it is normally required for effective regulation. Further to this, during 1990s and 2000s legislation of the country was constantly amended in order to be in line with challenges of the time and complexity of emerging market relations. While some laws and by-laws were totally repealed and the others amended, competition regulations were subject to very little amendments. It has then become clear that competition regulations require revision and as a result draft Competition Code of the Republic of Azerbaijan was prepared. Nonetheless, this Code was not adopted and competition regulations were left without amendments. Later on, with adoption of Strategic Roadmaps for National Economy it

was stated that competition regulations require revision. In the meantime, Azerbaijani legislator tends to develop legislation based on international best practice and this gives a ground to assume that upcoming amendments in competition regulations shall be also based on legislation of more developed jurisdiction. With that said, given current state of Azerbaijani competition regulations and anticipated amendments in this field current thesis seeks to identify areas for improvement in legislation of the Republic of Azerbaijan by comparing it to such of the EU.

For the purposes stated above, the first chapter of the thesis provides general overview of the EU Competition Law. In this chapter areas subject to comparison are identified and further elaborated. In the meantime, the thesis also provides overview of scope and sources of the EU Competition Law as well as its interrelation with national legislation of the Member States. It should be noted that even though EU is way more complex organization than a state, it is still required to analyze institutions involved in competition regulations as well as their respective functions in order to provide comprehensive comparison both from institutional and regulatory perspective. The thesis then proceeds with analysis of Articles 101 and 102 of the Treaty on the Functioning of the European Union, which possess great importance for analysis due to features of Azerbaijani Competition Law. With that said, the thesis conducts analysis of scope of application of these Articles. Firstly, analysis of the scope of application contemplates analysis of conceptual basis of these Articles and their respective criteria. Following this approach, the thesis focuses on concepts used therein and respective development of these concepts. The thesis also seeks to identify conditions triggering application of these Articles, as well as any possible exemptions from their application. The thesis specifically focuses on merger regulations in the EU as this is one of the fields also governed by Azerbaijani Competition Law. In analysis of merger regulation the thesis follows approach outlined above and seeks to elaborate conceptual basis of merger regulations as well as respective criteria required for application of merger regulations. By providing general overview of the EU Competition Law the thesis also identifies specific institutes subject to comparison. The second chapter of the thesis is dedicated to analysis of Azerbaijani Competition Law. Firstly, for the purposes of analysis and comparison the thesis provides overview of legislative system of the Republic of Azerbaijan as well as overview of institutions involved in competition regulation with their respective functions. Based on analysis of the EU Competition Law the thesis then proceeds with analysis of applicable provisions of Azerbaijani Competition Law, namely the Law on Antitrust Activities. In the course of analysis the thesis seeks to analyze conceptual basis of the Law on Antitrust Activities and other legislative acts required for analysis. Furthermore, the thesis highlights inconsistency between concepts used in the Law on Antitrust Activities and other applicable legislation, as well as certain gaps in regulation disabling effective application of competition regulations. In third chapter after summarizing t observations on legislation of both jurisdictions the thesis proceeds with their comparison. It is general observation of the thesis that Azerbaijani legislation requires details and mechanisms enabling effective application of competition regulations. In line with this observation, the thesis comments on the fields where development is required based on approach of the EU legislator.

Wettbewerbsrecht der EU und der Republik Aserbaidschan: Vergleichsstudie

Zusammenfassung

In der vorliegenden Masterarbeit werden die in der EU geltenden Wettbewerbsregeln analysiert und mit den einschlägigen Rechtsvorschriften verglichen, die in der Republik Aserbaidschan Anwendung finden. Man soll bemerken, daß der Übergang zur Marktwirtschaft in Aserbaidschan mit dem Kollaps der Sowjetunion begonnen hat. Natürlich hat es die Einführung neuer Regelungen erforderlich gemacht, damit die Wende entsprechend gestaltet und erleichtert werden kann. Demzufolge wurden in Aserbaidschan in den 90-er Jahren neue Gesetze (einschließlich Wettbewerbsregeln) erarbeitet. Allerdings haben sich die fehlende Erfahrung und die relativ

unentwickelten Marktverhältnisse auf die Gesetzgebung negativ ausgewirkt, indem weniger detailliert und gründlich erarbeitete Gesetze entwickelt wurden, die normalerweise für eine effektive Regelung nicht ausreichen. Darüber hinaus wurden die Gesetze des Landes in den 90-er und 2000-er Jahren kontinuierlich abgeändert, damit sie den aktuellen Herausforderungen Rechnung tragen und der Komplexität der neu entstehenden Marktverhältnisse gerecht werden. Während einige Gesetze und Verordnungen komplett widerrufen bzw. Andere modifiziert wurden, hat man an den Wettbewerbsregeln nur geringe Änderungen vorgenommen. Es war klar, daß die Wettbewerbsregeln überprüft werden müssen. Demzufolge wurde der Entwurf eines Gesetzbuches erstellt, in dem die in Aserbaidschan geltenden Wettbewerbsregeln zusammengefasst sind. Das Gesetzbuch wurde allerdings nicht verabschiedet und die Wettbewerbsregeln wurden nicht geändert. Parallel zur Annahme des Strategischen Entwicklungsplans für Nationalwirtschaft wurde erklärt, daß die Wettbewerbsregeln änderungsbedürftig sind. Inzwischen haben sich die Gesetzgeber von Aserbaidschan bereit erklärt, neue Gesetze auf der Grundlage von internationaler bester Praxis zu erarbeiten. Dies kann einen zur Annahme verleiten, daß die bevorstehenden Gesetzesänderungen auf den Gesetzen eines höher entwickelten Rechtssystems beruhen werden. In der vorliegenden Diplomarbeit versuchen wir, in Bezug auf die gegenwärtigen Wettbewerbsregeln und die voraussichtlichen Änderungen die Bereiche festzulegen, die im Rechtssystem der Republik Aserbaidschan unter Berücksichtigung der in der EU geltenden Rechtsvorschriften unbedingt verbessert werden sollen.

Der erste Kapitel der Diplomarbeit gibt einen allgemeinen Überblick über das Wettbewerbsrecht der EU. In diesem Kapitel werden die später zu vergleichenden Bereiche bestimmt und beschrieben. Die Diplomarbeit bietet auch einen Überblick über den Umfang und die Quellen des Wettbewerbsrechts der EU sowie über dessen Wechselbeziehung zu den nationalen Rechtssystemen der einzelnen Mitgliedstaaten. Obwohl die EU eine wesentlich komplexere Organisation als ein Staat ist, ist es erforderlich, die Einrichtungen, welche in die Wettbewerbsregelung involviert sind bzw. deren jewelige Funktionen zu analysieren, um einen umfassenden Vergleich sowohl unter institutionellem als auch unter rechtlichem Aspekt anstellen zu können. Anschließend werden die Paragraphen 101 und 102 des Vertrags über die Arbeitsweise der Europäischen Union gedeutet, die wegen der Merkmale des Wettbewerbsrechts von Aserbaidschan in Bezug auf die Analyse von erheblicher Bedeutung sind. In der Diplomarbeit wird erörtert, in welchen Bereichen diese Paragraphen Anwendung finden. Erstens: die Darstellung der Anwendungsbereiche beinhaltet die Beschreibung der begrifflichen Grundlage der betreffenden Paragraphen und der einschlägigen Kriterien. Anhand dieser Methode fokussiert die Diplomarbeit auf die Konzepte, die in den genannten Paragraphen angewandt werden sowie auf deren Entwicklung. In der Diplomarbeit unternehmen wir auch den Versuch, die Umstände zu benennen, die die Anwendung dieser Paragraphen erfordern bzw. die möglichen Ausnahmen zu bestimmen, welche die Anwendung der einschlägigen Regeln ausschließen. Im Besonderen fokussieren wir in der vorliegenden Diplomarbeit auf die Regelungen, die innerhalb der EU für die Fusion gelten, weil dies einer der Bereiche ist, der auch durch das aserbaidschanische Wettbewerbsrecht geregelt ist. Bei der Analyse der für die Fusion geltenden Vorschriften folgen wir der oben beschriebenen Methode und versuchen, die begriffliche Grundlage von Fusionsregelungen und die einschlägigen Kriterien festzulegen, deren Erfüllung zur Anwendung

der für die Fusion geltenden Vorschriften erforderlich ist. Durch den umfassenden Überblick über das Wettbewerbsrecht in der EU werden in der Diplomarbeit auch die speziellen Institutionen bestimmt, die verglichen werden müssen. In dem zweiten Kapitel wird das Wettbewerbsrecht von Aserbaidschan unter die Lupe genommen. Um eine Analyse vornehmen bzw. einen Vergleich anstellen zu können, bietet die Diplomarbeit einen Überblick über das Rechtssystem der Republik Aserbaidschan bzw. über die Institutionen (einschließlich von deren Funktionen), die von der Wettbewerbsregelung betroffen sind. Parallel zur Darstellung des Wettbewerbsrechts der EU werden auch die im Wettbewerbsrecht von Aserbaidschan zurzeit geltenden Rechtsvorschriften analysiert – mit besonderem Fokus auf das Gesetz über das Kartellverbot. Die begriffliche Grundlage des Gesetzes über das Kartellverbot und anderer Gesetze, die bei der Analyse unbedingt berücksichtigt werden müssen, wird ebenso dargelegt. Im Weiteren zeigt die Masterarbeit die Inkonsistenz zwischen den Konzepten auf, die im Gesetz über das Kartellverbot bzw. in anderen Rechtsvorschriften angewandt werden. Darüber hinaus wird auf gewisse Lücken in der Regelung hingewiesen, welche die effektive Anwendung von Wettbewerbsregeln unmöglich machen. Nachdem die Erkenntnisse über die Rechtsvorschriften beider Rechtsordnungen zusammengefasst worden sind, werden sie in dem dritten Kapitel miteinander verglichen. Es ist eine allgemeine Bemerkung der Diplomarbeit, daß die Gesetze von Aserbaidschan genauere Details und Instrumente enthalten sollen, die eine wirkungsvolle Anwendung der Wettbewerbsregeln ermöglichen. Im Einklang mit dieser Erkenntnis äussern wir unsere Meinung zu den Bereichen, in denen auf Grund der in der EU geltenden Gesetze eine Entwicklung erzielt werden soll.